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By PwC Deutschland | 29 November 2012

“Minimum taxation” constitutional

The Supreme Tax Court has held the “minimum taxation” deferral of loss relief to be constitutionally acceptable.

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Losses may be carried forward without time restriction. However, the offset in any one year is limited to the first €1 m of annual profit plus 60% of the remainder. This deferral of loss relief is known as “minimum taxation” as it ensures that 40% of annual earnings of over €1 m will be taxed regardless of past history. At the time of its introduction, the measure was explained as necessary in order to ensure the stability of tax revenue in view of the large volume of losses being carried forward throughout the country. An investment fund company has challenged this rule on constitutional grounds, alleging that charging part of its profits to tax is confiscatory when it has losses brought forward that will foreseeably lapse with the company’s liquidation in some 20 years’ time. This latter assertion was based on its investment policy of holding some two-thirds of its funds in shares producing income in the form of 95% tax-free dividends. Its fully taxable interest income was roughly equal to its annual operating expenses.

The Supreme Tax Court has now held that there is no constitutional objection to the rule. The state has a legitimate interest in securing its revenue with a system of minimum taxation. The present rule is an acceptable compromise between the conflicting principles of taxation according to the means to pay and taxation by reference to the period in question. The objection that the effect of minimum taxation is foreseeably confiscatory in view of the fund’s investment policy cannot be allowed to stand, as there is no certainty that either that policy or the tax law will remain unchanged for the next twenty years. In reaching this conclusion, the court was guided by early Constitutional Court rulings accepting that loss relief could be restricted to certain income categories, to a category of business or by time (up to 1979 there was a five year time limit on loss carry forwards).

Supreme Tax Court judgment I R 9/11 of August 22, 2012, published on November 28

Keywords

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