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By PwC Deutschland | 25. April 2014

Final PE loss abroad offset at home

The Supreme Tax Court has held that a foreign PE loss that for all practical purposes cannot be offset in its country of origin can be offset in German as the country of the head office.

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A German ice cream manufacturer operated a loss making branch in Belgium. Ultimately, he decided to wind up the Belgian venture and sell the assets. This resulted in a further loss. The Belgian tax office recognised the German taxpayer's right to a loss carry forward. The German tax office took this to mean that the taxpayer still had a theoretical possibility of offset in Belgium and that it was therefore not called upon to allow the loss in Germany as "final".

The Supreme Tax Court has now held that the Belgian loss must be allowed in Germany once it is clear that there is no longer a realistic prospect of obtaining relief in Belgium. This follows from repeated ECJ judgments in the same vein. The prospects of obtaining relief can be denied for either legal or for practical reasons. The legal entitlement of the taxpayer to an indefinite carry forward in Belgium was not, in the case at issue, in dispute. However, the taxpayer maintained, and the court agreed with him, that having effectively sold the Belgian business, the taxpayer had ceased to earn Belgian business income, and thus no longer had anything against which the loss could be offset. That the Belgian business had been closed down and the appropriate notices sent to the respective authorities was for the court, sufficient evidence of the lack of intention to earn income in Belgium. The loss was therefore "final" and, as such, to be relieved in Germany. Should by any manner of chance relief become available in Belgium at some future point, the German deduction could be reversed under the "new facts" provision of the Tax Management Act. There was thus no chance of abuse.

Supreme Tax Court judgment I R 48/11 of February 5, 2014 published on April 24

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