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Loss carry back in case of change in shareholding during the year?

The Lower Tax Court of Muenster held that losses incurred during the year in which a harmful change in shareholding took place can be carried back to the previous tax year.

From 2008 losses brought forward will be forfeit on the acquisition of more than 50% of the shares by a single person within a five year period. Acquisitions of between 25% and 50% lead to forfeiture in proportion to the holding acquired – Sec. 8c Corporation Tax Act (CTA). A harmful share transfer leads not only to the full or partial loss of the loss brought forward at the beginning of the year but also has the same effect on the loss for the current year up to the date of the transfer. There are still many aspects of the rules on loss curtailment that remain unclear. The German tax administration attempted to clarify the position with a circular of July 4, 2008, albeit not entitled successfully. For example, in case of a harmful share acquisition during the current year it was held that any current profits up to the date of sale cannot be offset against unutilised losses.

In a judgment of November 30, 2011 (I R 14/11) the Supreme Tax Court disagreed with the tax administration and held that a harmful share acquisition during the current year does not lead to the curtailment of the loss incurred to date but also that current profits up to that date can be offset against unutilised losses. The curtailment of loss relief only relates to post-transfer profits.

The most current case before the Lower Tax Court of Muenster involved a harmful change in ownership in 2013. The tax office cited the circular issued by the tax administration in 2008 and generally refused a loss carry back once a harmful share transfer took place. The Lower Tax Court considers the law as being not unequivocal. It is the intention of Section 8c to hinder only the use of earlier losses by *new shareholders*. Accordingly, this necessitates not only separation of the relevant losses but also that profits earned prior to the share transfer/change of ownership be exempted from curtailment. It is the wording of Sec. 8c sub-sec. 1 CTA which sheds some light on the case at hand: “losses not recovered or deducted before the harmful acquisition (...) cease to be deductible”. Bearing this in mind the court concluded that not only losses incurred prior to the change in shareholding but also those accrued thereafter may be carried back to 2012.

Lower Tax Court of Muenster judgment 9 K 2794/15 K, F) of July 21, 2016 – it is not known presently whether this decision will be appealed and brought before the Supreme Tax Court

Keywords

change of shareholders, loss carry-back, loss curtailment