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Austrian Corporate Taxation: Mechanics of the Use of Cross-Border Losses

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Austrian corporations have been allowed to integrate non-Austrian corporations into an Austrian tax consolidation group since 2005. This opportunity has proven to be an effective tool in achieving a crossborder use of losses between separate corporate entities and is widely used by internationally active groups with operations in Austria.

When the law was introduced, many commentators were extremely sceptical. They argued that this new planning tool would allow a large number of internationally active corporate groups to reduce their effective Austrian tax burden to zero. The total corporate income tax revenue would dramatically erode and other taxes (such as personal income tax) would have to be raised in order to finance the federal budget.

After three years of practical experience with the law, one can say that none of these rather pessimistic outlooks has become reality. The Austrian tax revenue resulting from corporate income tax in 2007 is larger than ever in Austria’s history. Partly because of the highly attractive tax legislation - most notably offering the feature of cross-border tax consolidation - a large number of international investors have used Austria as a tax-efficient base for their investments in Central and Eastern Europe. In fact, since the enactment of the new law, hundreds of Austrian headquarter and holding companies have been established in Austria, the majority of them most likely making use of cross-border tax consolidation.

As a result, how does the Austrian international tax consolidation system actually work from a technical perspective?

The principle is quite simple, yet the details to obtain the best results from the system can be complicated. The essential requirement for qualifying for cross-border tax consolidations is that an Austrian entity must act as the parent group of a tax consolidated group registered with the local Austrian tax authority. Non-Austrian companies can only be members of the tax consolidated group if more than 50% of the shares in the non-Austrian subsidiary are directly held by the Austrian group parent or another Austrian group member during the entire business year. Therefore, indirect non-Austrian subsidiaries (i.e. a foreign subsidiary of a foreign group member) cannot become members of an Austrian tax group. Their losses can eventually be used indirectly if they lead to a decrease in value and in consequence to a tax loss (for instance, due to a write-off of the participation) on the level of the foreign group member.

Under the Austrian international tax consolidation rules, only losses and not profits of foreign group members are attributed to the group parent. The loss is attributed to the Austrian group parent according to the participation in the foreign group member. If, for example, the Austrian group parent (or an Austrian group member) holds 70% of the foreign group member, 70% of its loss is attributed to the Austrian group parent.

Unfortunately for international tax planners, Austrian law also contains some anti-abuse provisions such as the rule that tax loss carry forwards incurred by the foreign group member prior to entering the Austrian tax group cannot be imported into the Austrian tax group. Another even more relevant anti-abuse clause is the provision on the recapture of losses. According to these rules, loss previously used in Austria must be recaptured on the level of the Austrian group parent, if after the attribution of the loss to the Austrian group parent, the foreign group member obtains a credit for the loss carried forward against profits in its own country. The obvious purpose of this rule is the avoidance of a double use of losses in both countries. However, as your skilled Austrian tax lawyer would explain to you, even such double dipping can be achieved under certain circumstances.

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