AUSTRALIAN TAX ADVISER

2105: FEBRUARY 2021

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IN THIS ISSUE

Continued

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IN THIS ISSUE

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SECTION 1 – PROFESSIONAL DEVELOPMENTS

THE NEW LOSS CARRY BACK RULES

No-one likes to make a loss, but in the era of the COVID pandemic, losses were, for the most part, unavoidable. Add to that, the largesse of the government in allowing most entities to immediately expenses most depreciating assets means that even profitable entities will likely show a tax loss for the 2019–20 and/or 2020–21 income years.

As a welcome part of the COVID economic recovery strategy, the federal government introduced a reworked version of the loss carry back rules, which had existed for just a single tax year back in 2012–13. Under the new rules, companies are able to claim a refundable tax offset in their 2020–21 and 2021–22 company tax returns. The legislation is to be found in the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020, which received Royal Assent on 14/10/2020 as Act no 92 of 2020.

¶5.1 Eligible entities

Let's start by looking at who can claim these loss carry-backs. Well, to be eligible for the offset, the taxpayer must:

- carry on a business – entities who carry on an activity that falls short of what constitutes a business will miss out[1]
- be a company, a corporate limited partnership or a public trading trust (so, for all practical purposes, the entity must be a company); and
- have an aggregated annual turnover[2] of less than $5 billion for the income year in which the loss was made; this will include all but the largest of our companies in Australia.

In addition to these conditions, the taxpayer must have been a company, a corporate limited partnership or a public trading trust for the **whole of the income year** in which the tax offset is being claimed, the whole of the income year it chooses to carry the loss back to (ignoring any part of the year before it existed), and any income years between those two years.

¶5.2 Eligible losses

Entities can only carry back tax losses **made** in the 2019–20, 2020–21 or 2021–22 income years and can only use a tax loss once. In addition, entities can only **carry those losses back** to the 2018–19, 2019–20 or 2020–21 income years. Logically, a loss offset can only be claimed in income years in which the company was liable to pay income tax.

1 For what amounts to the carrying on of a business, the ATO generally relies on Taxation Ruling TR 97/11

2 An entity's aggregated annual turnover includes its own turnover plus the turnovers of all its affiliates and connected entities.