New developments in group taxation in Germany and how to use Austrian group taxation

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- Update on Group Taxation in Germany (1)
  - German fiscal authorities are still very reluctant to accept losses from foreign subsidiaries or PE´s of German corporations
  - Pressure is coming via EU court decisions (Lidl Belgium etc.) to accept at least so-called „final" losses.

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Update on Group Taxation in Germany (2)

- 2 recent decisions by Germany´s Superior Fiscal Court (BFH) on losses of French PE´s of German corporations. In France losses can be carried forward and backward for limited period of time and restricted transfer of losses within restructurings is allowed.

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Update on Group Taxation in Germany (3)

Case A)

- The losses of a French PE were not accepted in Germany because they did not become „final" because of termination of the French PE in 2005 but because France has limited the time for losses carried forward to five years (here 1999-2004) and this period had expired in 2004 for the 1999 losses, thus before the termination of the PE.
- Recommendation: If you wish to shut down a PE, do it while losses can be carried forward according to local law of the PE.

Update on Group Taxation in Germany (4)

Case B)

- Losses of the French PE were not accepted because the German mother company asked for consideration of losses of the French PE in the year the losses occurred.
- Recommendation: Losses can only be considered at mother company level if they are „final" and not in the year of occurrence.

Update on Group Taxation in Germany (5)

Conclusions from the 2 court decisions:

- Losses are NOT "final" if they cannot be used in the country of the PE because time has expired.
- Losses are "final" if they cannot be used in the country of origin because of real reasons, e.g. restructuring of a PE into a corporation, transfer or termination of the PE.
- These "final" losses can be used only in the year they become final (not in the year they occurred).

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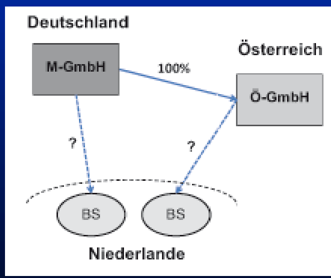
How to use Austrian group taxation (1)

- Case: German mother company (M) has 100% subsidiary in Austria (Ö-GmbH). M wishes to establish a PE in the Netherlands and asks you what to do. M and Ö are both active and profitable, the PE is expected to have losses in the first 3-5 years.



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How to use Austrian group taxation (2)

- Alternative 1) M directly establishes the PE in NL

- Consequences: Losses of the PE can be carried forward for 9 years in NL. and <u>cannot be used</u> in Germany (unless "final" losses)

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- How to use Austrian group taxation (3)
  - Alternative 2) M asks Ö to establish a PE in NL
  - Consequences: Losses of the PE can be carried forward for 9 years in NL and can be offset against profits of the Ö-subsidiary. If the NL PE makes profits in the future and can use its former losses, the tax base in Ö will be increased (thus reversing group relief).

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- More about Austrian loss treatment from Carina Sagmeister from Austria

- Contact us:

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Thank you for your attention!