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By PwC Deutschland | 16. Januar 2026

Restriction to offset losses from tax deferral model in case of investor's inactivity

In a recent judgment, the Supreme Tax Court held that the loss offset restrictions of Section 15b of the Income Tax Act would come into effect if the investor did not actively participate in the project. This also applies if the initiator of a tax deferral model, as a founding partner, participates on the same terms as the other investors.

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Background

A tax deferral model within the meaning of Section 15b Income Tax Act (ITA) will be assumed if it is intended to achieve tax advantages in the form of negative income based on a model structure. This is the case if the taxpayer is offered the opportunity to offset losses against other income at least in the initial phase of the investment. Such losses may neither be offset against income from business operations nor against other types of income. A loss carry-back or carry-forward is also not possible. The losses only reduce the income of the taxpayer from the same source of income, i.e., the same tax deferral model, in subsequent financial years.

One of the prerequisites for a tax deferral model is that “the taxpayer should be offered the opportunity, on the basis of a predefined concept, to offset losses against other income, at least in the initial phase of the investment.” A key feature is therefore the investor’s passivity (non-involvement) in the development of the business idea and in drafting of the contract.

The plaintiff – a limited liability company (GmbH & Co. KG) – was established in December 2012. The purpose of its business was to operate wind turbines. Its articles of association provided that the capital should be increased by taking on additional shareholders up to a certain amount. For this purpose, an investor prospectus was published with tax loss forecasts for potential investors in the early years. In 2013, more limited partners came on board. The sole founding shareholder of the plaintiff was another limited partnership (who was a joined party in the proceedings). The tax office assumed a tax deferral model. It treated the loss incurred in the year in dispute, which resulted primarily from the utilization of a special depreciation allowance pursuant to Section 7g Income Tax (investment deduction amount) pursuant to § 7g (1) ITA, as being only offsetable against future profits. The plaintiff's subsequent appeal was rejected by the lower tax court.

Decision

The Supreme Tax Court took a somewhat different view. It agreed that the joined party had participated in a tax deferral model within the meaning of Section 15b ITA and confirmed that the offsetting restriction applies even if the loss results in part from the use of an investment deduction amount in accordance with the concept. The Supreme Tax Court further clarified that, contrary to the plaintiff's opinion, a founding shareholder may also be subject to the loss restriction rules of Section 15b ITA.

However, since the lower tax court did not establish whether the concept had been developed with the participation of the joined party, as claimed by the plaintiff, the Supreme Tax Court overturned the previous decision and referred the case back to the lower tax court. If the joined party had not played a significant role in determining the concept, it would not – contrary to the opinion of the lower tax court – be treated in the same way as the other investors simply because it had joined the model pre-designed joint project on the same terms. The pre-designed concept must be prepared by a person other than the taxpayer.

The Supreme Tax Court pointed out that the initiator and developer of a pre-designed concept is not subject to the loss offset restriction under Section 15b ITA solely because he participates in the tax deferral model under the same conditions and terms as the other investors.

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It is also not relevant that the earnings forecast stated in the prospectus is essentially driven using declining balance depreciation and special depreciation allowances, the Supreme Tax Court said. According to the clear wording of Section 15b (2) sentence 3 ITA it is irrelevant on which provisions the negative income is based. It must be taken into account that the use of declining balance depreciation and special depreciation are optional. Therefore, even forecast losses based on statutory depreciation methods can lead to the application of Section 15b ITA.

Source:

Supreme Tax Court, decision of 2 October 2025 (IV R 14/23), published on 15 January 2026.

Schlagwörter

loss curtailment, restriction, tax deferral scheme