

## Company trading loss carry back claims (Lecture B1388 – 13.43 minutes)

### *Background*

Where a company makes a trading loss, there are several possible ways for that trading loss to be relieved, subject to certain conditions and restrictions.

For example, the trading loss can be carried forward against total profits of later years, so long as the trade continues (CTA 2010, s.45A); the company could claim to offset the loss against its total profits of the same accounting period (CTA 2010, s.37(3)(a)); if there are no other profits of the same accounting, or to the extent that profits of the same accounting period have been fully relieved, a claim can generally be made for the trading loss to be carried back and offset against total profits of the preceding 12 months (CTA 2010, s.37(3)(b)).

### *Losses carried back*

As indicated, where the amount of trading loss exceeds the profits of the same accounting period, the company may claim to carry back the excess against the profits of preceding accounting periods. The preceding accounting periods are those falling wholly or partly within the 12-month period ending immediately before the start of the loss-making accounting period. The loss relief is given against total profits, including chargeable gains.

The company cannot choose to restrict the claim to cover only particular items of income or gains. In addition, a claim must first be made to offset losses against profits of the current accounting period, before carrying back any balance of unused losses against profits of preceding accounting periods. A company cannot claim to carry back losses without first setting them off against profits of the current period.

Trading losses may only be carried back against profits of a preceding accounting period if the company was carrying on the relevant trade in that accounting period, and only if the trade was not carried on wholly outside the UK. However, HMRC accepts it is not necessary for the trade to have been carried on for the whole of the preceding accounting period. If the trade was carried on at any time in an accounting period, losses may be set-off against the profits of the whole of that accounting period (see HMRC's Company Tax Manual at CTM04510).

However, where only part of an accounting period falls within the 12-month carry back period, the profits of that accounting period available for set-off are restricted to profits apportioned to the part of the accounting period falling within the 12-month period (CTA 2010, s.38).

### *Claiming the relief*

A claim to carry back losses to accounting periods within the previous 12 months must be claimed. The time limit is generally two years after the end of the loss-making period. However, HMRC may allow a longer period at its discretion (CTA 2010, s.37(7)).

In practice, loss relief claims are normally made in the company's tax return for the loss-making accounting period. However, if the claim has not been included in the company's tax return (or in an amendment to the return), it may be possible to make a claim under the provisions for claims not included in returns (TMA 1970, Sch 1A).

If the loss relief claim needs amending, and the claim was made in the company's tax return, it may be amended at any time up to 12 months from the statutory filing date for the return. The effect is that the claim is treated as an amendment to the return (FA 1998, Sch 18, para 58(2)).

Alternatively, if the company cannot make the claim in a company tax return or an amended return, so that the claim is within the rules regarding claims not included in returns, the time limit is within 12 months of making the claim. Effect is given to the claim by discharge or repayment of corporation tax (FA 1998, Sch 18, para 58(3)). If the company discovers that it made a mistake in a claim, it can make a supplementary claim within the time allowed for making the original one (FA 1998, Sch 18, para 56).

#### *Claims after HMRC enquiries, etc.*

Where additional tax has been brought into charge by an amendment to the company's tax liability following an HMRC enquiry closure notice or discovery assessment, in some cases it is possible to make claims against the additional tax liability arising, after the normal time limit for doing so has passed (FA 1998, Sch 18, para 61). Those cases include the amendment of a company tax return following an HMRC enquiry closure notice, or where HMRC makes a discovery assessment.

The extended time limit for claims in such cases is one year from the end of the 'relevant accounting period', i.e., the accounting period in which the tax return enquiry amendment was issued, or the discovery assessment was made by HMRC (FA 1998, Sch 18, para 62(1)). The liabilities that can be reduced include the further liability resulting from the amendment or assessment.

A company can normally vary or revoke a claim previously made or given (unless it is irrevocable). However, if the company varies or revokes the claim, it must do so in the same way the claim was made. If a consequential claim is made, the reduction in tax liability resulting from the claim is restricted to the additional tax liability resulting from the amendment or assessment (FA 1998, Sch 18, para 64).

#### *Careless or deliberate conduct*

The general rule about consequential claims following an HMRC closure notice or discovery assessment is subject to restriction in certain circumstances. If HMRC assesses the company for a loss of tax brought about carelessly or deliberately by or on behalf of the company, an additional claim can still be made. However, the only claims the company can make are those that can be given effect in that assessment. The claim must therefore be made before HMRC issue the assessment, or in the appeal period relating to that assessment (FA 1998, Sch 18, para 65; see CTM90665).

#### *Civic Environmental Systems Ltd v HMRC*

In *Civic Environmental Systems Ltd v Revenue and Customs* [2023] EWCA Civ 722, the appellant company ('CES') commenced trading on 8 June 2006. Its first accounts for the period 8 June 2006 to 30 April 2007 showed a profit before tax of £142,039. The corporation tax return for the 2007 period showed corporation tax of £41,372.

CES made a loss in the year ended 30 April 2008 of £444,747. It claimed to carry back that loss and set it off against its profits for the 2007 period, which were then considered to be £142,039, and HMRC repaid the corporation tax for the 2007 period of £41,372. That left remaining losses of £302,708 to be carried forward to set off in later years. However, the First-tier Tribunal (FTT) subsequently ruled that CES's profits for 2007 had been understated by £540,000. Both the FTT, and on appeal the Upper Tribunal (UT), decided that notwithstanding this increase to CES's profits for

2007 it remained that only £142,039 of the 2008 loss could be set off against the 2007 profits. CES appealed.

The Court of Appeal considered that CES's loss relief claim was not given effect to as an amendment to its 2007 return. It was therefore correct for it not to be taken into account by HMRC in the closure notice or the FTT in their decision. Instead, it was given effect to as a freestanding claim under TMA 1970, Sch 1A, which had resulted in the tax repayment. The court held that there was no mechanism to enable that claim to be re-opened on the basis that the profits for the period had subsequently been increased by HMRC or FTT. CES's appeal was dismissed.

*Contributed by Mark McLaughlin*