Downloaded from Blogs on 11.10.2026 01:49h

By PwC Deutschland | 20. Januar 2011

Upstream merger does not imperil loss carry forward of survivor

The Supreme Tax Court has held that a downstream, but not an upstream, merger leads to new assets for the surviving entity that can imperil its loss carry forward.

Downloaded from Blogs on 11.10.2026 01:49h

Share transfers of more than 50 per cent in periods beginning before January 1, 2008 led to forfeiture of the remaining loss carry forward, where the business operation was continued or restarted with substantially new business assets. The underlying principle was the presumption of a change in business identity with the consequence that the company offsetting the loss was not the same business as the one that made it. In the meantime, the courts have consistently held that substantially new business assets refers to those fixed and current assets used in the business and that the measure of comparison is whether the total gross assets – but measured at current market value and including off-balance sheet intangibles – were more than doubled by the increase. The Supreme Tax Court has also held that the two events, share transfer and increase in gross assets, should be in some way connected; the connection can generally be assumed in the absence of an indication to the contrary where the two events take place, or develop, within five years.

The Supreme Tax Court has now had occasion to try these principles against the background of a full share acquisition followed eight months later by a downstream merger of the acquirer onto the target. At the same time, the target, till then a holding company, became an operating entity through the absorbsion by upstream merger of the entire business assets and operations of its subsidiaries. The Supreme Tax Court has now held that the downstream merger of the parent onto the subsidiary led to new assets for the subsidiary potentially harmful to its prospects of carrying the remaining loss forward (though there was doubt as to whether the new assets exceeded those already existing), whilst the upstream merger did not. Despite the resolution of both mergers on the same day, the court saw the upstream merger as a group reorganisation independent of the change in group ownership. Hence, the upstream merger was not connected with the share transfer and the two events could not combine to destroy the right of loss carry forward.

Share transfers in periods beginning on, or after January 1, 2008 are governed by different rules. Survival of the loss carry forward is now solely dependent on the level of ownership change, the reference to new assets having been dropped from the legislation. However, the current case remains relevant in respect of earlier acquisitions, given that the five year's period for asset accretion can run until the end of 2013.

Supreme Tax Court judgment I R 64/09 of October 12, 2010 published on January 19, 2011

Schlagwörter

Upstream merger, downstream merger, forfeiture, loss carry forward, share acquisition, share transfer