

## Leading across the border

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# Agenda

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## Introduction

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## Basics

- Transfer pricing and payroll tax obligations - hand in hand?
- Domestic taxation of executive compensation "in a nutshell"

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## Spotlights

- Secondments/staff leasing
- Management services
- German Federal Fiscal Court – exemplary court decision

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## Substance over Form

# Introduction

# Introduction

## Reasons for cross-border managing director activities in a business group

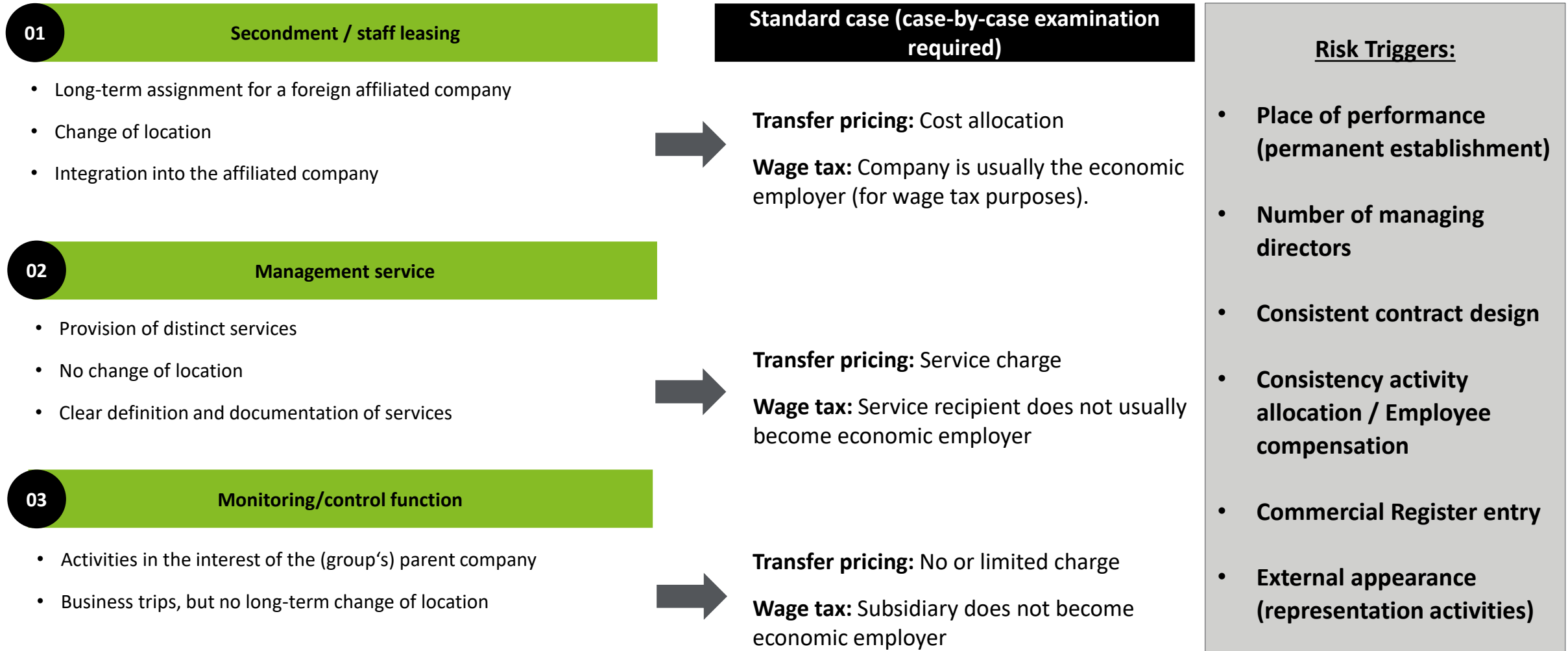
- 01 Vacant Position**  
E.g. due to departure of current managing director, replacement by employee of foreign group company
- 02 Advisory Services**  
E.g. by executive of foreign group company
- 03 Supervision/Control**  
Monitoring/control by foreign parent company (shareholder), e.g. to ensure implementation of group strategy
- 04 Private Reasons**



# Basics

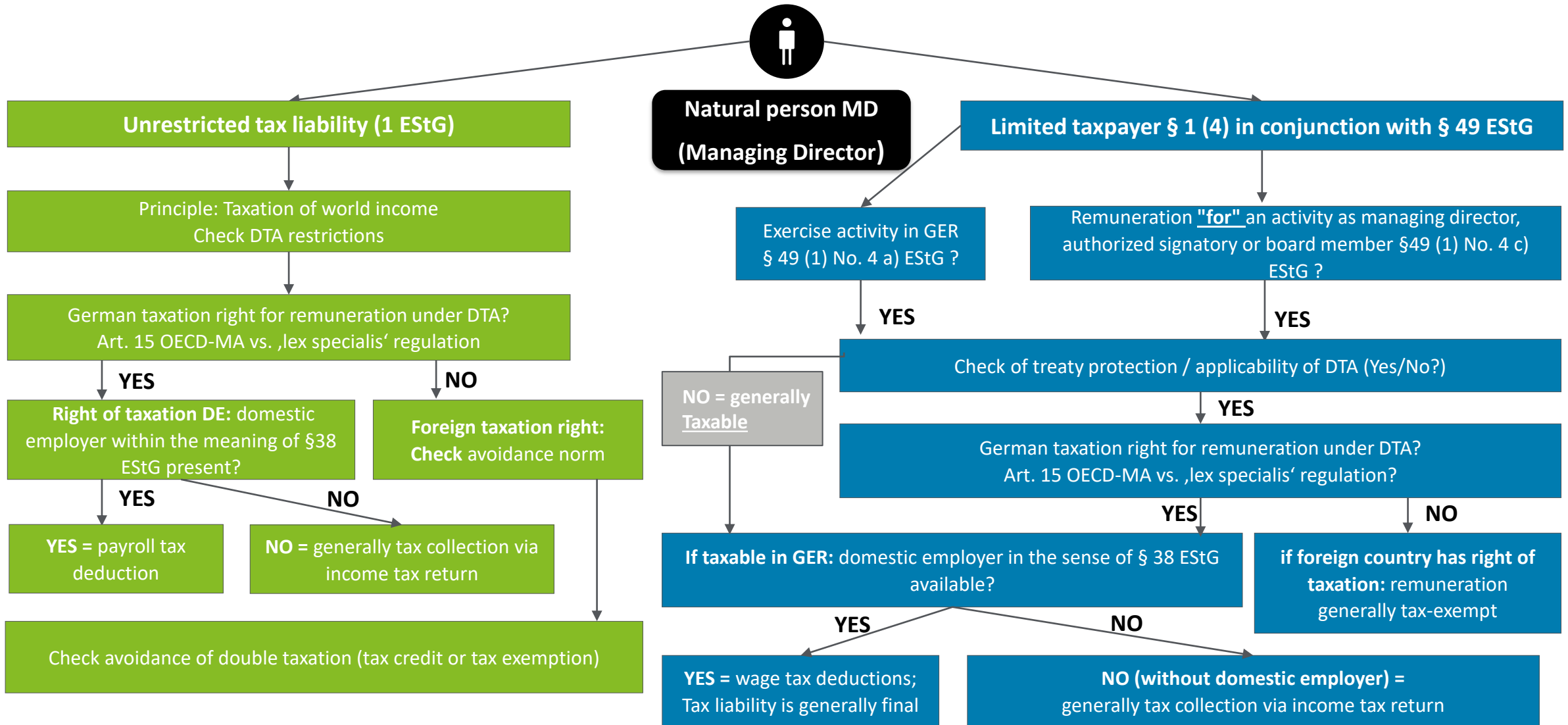
# Basic constellation

## Transfer pricing and payroll tax obligations - hand in hand?



# Basic constellation

## Domestic taxation of executive compensation "in a nutshell"



# Spotlights



# Spotlights

## Spotlight on secondment / personnel leasing - What needs to be considered?

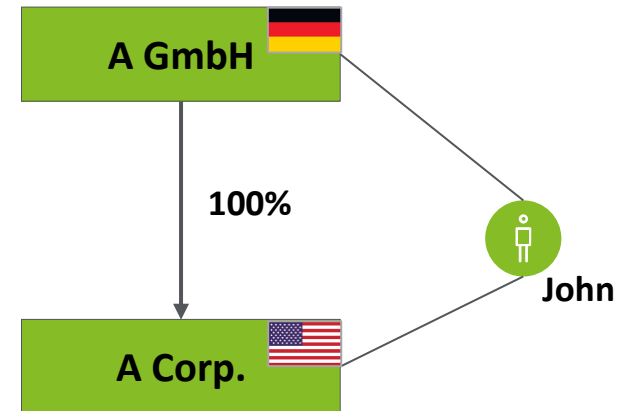


### Transfer Pricing / Corporate Tax - Securing the deduction of operating expenses

- Allocation of income between affiliated companies: How should employee costs be allocated?
- Documentation measures (e.g. secondment agreement)
- In case of split role: Adequate delineation of activities/costs, splitting of costs if necessary
- Application of the arm's length principle for remuneration
- Permanent establishment risks (fixed place of business / agent permanent establishment / management permanent establishment)
- Relocation of management? Consequence: Relocation of the company's domicile / realisation of hidden reserves
- Avoidance of inconsistent contract design or actual behavior, e.g. existence of a service

### Income tax/wage tax

- Which country may tax the MD's remuneration?
- Who is the economic employer (economic benefits and risks from the activity, inclusion, etc.)?
- Special DTA regulations for managing director compensation (taxation usually in the company's country of residence)
- Taxation of special remuneration components (e.g. severance payments)
- Ensuring general compliance



- John is the managing director (MD) of A-GmbH
- He is to take over the MD position of the newly acquired A Corp. for 2 years (move to the U.S.)
- However, he will continue to perform operational management tasks for A GmbH
- Activity approx. 25% DE, 75% USA

### What to consider?

### Special DTA regulations for MDs (not exhaustive)



Austria



Switzerland



Netherlands



Denmark



Poland



Sweden



Belgium

# Spotlights

## Spotlight secondment / staff leasing - Do's and Don'ts

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### Do's

- Execution of the activities envisaged within the framework of secondment / staff leasing according to the agreement
- Settlement of relevant costs between affiliated companies according to agreement (benefit test)
- Appearance as an employee of the respective company located on site, e.g. email, business cards, LinkedIn profile information.
- Integration of the employee into the organization of the receiving company



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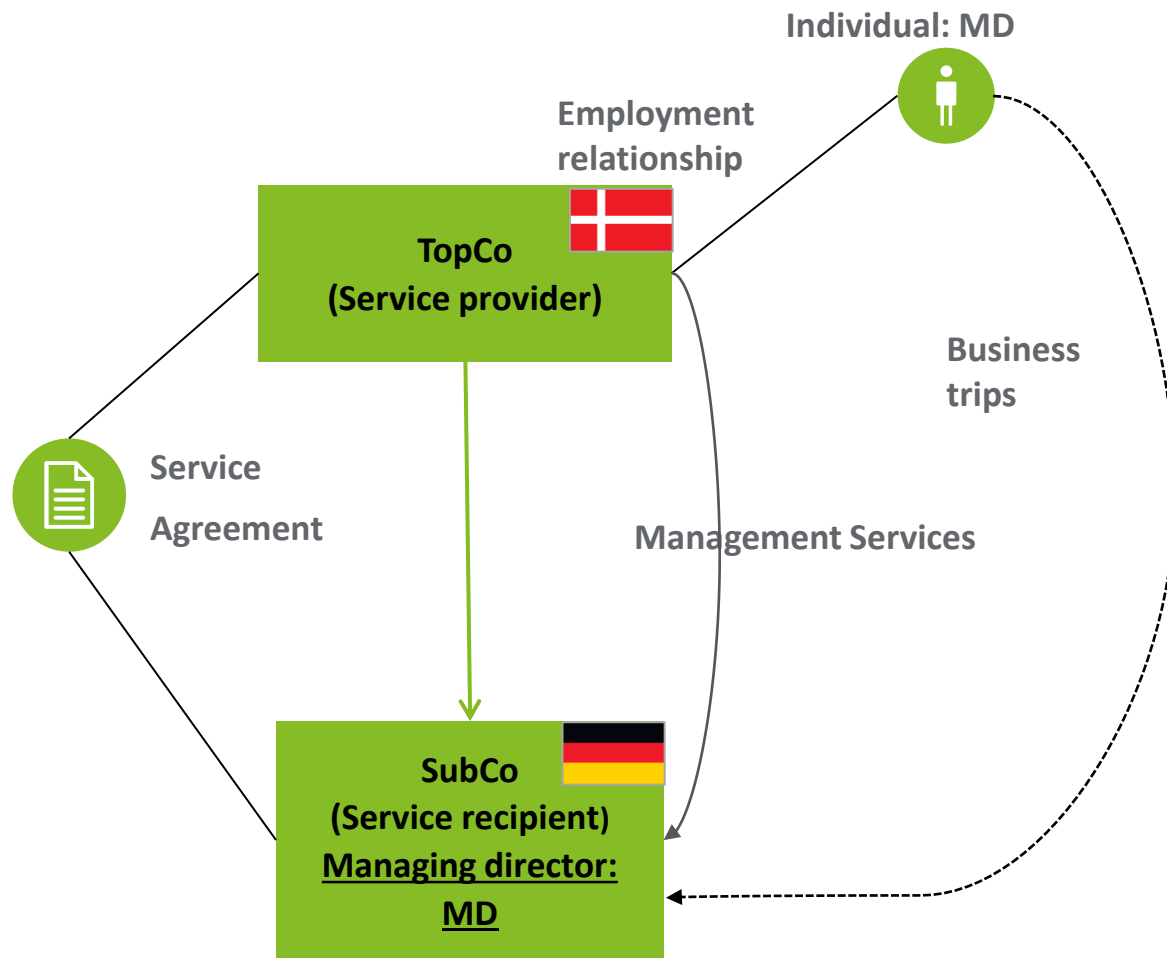
### Don'ts

- Performance of management activities for one company while physically present at the other company (avoidance of permanent establishment risks)
- Applying a profit element on the remuneration for activities
- Change of place of activity without prior agreement



# Spotlights

## Spotlight Management Services



### Transfer Pricing / Corporate Tax

- General: Compliance with the arm's length principle
- Service agreement ("Service Agreement") between the participating companies
- Service description / definition of scope
- Benefit test, differentiation from shareholder activities
- Determination of an arm's length compensation by merits and amount ("service fee" as direct service charge or allocation mechanism)
- Actual implementation of the agreement, generally no retroactive effect

### Income Tax / Wage Tax

- Which country may tax the MD's remuneration?
- Who is the economic employer (economic benefits and risks from the MD's activities, integration, etc.)?
- Special DTA regulations for managing director compensation (taxation usually in the company's country of residence)

# Spotlights

## Spotlight Management Services - Do's and Don'ts

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### Do's

- Provision of the management service in line with the agreement
- Time sheet for keeping track of the activities performed, regular accounting of the services provided
- Keeping a travel calendar
- Appearance as an employee of the service provider (here: TopCo), e.g. email, business cards, LinkedIn profile information
- Appearance on site with the service recipient as a "guest" if possible



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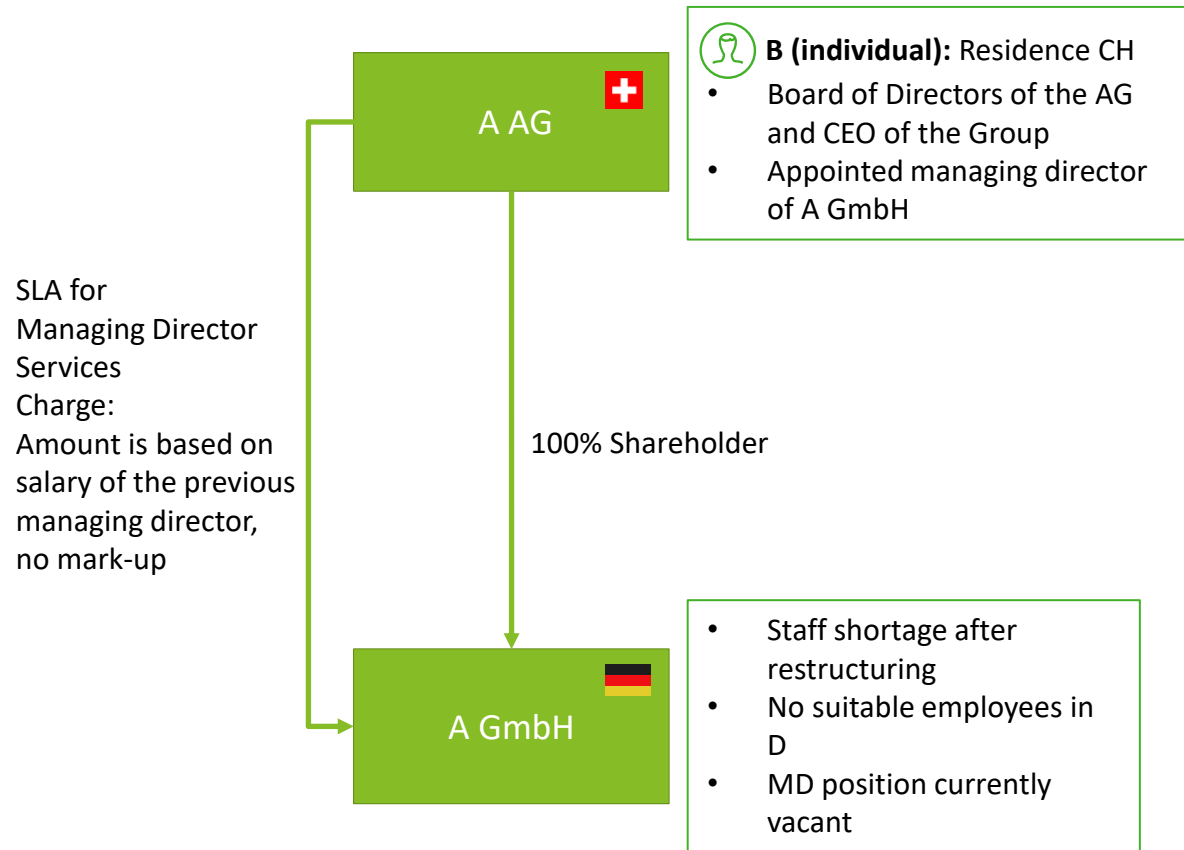
### Don'ts

- Personal reference in service agreement
- Fixed workplace/office in the premises of the service recipient (≠ fixed place of business of TopCo)
- Reimbursement of rental costs from TopCo and SubCo
- Own access card to the office of the service recipient (SubCo in the example case).
- Direct charging of salary costs of the employees involved
- Integration of the employee into the organization of the service recipient
- Performance of management activities for TopCo (service provider) during presence in GER (avoidance of permanent establishment risks)



# Spotlights

German Federal Fiscal Court (BFH) VI R 22/19 dated 4.11.21 - previous instance fiscal court (FG) Thuringia 3K 795/16 dated 13.12.18



## Position Tax Auditor / Fiscal Court Thuringia

Wage tax withholding obligation for A GmbH, because

- A GmbH is the economic employer of the MD
- Being bound by instructions is not relevant for an MD

## Decision Federal Fiscal Court

- Facts for economic employers to consider:
  - Economically bearing the costs
  - Integration into processes
  - Bound by instructions
  - Interest of the receiving company
- Wage component of B to be clarified
- Consideration of the arm's length nature of the MD remuneration: potential hidden profit distribution

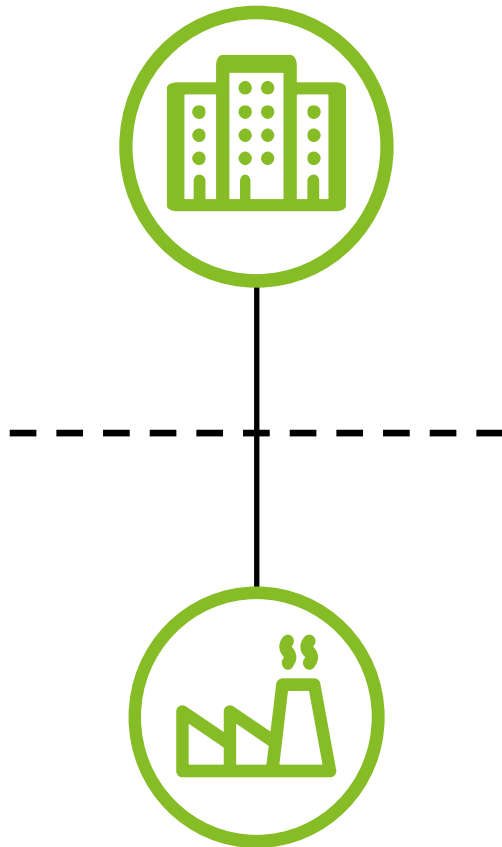
## Practical Consequences

- SLA does not protect against the existence of an economic employer
- Economic employer to be examined on the basis of all relevant facts
- Determine and document arm's length (service-) fee/remuneration
- Cross-disciplinary analysis required (Personal income tax/wage tax vs. corporate taxes)
- Management permanent establishment to be examined

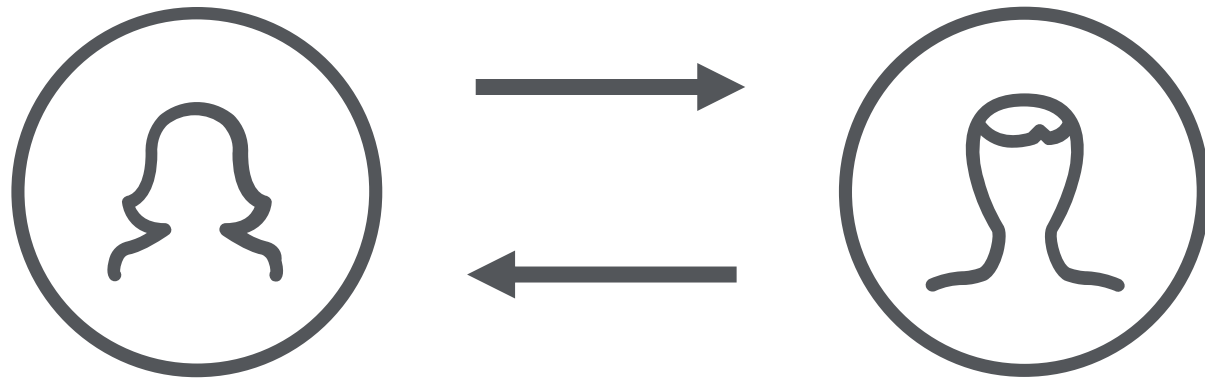
# Substance over Form

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## Actual behavior



- Actual behavior can be observed and is usually interpreted individually.
- It is important that the actual behavior corresponds to the intended or chosen contract design.



### Consideration of the MD's function:

- secondee
- service provider
- shareholder

# Questions & Answers





# Team



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