

# Undeducted company loss deductible after dissolution of TG

## I. General interpretation on deduction of losses by tax group members published

At the end of October, the minister of finance published another general interpretation. This time, the subject is Article 7 par. 5 of the Corporate Income Tax Act of 15 February 1992 (the CIT Act), namely the method used to determine the period of the next five consecutive tax years. The general interpretation covers the settlement of tax losses incurred and not deducted in the years preceding the first year of the tax group, after the group is dissolved. The 15 October 2021 interpretation has been published in the 2021 Official Journal of the Ministry of Finance and Regional Policy in item 148.

The period of the next five consecutive tax years for the settlement of a tax loss incurred prior to joining a tax group does not include the tax years during which the company belonged to the group.

## II. Joint reporting by companies only while tax group in effect

A tax group (TG) may be formed by at least two commercial law companies with legal personality, which are related through capital. Specific conditions must be met. The first is the conclusion in the form of a notarial deed of an agreement for the formation of a TG for a period of at least three tax years (this period may be extended). The agreement must be reported by the holding company to the head of the tax office with jurisdiction over its place of establishment at least 45 days before the start of the tax year adopted by the TG. Once the head of the tax office issues a decision to register the agreement, the TG becomes a taxable person of corporate income tax. From the start of the tax year indicated in the agreement up until the end of the agreement's term, the companies report their income and losses jointly. In consequence, the end of the last tax year in the term of the agreement, in the absence of reporting and registering a new TG agreement for the coming tax years, will result in the TG losing the status of taxable person.

### III. Formation of TG ends the tax years of its members

A TG loses the status of taxable person before the term of the agreement if changes occur in the actual or legal status that violate the conditions specified in the CIT Act. In such cases, the first day of the tax year of the companies that comprised the TG will, as a rule, be the date of such changes. The CIT Act also regulates breaches of the conditions for recognizing a TG as a CIT taxable person resulting from a decrease in the minimum profitability threshold below 2%. In such cases, the TG loses the status of taxable person not on the day on which the profitability threshold falls, but at the end of the TG's tax year in which the change occurred. Therefore, the TG loses the status of taxable person as a result of the end of the term of the TG agreement or the occurrence during the term of the agreement of changes in the actual or legal status that violate the conditions for recognizing the TG as a CIT taxable person. The day preceding the first tax year of the TG is the last day of the tax year of the companies that comprise the TG. Where the term of the TG agreement ends, or where the TG loses the status of taxable person for other reasons, the tax year of the companies that previously made up the TG starts on the day following the occurrence of those circumstances.

### IV. TG cannot deduct losses incurred by members before its formation

CIT taxable persons can either reduce their income by the amount of the loss from the same source over the next five consecutive tax years, where the amount of the reduction of such income from any of those years cannot exceed 50% of that loss; or reduce their income on a one-off basis by the amount of the loss from the same source over the next five consecutive tax years by no more than PLN 5 million. The undeducted amount may be settled in the remaining years of the five-year period, where the amount of income reduction in any of those years cannot exceed 50% of the value of the loss. At the same time, the companies that make up the TG cannot reduce their income by the amount of the loss incurred by the TG, whilst the income of the TG is not used to cover the losses of the companies comprising the TG, incurred by those companies prior to the formation of the TG.

### V. Eligibility to deduct earlier loss not lost after joining TG

A key component of the general interpretation is an answer to the question how to calculate the period of the next five consecutive tax years for the purpose of deducting tax losses incurred by a group member before the first tax year of the TG. Applying a literal interpretation, the minister of finance found that the regulations indicate that a company that is part of a TG has no separate tax year whilst the PG agreement is in effect. In consequence he found that the period of five years allotted for the deduction of a loss incurred prior to joining the TG is suspended for the term of the TG agreement. At the same time, the requirement to settle tax has no bearing on determining the first day of the tax year of the companies that previously comprised a TG. Although it is true that the companies comprising a TG report tax jointly during the TG's operation, according to the minister, the regulations distinguish between income and loss generated by the TG and the companies before and after the TG's operation. The regulations do not, however, indicate that a TG member company loses the right to settle a loss incurred prior to the formation of the TG.

### VI. TG member companies and TG are separate taxable persons

In the interpretation the minister stressed that binding regulations indicate that a TG and the companies that comprise it are separate corporate income tax entities. This distinction is confirmed in a regulation that states that the holding company is required to file tax declarations for the TG, as well as a regulation requiring the holding company to withhold and pay tax and tax advances. Thus, a TG cannot be equated with the companies that comprise it. The rights and responsibilities of the TG do not apply to the companies that form the TG, and the rights and responsibilities of the companies that form the TG do not apply to the TG. Therefore – as explained by the minister of finance – the TG and the companies that comprise it do not share a subjective identity.





## VII. Tax year of TG member and tax year of TG are not the same

The interpretation explains that the period of the next consecutive five tax years during which an entity is eligible to reduce its income by the loss incurred in prior years refers to the tax years of the entity that incurred the loss. Firstly, because a TG and the companies that comprise it are separate CIT taxable persons. As a result, they do not share income and losses, and thus cannot offset them. Secondly, the tax year of a TG member ends with the start of the tax year of the TG, and the next tax year begins when the TG ceases to operate. The provisions of the CIT Act clearly distinguish the tax year of the company from the tax year of the TG. Thus, the tax year of the TG cannot be equated with the tax year of its member company.



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## VIII. TG member's undeducted loss may be deducted after dissolution of TG

In summary the minister of finance found that the period of the next five consecutive tax years for the settlement of a tax loss incurred by a company prior to joining a TG does not include the tax years of the TG. The five-year period (with respect to the tax loss incurred by the company before the TG was formed) is suspended as a result of the company joining the TG. It begins to run with the start of the company's next tax year, as it is the nearest consecutive tax year of an entity eligible to deduct the loss. As stressed in the general interpretation, this understanding of Article 5 par. 5 of the CIT Act is consistent with the position presented by administrative courts.

The information presented herein does not constitute comprehensive information or opinion. Consult your adviser before making any decisions.

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