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Amendment of tax loss utilisation rules for corporations

Under certain conditions, changes in shareholders and the admission of new investors will in future be possible without giving rise to a forfeiture of losses carried-forward. On 23 December 2016 the Act for the Further Development of Tax Loss Utilisation for Corporations was published after having been adopted by the German Parliament (Bundestag and Bundesrat) on 20 December 2016.

The new rules represent a significant change for corporations in the tax treatment of loss utilisation. Previously a corporation's unutilised losses could be subject to (partial) forfeiture, where there was a change in the shareholder ownership above certain levels ("harmful change of ownership"). A new provision has now been introduced into the Corporation Tax Act, according to which it is possible to apply for relief from the forfeiture of tax losses after such a harmful change in ownership.

Strict conditions for the application of the rule

An application under the new provision can only be successful, to the extent that the corporation has maintained exclusively the same business since the corporation was established or at least has maintained exclusively the same business in the last three periods of assessment before the period of assessment in which the harmful change of ownership arose. Furthermore during this period the corporation cannot have been a controlling enterprise in a tax consolidation group ("Organträger") nor can it have held an interest in a commercial partnership.

In addition to the above, the provision lists a number of harmful events; where any of these harmful events have occurred in the above mentioned three year period, the corporation will not be entitled to the relief.

The relief from tax loss forfeiture does not apply to losses which were incurred in a period prior to a previous discontinuance or dormancy of the business. This would apply, in particular, to situations where the corporation had discontinued its business in the past and then started a new business.

The corporation must apply for application of the relief in its tax return for the period of assessment in which the harmful change of ownership occurred.

Earmarked loss carry-forward

The whole of the loss carry-forward available at the end of the period of assessment in which the harmful change of ownership occurred, will become an earmarked loss carry-forward. It may be set off against profits arising in future years subject to the rules of minimum taxation.

Harmful events

Any earmarked loss carry-forward which has not already been utilised will be forfeit if the business is discontinued or if any of the harmful events listed in the provision occur. In such a case, the corporation will be able to retain the earmarked loss carry-forward to the extent that the corporation has hidden reserves. This only applies however to hidden reserves which existed at the end of the period of assessment, which preceded the period of assessment in which the harmful change of ownership occurred.

Other important conditions

- The earmarked loss carry-forward must be separately declared and assessed.
- The provision will apply to harmful changes of ownership, which occur after 31 December 2015.

- No application for non-forfeiture may be made for “old” losses incurred in periods prior to a discontinuance or dormancy of the business. In the case of a discontinuance or dormancy occurring prior to 1 January 2016, it may not be possible to allocate the losses properly as these events may have occurred far back in the past. Accordingly an application for non-forfeiture is completely excluded in these cases.
- The provision also applies accordingly to any interest carry-forward and to any loss carry forward for trade tax purposes.

Keywords

Corporation tax, Loss utilisation, curtailment of losses