

# Case Law

## *Austria, The Netherlands*

### AUSTRIA

#### **NO IMPORTATION OF FOREIGN LOSSES THAT WERE INCURRED BEFORE THE CHANGE OF RESIDENCE**

The utilization of foreign losses in the light of the EC Treaty's fundamental freedoms has already received quite some attention by the European Court of Justice (ECJ).<sup>1</sup> These cases, however, had in common that the respective losses were claimed by persons that were (virtual) residents of one Member State at the time when those losses were incurred in another Member State. It therefore remained undecided whether an incoming taxpayer may also 'import' foreign losses that were sustained before becoming a resident. This question was recently answered to the negative by the Austrian Supreme Administrative Court (*VwGH*) without making a reference to the ECJ.<sup>2</sup>

The case concerned a taxpayer who, prior to the year 2000, incurred losses from a self-employed activity while being a resident of Germany and wanted to offset these 'German' losses against Austrian profits that he made after becoming a resident of Austria in early 2000. Although, under Austrian domestic law, such 'importation' of losses is clearly not permitted,<sup>3</sup> the question arose whether the analysis has to be different under the fundamental freedoms as the denial of a 'loss importation' may be viewed as an obstacle that hinders the taxpayer's exercise of the freedom to engage in an economic activity in Austria. In a rather brief decision, the Austrian Supreme Administrative Court has broadly – and quite correctly – relied on the principle of territoriality as accepted by the ECJ in *Futura Participations*<sup>4</sup> and held that the freedoms do not require a Member State to accept the utilization of losses that have no connection to domestic profits. Even more so, as there was no guarantee that these losses will not be utilized in Germany at some point in the future.

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