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By PwC Deutschland | 11 September 2013

Organschaft parent need not be active business until subsidiary’s first year end

The Supreme Tax Court has held that an Organschaft parent must be an active business by the effective date of the first profit surrender, i.e. the first year end of the subsidiary. It also held that the provision allowing profit pooling agreements with formally inadequate loss subvention provisions to be corrected by December 31, 2014 applies to all agreements existing on February 26, 2013 regardless of the nature of the inadequacy.

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The *Organschaft* provisions in the Corporation Tax Act require that the parent hold a majority of the voting rights throughout the term of the *Organschaft*. They also require that the parent be an active business entity. A tax office rejected an *Organschaft* profit surrender on the grounds that the parent had acquired its subsidiary whilst it was still an asset managing entity and had not begun its own business activities until the following year. Accordingly, it had not been an active business at the beginning of that year and thus could not qualify as the *Organschaft* parent until a year later.

The Supreme Tax Court has now held against the tax office. The letter of the statute does not specify a time and thus does not insist on continuity of activity throughout the period. It is therefore sufficient that the parent be a business entity when the profit surrender takes effect. This is the balance sheet date of the subsidiary. This conclusion satisfied the intention of the statute of ensuring that trading income remains taxable as trading income after surrender to an unincorporated parent.

An act entering into force on February 26, 2013 required a specific form of wording for the loss subvention provision of an Organschaft profit pooling agreement. Agreements then existing but not conforming to the requirement were given until the close of business on December 31, 2014 for amendment. The main condition is that of actual subvention of any loss incurred at any time prior to the amendment of the agreement.

The Supreme Tax Court has now held that the fact of loss surrender is irrelevant if no loss was incurred. It also held that the changeover provision applied to any defective loss subvention provision. This included instances of agreements with no loss subvention at all. Finally, it made the point that there was no need for any amendment to an agreement that loses its effect before January 1, 2015.

Supreme Tax Court judgment I R 40/12 of July 24, 2013, published on September 11

Keywords

Active business, Organschaft, parent, profit surrender