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Loss carry forward transfer only if loss maker still owned at date of transfer

The Supreme Tax Court has held that unused loss relief may only pass to transferee under the Reconstructions Tax Act up to December 12, 2006 if the loss making business was still held by the transferor on date of transfer.

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In its version applicable to corporate reconstructions reported to the trade registry on or before December 12, 2006, the Reconstructions Tax Act provided that an unused loss carry-forward passed to the surviving entity(ies) in proportion to the assets transferred. However, the transfer was conditional on the loss-making entity (or business segment) continuing with its operation in a substantially unchanged form for the next five years. The Supreme Tax Court has now held the loss carry forward transferred to a newly formed subsidiary to be forfeit, because the business unit that caused the loss had been sold by the transferor some two years before.

The court accepted that the unused loss carry forward should be divided between the original holder and the new subsidiary at the time of the drop-down in proportion to the assets transferred, given that both the assets transferred and those remaining constituted a recognisable business unit capable of its own sustained economic existence. The court also accepted that the five year continuity requirement in respect of the business activity that caused the loss could be met by either the transferor, the transferee, or, for that matter, by a third party. However, the question only arose after the date of the transfer. If the loss making activity had already been sold or abandoned, the transferor was no longer in a position to ensure continuity for a further five years. Accordingly, the successor subsidiary could not benefit.

Supreme Tax Court case reference I R 13/11, judgment of March 14, 2012

Schlagwörter

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