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By PwC Deutschland | 26. Januar 2011

No serious doubt on long enforcebility of loss subvention claim

The Supreme Tax Court has held that there is no serious doubt that a profit pooling agreement must provide for a ten year statute bar on loss subvention claims of an Organschaft subsidiary.

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Sec. 302 of the Public Companies Act governs the duty of a parent to subvent the loss of an Organschaft subsidiary. Subsec. 1 provides for full loss subvention, subsec. 2 governs the special case of a subsidiary's leasing its business to the parent, subsec. 3 limits (considerably) the subsidiary's ability to waive a loss subvention claim and, since 2004, subsec. 4 rules that a loss subvention claim does not become statute-barred for ten years after registration of the withdrawal of the subsidiary from the Organschaft. At first sight, this provision only applies to public companies (AG and KGaA – partnerships limited by shares); however, case law has firmly established that it must be followed in all Organschaft profit pooling agreements regardless of the legal forms of their members. Often the formality is met with a simple reference in the agreement to Sec. 302 of the Public Companies Act. The Supreme Tax Court has, again, been presented with a claim that it is sufficient for a GmbH limit its reference to the first three subsections only. Pointing to its own case law on the subject it has refused an application for a stay of execution of assessments issued on account in advance of the main hearing, saying there is no serious doubt that Sec. 302 must be referred to in its entirety, omitting only subsec. 2 if that provision is not relevant in the circumstances.

Supreme Tax Court resolution I B 83/10 of December 22, 2010 published on January 26, 2011

Schlagwörter

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