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By PwC Deutschland | 15 January 2020

Cologne Tax Court - no cut-off period for applications for continuance-bound loss carry-forwards

The Cologne Tax Court held in its decision (10 V 1706/18) published on 15 January 2020, that the wording of Section 8d (1) Sentence 5 of the Act did not contain a cut-off period according to which the application under Section 8d (1) CTA for continuance-bound loss carry-forwards must be filed in the first tax return - and only there.

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Background

The appellant was a limited liability company. In 2016 a transfer of shares took place, whereby more than 50 % of the shares in the company were transferred. On 18 April 2018, the appellant's tax advisor submitted the corporation tax return in electronic form. In doing so, he omitted to file an application in accordance with Section 8d Corporation Tax Act (CTA)- application for a continuance-bound tax loss carry-forward. At the time the application should have been included in an appendix to the corporation tax return (Appendix WA).

Subsequently, the tax office, applying the provision on loss forfeiture following a harmful share transfer, assessed the remaining loss carry-forward as at 31 December 2016 at EUR 0 for both corporation and trade tax purposes.

The appellant appealed against the tax assessments and submitted an amended corporation tax return 2016 in support thereof. The amended return contained an application under Section 8d CTA in Annex WA. At the same time, it requested suspension of enforcement.

The tax office rejected the appeals and the request for suspension of enforcement, arguing that the application for the continuance-bound loss carry-forward had to be filed in the tax return and, pursuant to Section 8d (1) Sentence 5 CTA, could not be made subsequently in proceedings to correct the tax return .

The appellant’s case was partially successful before the Cologne Tax Court, in particular with regard to its claim that the application for the continuance-bound tax loss carry-forward in the administrative appeals process via the amended tax returns was valid.

The parties did not dispute that the appellant was subject to the loss forfeiture under Section 8c CTA nor that the requirements of Section 8d CTA for a continuance-bound tax loss carry-forward had been met. The only disputed issue is whether the applicant was allowed to file the application for the first time (pursuant to § 8d (1) Sentence 5, CTA), in the administrative appeals process by filing an amended tax return.

Judgment

The wording of Section 8d (1) Sentence 5 of the Act does not contain a cut-off period according to which the application under Section 8d (1) CTA for continuance-bound loss carry-forwards must be filed in the first tax return - and only there. Rather Sentence 5 states that the "application must be filed in the tax return for the relevant period of assessment “. The wording contained in the official explanatory memorandum to the Act, that an application under § 8d (1) Sentence 5 can be filed "until the end of the financial year", has not been incorporated into the Act and was therefore irrelevant. The Court noted, in particular, that the legislator had forgone an explicit limitation of the application period - in contrast to, for example, Section 27 (5) Sentence 2 CTA.

Nor could the Court see any substantive legal reasons for restricting an application pursuant to Sec. 8d CTA to the first declaration. Rather by making an application under § 8d CTA, the taxpayer is choosing a type of loss utilisation which is deviates from § 8c KStG, and which follows its own rules. The loss deduction

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granted in this respect is subject to the proviso that no harmful event (within the meaning of § 8d (2)) occurs in the future until the loss is utilised. In such a case, any loss carry-forward still available for the continuation of operations would be completely lost.

Finally, the inability to file an application under Section 8d CTA in cases where a loss was subsequently forfeited under Section 8c CTA (e.g. after a tax audit in which a loss deduction under Section 8c CTA was restricted for the first time) also spoke against the tax office's interpretation. If Section 8d (1) Sentence 5 CTA were to be understood as the statutory preclusive period, a corporation - in the event of a loss arising subsequently - would be deprived of its right under statute to a loss treatment differing from Section 8c CTA.

Also, interesting to note was the Court’s reference to certain professional literature which had pointed out that the placement of the Section 8d CTA application in the tax declaration form was under consideration and that the taxpayer had to make the application in Annex WA until a solution was implemented. This could mean that the taxpayer was more likely to make a mistake. (N.B. The 2018 corporation tax forms now include the application in the Appendix "Losses")

Source:

Cologne Tax Court decision - 10 V 1706/18 - published on 15 January 2020

Keywords

continuance-bound tax loss carry-forward, harmful share transfers