Downloaded from Blogs on 28.11.2026 15:01

By PwC Deutschland | 03 September 2014

Loss offset deferral unconstitutional?

The Supreme Tax Court has referred to the Constitutional Court on whether a confiscatory effect of the loss offset deferral provisions can be a breach of the equal treatment requirement of the constitution.

Downloaded from Blogs on 28.11.2026 15:01

A company's sole purpose was to own and manage an investment project on behalf of an operating company of the provincial government. In its view, its principal, the operating company, was liable to make good all losses from the project. However, its demands were refused and a lengthy legal battle ensued. At one point its position at court appeared hopeless and it wrote off its claim. This led to a large loss in the accounts. It then became clear that whatever the outcome of the dispute, the government would no longer accept the company as a business partner. Faced with the loss of its business, it went into liquidation. In the event, the liquidator was more successful at court than the previous management and ultimately won the case. This led to a liquidation profit corresponding to the loss brought forward. At this point the "minimum taxation" rule took effect with the consequence that basically only 60% of the loss brought forward could be offset against current income. Since only one assessment is raised for the entire the liquidation period, the liquidation assessment is necessarily the final assessment in a company's lifetime. The remaining loss carry forward therefore lapsed unused. Given that this consequence is indisputable under the terms of the tax acts, the company based its case on the grounds that the provision, as such, is an unconstitutional offence against the guarantee of unfettered ownership.

The Supreme Tax Court does not go as far as the taxpayer. It accepts the "minimum taxation" provision as being within the constitution in the normal course of events. The primary effect is deferral and it is within the authority of parliament to defer a tax privilege such as loss offset in the interests of secure public finances. It also considers that even the confiscatory effect of taxing part of the profit earned in a final period whilst allowing a remaining loss carry-forward to go unused does not offend against the constitution. The guarantee of unfettered ownership is not a guarantee of business success. However, it sees the present case as something of an exception in that the cause of the loss and the cause of the profit – write-down followed by recovery of a receivable – are inseparable. The profit is the consequence of the loss and to treat it differently to the permanent disadvantage of the taxpayer is to breach the constitutional demand for equal treatment of like circumstances. How the Constitutional Court will decide the matter remains to be seen.

Supreme Tax Court decision I R 59/12 of February 26, 2014 published on September 3

Keywords

loss offset, minimum taxation