

## The institute of the tax loss carryback approaches

1<sup>st</sup> June 2020

As part of the so-called anti-crisis package<sup>1</sup> that has just been approved in an accelerated procedure by the Chamber of Deputies, it is proposed, among other things, to introduce the institute of the tax loss carryback. Below we summarize what are, from our point of view, the main elements of this instrument.

- ▶ The tax loss, or part thereof, should be deductible from the tax base **in the 2 tax periods immediately preceding** the tax period (or the period for which a tax return is filed) for which the tax loss is assessed, or - as until now - in the 5 tax periods immediately following the period for which the tax loss is assessed.
- ▶ However, compared to the original proposal, a limit was approved - in the tax periods preceding the period for which the tax loss is assessed, this tax loss may only be deducted from the tax base **up to a total amount not exceeding CZK 30,000,000**.
- ▶ The personal income tax payer **should not be able to deduct** the tax loss **against the income tax base from dependent activity**.
- ▶ Simply put, a taxpayer who will have an assessed tax loss for the 2020 tax period may claim this loss in the 2019 tax period, and possibly also the 2018 tax period, and deduct this tax loss from the tax base for these tax periods (by means of a supplementary tax return). Assuming that the taxpayer had a positive tax liability for the tax periods of 2019 and 2018 and has already paid it, **this will give rise to an overpayment of the taxpayer**.
- ▶ It is newly proposed **to waive the right to claim a tax loss** as an item deductible from the tax base **in the tax periods following** the period for which it was assessed. This waiver must be effected by the taxpayer to the tax administrator within the deadline for filing the tax return for the period for which the tax loss is assessed, and always applies to all subsequent tax periods and to the entire tax loss. The purpose of this institute is to limit the extension of the deadline for tax assessment according to § 38r(2) of the Income Taxes Act ("ITA") - see the related point below.
- ▶ It also stipulates the **taxpayer's obligation to state** which tax loss is being claimed and in what amount in the tax return when claiming a tax loss.
- ▶ According to the explanatory memorandum, not utilizing the tax loss for the period preceding the period for which it was assessed should not constitute a breach of the conditions for applying the tax relief under § 35a of the ITA, i.e. **for recipients of investment incentives**.

<sup>1</sup> <https://psp.cz/sqw/historie.sqw?o=8&t=874>

- ▶ Even with the tax loss carryback, it will be necessary to meet the conditions set out in the so-called **test of substantive change or test of maintaining the same activity** per § 38na of the ITA. In this context, according to the explanatory memorandum, the definition of the term “change in the composition of persons” is “clarified”, while it is not entirely clear whether the practical interpretation of this term is somehow shifting – as part of their addressing of comments, Ministry of Finance representatives have indicated that a change in content is not the purpose of the amendment.
- ▶ In the case of **transformations**, the tax loss assessed to the taxpayer for the period after a transformation should not be claimed against the tax base of the legal predecessor (dissolved company), which was assessed in the period before the transformation. A taxpayer who does not cease to exist upon a transformation should generally be able to utilize the tax loss that was assessed in the period after the transformation against the tax base that was assessed in the period before the transformation, however, only that part of the loss which relates to the same activities that the taxpayer had already been carrying out in the period before the transformation.
- ▶ When applying the tax loss carryback, **the deadline for assessing the tax for the given periods is extended**, generally until the end of the tax assessment deadline for the last tax period for which the tax loss or part of it could be utilized.
  - ▶ However, if the taxpayer does not exercise the option of utilizing the tax loss, this deadline (for the tax period preceding the period for which the tax loss was assessed) should not be extended.
  - ▶ If the taxpayer waives the right to utilize a tax loss for the tax period following the period for which this tax loss is assessed, the tax assessment period for the tax period preceding the period for which the tax loss was assessed and in which the tax loss was utilized ends at the same time as the tax assessment period for the period in which the tax loss was assessed.
- ▶ Under the proposed transitional provision, this new arrangement is **already applicable** to a tax loss legally assessed **for a tax period ending on or after 30 June 2020**.
- ▶ It is also proposed to **speed up** the possibility of **claiming the tax loss carryback for the first period of application** of this legislation (and only in the first tax period immediately preceding the period for which the tax loss was assessed) in the form of an accelerated claim possibility of a loss in the expected amount (already during the tax period for which it arises).
- ▶ If the actual assessed tax loss is different from the amount determined by the taxpayer, or there is no tax loss, it means that the tax for the immediately preceding tax period in which the taxpayer reduced the tax base by a notional tax loss is incorrect;
  - ▶ If the final tax is to be higher (i.e. the actual tax loss is lower than the amount determined by the taxpayer, or the taxpayer did not incur a tax loss) than the last known tax, then the taxpayer must file a supplementary tax return and pay the difference, including interest on arrears.
  - ▶ If, on the other hand, the loss is higher (i.e. the actual tax loss is higher than the determined amount), then the taxpayer should be able to file a supplementary tax return.

If you have any questions, please contact your usual EY tax team.

We will continue to monitor the situation for you.



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