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Section 37: relief for losses etc; Schedule 8: relief from corporation tax for losses and other amounts

Background

When reforms to corporation tax loss relief were announced in 2016, the government heralded them as part of its programme for modernising the UK's tax system. At the same time, it was very careful to avoid any suggestion that they represented any simplification of the rules in this area.[1] Anyone who has worked through the relevant provisions will understand why: the reforms add significant complexity to an area which, conceptually at least, is relatively straightforward (i.e. if you tax profits, you should relieve losses).[2]

Much of the complexity derives from the operation of the corporate income loss restriction (CILR) and, since April 2020, the corporate capital loss restriction (CCLR)[3] and their related

[1] HM Treasury and HMRC, *Reforms to corporation tax loss relief: consultation on delivery* (May 2016), *https://www.gov.uk/government/consultations/reforms-to-corporation-tax-loss-relief-consultation-on-delivery* [Accessed 16 August 2021].
[2] Ashley Greenbank and Jeremy Moncrieff, "Finance (No.2) Act 2017 Notes: Section 18 and Schedule 4: carried-forward losses; Section 19: losses: counteraction of avoidance arrangements" [2017] B.T.R. 547.
[3] Sarah Squires, "Finance Act 2020 Notes: Section 25 and Schedule 4: corporate capital losses" [2020] B.T.R. 435.

compliance obligations as set out in Part 7ZA of the Corporation Tax Act 2010 (CTA 2010). There is extensive guidance on how the rules are intended to work, primarily in the *Company Taxation Manual*.[4]

Unsurprisingly, as the rules bed in, both HMRC and taxpayers find themselves facing situations where the legislation does not quite work as expected.

The first sign that, notwithstanding a relatively lengthy initial consultation,[5] the rules did not fully achieve their intended policy (or indeed practical) outcomes came in 2019 when a number of technical amendments were made in Finance Act 2019 (FA 2019).[6] Finance Act 2021 (FA 2021) shows that issues have continued to be discovered as HMRC and taxpayers gain more experience of applying the rules in practice. The FA 2021 changes include amendments to "ensure the legislation works as intended"[7] (in some cases, resulting in statements in HMRC's published guidance now being incorporated in specific legislation—which in the writer's view is encouraging given that guidance should not be a panacea for defective law). But other changes are aimed at simplifying certain of the administrative requirements around CILR—also encouraging as it indicates HMRC's continued willingness to respond to taxpayer concerns.

Notwithstanding the number of changes made by FA 2021, it may yet be premature to rule out further tweaks in future Finance Acts, particularly given that groups will only now be grappling with the carry-forward group relief rules in practice.

This note summarises the main changes made to the rules for corporation tax loss relief by FA 2021.

Commencement

Like the FA 2019 changes, the changes made by Schedule 8 FA 2021 have varying commencement dates.[8] Some changes are to be read back to 1 April 2017 when the loss reforms were first introduced; some are backdated to the introduction of CCLR on 1 April 2020 and others apply prospectively (to accounting periods beginning on or after 1 April 2021). There are also detailed transitional rules for one specific change.[9] Given that companies will still be dealing with CILR for accounting periods beginning before 1 April 2021 for some time yet, this means that care is needed to ensure that, for any given accounting period, taxpayers consider, and comply with, the provisions then in effect (including those in effect retrospectively).

[4] HMRC, Internal Manual, *Company Taxation Manual* (published 16 April 2016; updated 1 April 2021), CTM05000, "Corporation tax: restriction in relief for carried-forward losses".

[5] After the initial May 2016 consultation on delivery, draft legislation was published for consultation in two instalments in December 2016 and January 2017 and the May 2017 election provided further time for comments as the Finance Bill was published in September 2017.

[6] Ashley Greenbank, "Finance Act 2019 Notes: Section 27 and Schedule 10: corporation tax relief for carried-forward losses" [2019] B.T.R. 328.

[7] *Finance (No. 2) Bill: Explanatory Notes* (2021), explanatory notes to Clause 37 and Schedule 8: Relief from corporation tax for losses etc, *https://publications.parliament.uk/pa/bills/cbill/58-01/0270/en/200270en.pdf* [Accessed 16 August 2021], p.109, para.32.

[8] Finance Act 2021 (FA 2021) Sch.8 paras 16–21.

[9] FA 2021 Sch.8 paras 22 and 23.

Limit on carry-forward group relief

The carry-forward group relief provisions were summarised in a note in this *Review* on Finance (No.2) Act 2017.[10] A key feature of the regime is that the putative surrendering company must first use its carry-forward losses to the maximum extent allowed under CILR. This is because only (eligible) carry-forward losses in excess of its own relevant maximum are available for surrender to other group companies—or, as the headnote to the relevant provision put it, there is a "restriction on surrendering losses etc where surrendering company could use them itself".[11]

However, the original drafting of section 188BE CTA 2010 meant that there were situations where, even though a surrendering company could not use carry-forward losses itself, it was not able to surrender them to other group companies with carry-forward loss capacity.

The reason for this was referenced in a previous version of HMRC's *Company Taxation Manual*—although not perhaps in the most user-friendly fashion:

> "There may be some circumstances where the maximum permitted exceeds the amount of profits against which relevant deductions can be relieved. This may occur where the deductions allowance allocated to the company exceeds the qualifying profits, and can be avoided by ensuring that any excess allowance is allocated to another company in the group."[12]

The issue HMRC references links to how the loss restriction formula is structured. A surrendering company is always able to use carry-forward losses up to the amount of its allocated deductions allowance. This means that if its allocated deductions allowance is greater than its CILR-determined profits, the CILR formula means it is treated as having loss capacity even though it has no profits against which the relevant losses can be offset. (For example, assume a company had £250,000 profits and specified a £5 million deductions allowance in its tax return. It has carry-forward losses of £500,000. In practice, its ability to use carry-forward losses is limited by its actual profits, but the CILR calculation treats it as having loss capacity of £5 million and so able to use all its losses itself!)

Paragraph 6 of Schedule 8 FA 2021 fixes this issue, by replacing section 188BE CTA 2010 with some plain(er) English drafting. This means that, for accounting periods beginning on or after 1 April 2021, a company's ability to use its own losses is tested by reference to "actual" loss capacity (i.e. the availability of profits). As this measure is not retrospective,[13] companies making carry-forward group relief claims for earlier accounting periods may need to heed HMRC's advice about avoiding specifying an "excess allowance" where a company's ability to use carry-forward losses is circumscribed by its profits, and not the maximum available deductions allowance.

[10] Greenbank and Moncrieff, "Finance (No.2) Act 2017 Notes: Section 18 and Schedule 4: carried-forward losses; Section 19: losses: counteraction of avoidance arrangements" [2017] B.T.R. 547.
[11] Corporation Tax Act 2010 (CTA 2010) s.188BE.
[12] HMRC, Internal Manual, *Company Taxation Manual* (December 2020 version), CTM82030, "Corporation Tax: Group relief for carried-forward losses: Restrictions".
[13] FA 2021 Sch.8 para.17.

Group allowance allocation statement: changes to filing obligations

A key feature of CILR is the availability of a "deductions allowance"[14] of up to £5 million per accounting period (allowing unrestricted offset of carry-forward losses to the extent of that allowance—provided certain compliance obligations are met). For groups of companies, those compliance obligations include the appointment of a "nominated company" by UK members of the group[15] which has responsibility for allocating group deductions allowance between UK group members and then informing HMRC of that allocation (by submitting a group allowance allocation statement for each of its accounting periods).[16]

The obligation to submit a group allowance allocation statement is contained in section 269ZT(1) CTA 2010 which provided that:

> "A company must submit a group allowance allocation statement to HMRC for each of its accounting periods in which it is the nominated company in relation to a group."

The mandatory nature of this obligation meant that once a group had appointed a nominated company, the group had to file a statement even if there were no carried-forward losses being claimed in a particular period (such that any allocation was irrelevant). Contrary to the legislation, HMRC's published guidance suggested that groups did not have to fulfil this particular requirement if, in a particular period, no group members were accessing carried-forward losses.[17] Confusion was guaranteed.

Paragraph 11(3) of Schedule 8 FA 2021 inserts a new section 269ZT(3A) CTA 2010. This provides that, where a group is not accessing carried-forward losses in a given accounting period, the nominated company does not have to submit a group allowance allocation statement. This amendment is welcome, but note that it only takes effect prospectively (for accounting periods beginning on or after 1 April 2021).[18] So for all earlier accounting periods, the legislation still requires a group allowance allocation statement to be filed even where the group is not accessing carried-forward losses.

Paragraph 11 of Schedule 8 FA 2021 also rewrites section 269ZT(4) CTA 2010 which sets out the filing date for submission of a group allowance allocation statement. This subsection, as originally enacted, provided for a single filing date (being the first anniversary of the filing date for the nominated company's corporation tax return for the relevant accounting period). As rewritten by paragraph 11(4) of Schedule 8 FA 2021, later filing of such a statement in response to closure of an inquiry or following determination of a tax appeal is now possible without having to rely on HMRC discretion (mirroring the rules that apply to filing a revised statement). This change is similarly prospective, taking effect for group allowance allocation statements relating to accounting periods beginning on or after 1 April 2021.[19]

[14] CTA 2010 s.269ZW (company that is not a member of a group) and s.269ZR (company that is a member of a group).
[15] CTA 2010 s.269ZS.
[16] CTA 2010 ss.269ZR–269ZT.
[17] HMRC, Internal Manual, *Company Taxation Manual* (published 16 April 2016; updated 1 April 2021), CTM04835, "Corporation Tax: CT loss restriction: administrative requirements for the deductions allowance", *https://www.gov.uk/hmrc-internal-manuals/company-taxation-manual/ctm04835* [Accessed 16 August 2021].
[18] FA 2021 Sch.8 para.17.
[19] FA 2021 Sch.8 para.17.

Group allowance allocation statement: allowing retrospective compliance

Schedule 8 FA 2021 contains a further change relating to the submission of group allowance allocation statements. Paragraphs 2 and 3 of Schedule 8 FA 2021 insert two new sections into Part 7ZA CTA 2010. These sections enable what is effectively a compliance "catch-up" by allowing, in certain specific circumstances, late appointment of a nominated company and late filing by that company of a group allowance allocation statement. The specific circumstances mean that this change will be of particular relevance where, following a change in ownership of a group, the new owner discovers, when dealing with the group's pre-takeover tax affairs, that no nomination had ever been made.

The appointment of a nominated company is central to the operation of group compliance obligations under CILR. Although the legislation already allows for retrospective appointment of a nominated company by a group,[20] this is only an option for an existing (and so continuing) group of companies. So, where there is a change of ownership of a group, retrospective appointment of a nominated company for periods prior to the change of ownership would not be possible as the relevant group no longer exists. (For example, assume a group (Group A) is taken over by company X. Group A ceases to exist as a CILR group at the time of the take-over because it has a new ultimate parent (company X)[21] and so becomes part of X's CILR group from the date of the takeover.)

This is where new sections 269ZSA and 269ZVA CTA 2010 come in. They apply to what the legislation defines as a "former group" (i.e. companies that had been, but no longer are, members of a group for CILR purposes). If the former group never appointed a nominated company,[22] new section 269ZSA allows them to do so—even though they are then no longer a group for CILR purposes. The former group nomination takes effect up to the date on which the former group ceases to exist as a stand-alone group. In terms of the mechanics of appointing a former group nominated company, the existing compliance rules are adapted,[23] with section 269ZSA(2) CTA 2010 requiring the nomination to be agreed by all the companies that were members of the former group (and within the charge to corporation tax[24]) immediately before the former group ceased to exist.[25] Specific transitional provisions address the situation where former group members ceased to exist prior to enactment of FA 2021 (given the clear impossibility of a non-existent company agreeing a nomination).[26]

Once the former group has appointed its nominated company, the new section 269ZVA CTA 2010 allows that nominated company to file group allowance allocation statements for the former

[20] CTA 2010 s.269ZS(5). Given that the regime came into effect before Finance (No.2) Act 2017 was enacted, the ability to appoint retrospectively (i.e. to 1 April 2017) was essential.
[21] CTA 2010 s.269ZZB.
[22] Note that although the legislation prescribes how a nomination should be made, there is no official (i.e. HMRC) record as such of whether one has been made: this is because there is no requirement to submit a nomination to HMRC (see HMRC, Internal Manual, *Company Taxation Manual* (published 16 April 2016; updated 1 April 2021), CFM05180, "Corporation tax: restriction on relief for carried-forward losses: deductions allowance nominated companies").
[23] CTA 2010 s.269ZSA(5) as inserted by FA 2021 Sch.8 para.2.
[24] Although note that such companies need not be in the charge to corporation tax at the time the former group appoints a nominated company under FA 2021 s.269ZSA.
[25] So if Group A was originally grouped with company B (its ultimate parent) and company B also then owned company C, any nomination would need to be signed by all the members of Group A, company B and company C.
[26] FA 2021 Sch.8 para.22.

group's prior accounting periods. Necessary adaptations are made to the existing provisions dealing with group allowance allocation statements.

These changes are backdated to when the loss reforms were introduced (i.e. for accounting periods, real and deemed, beginning on or after 1 April 2017)[27] and so there may be former groups within the scope of these provisions that now would be out of time for filing a group allowance allocation statement for prior accounting periods. So, paragraph 23 of Schedule 8 FA 2021 extends the normal "first anniversary of the filing date" time limit to 31 March 2022.[28] This provides former groups with a limited period to identify if a valid nomination has been made, and if not, whether one should be made—and if so, appoint a nominated company and file the relevant allocation statements.

Working out loss capacity under CILR: in-year reliefs

When applying CILR (and CCLR) to determine the amount of profits of a company against which it can offset carry-forward losses, the company must first work out its "qualifying profits" using what the legislation describes as a five step process. This involves, at step 2, calculating "the sum ('the step 2 amount') of any amounts which…*could be relieved* against the company's total profits of the accounting period".[29] This basically means, as explained in HMRC's published guidance, in-year reliefs.

Many in-year reliefs need to be claimed. HMRC's published guidance confirmed that, where a claim was needed, the only amounts that "could be relieved" were those where a claim was being made.[30] The possibility of being able to make a claim was not itself said to be enough for an amount to be included as a step 2 amount.

Paragraph 9 of Schedule 8 FA 2021 ensures that this interpretation of "could be relieved" is now underpinned by statute. HMRC simply say they are clarifying step 2 (albeit four years after the rules were brought in).[31] As a result, this amendment is treated as having always had effect, and so any risk of ambiguity (and therefore potential disputes) as to the meaning of "could be relieved" in the last four years is avoided.

Priority: current year group relief versus carry-forward losses

Groups looking to optimise the use of losses need to pay particular regard to the priority rules that determine the order in which particular types of loss relief can be applied. Paragraph 4 of Schedule 8 FA 2021 amends section 137 CTA 2010 to put beyond doubt that profits must first be reduced by any losses available under current year group relief before (same company) relief

[27] FA 2021 Sch.8 para.16.
[28] FA 2021 Sch.8 s.23(2).
[29] CTA 2010 s.269ZF(3), emphasis added.
[30] HMRC, Internal Manual, *Company Taxation Manual* (published 16 April 2016; updated 1 April 2021), CFM05060, "Corporation tax: restriction on relief for carried-forward losses: in-year reliefs".
[31] *Finance (No. 2) Bill: Explanatory Notes* (2021), explanatory notes to Clause 37 and Schedule 8: Relief from corporation tax for losses etc, *https://publications.parliament.uk/pa/bills/cbill/58-01/0270/en/200270en.pdf* [Accessed 16 August 2021].

for carry-forward losses can be accessed. The change is again prospective, taking effect for accounting periods beginning on or after 1 April 2021.[32]

Trade succession and loss relief: anti-avoidance

FA 2021 also makes amendments to the anti-avoidance provisions in CTA 2010 which restrict the use of carried-forward losses following a change in ownership of a company. The changes only affect Chapter 2E of Part 14 CTA 2010 which applies where there is both a change in ownership and a trade succession within section 940C CTA 2010.[33] As a result of paragraphs 13 to 15 of Schedule 8 FA 2021 the (extended) definition of "change of ownership" that applies for the purposes of Chapters A to D of Part 14 CTA 2010 will now also apply to Chapter 2E. In particular, this means that there will be a change of ownership where, as a result of a person acquiring ordinary share capital in a company, that company becomes a member of a group of which it was not previously a member.[34] Although this appears to be one of the changes that ensures the "legislation works as intended", it only comes into effect where share capital (or other rights/powers) in a company are acquired on or after 1 April 2021.[35]

Other changes

Schedule 8 FA 2021 contains a couple of other changes to the loss relief provisions. Two of these appear simply to involve correcting drafting errors (some of which follow on from the changes made in Finance Act 2020 to include CCLR within Part 7ZA CTA 2010).[36] Commencement dates for these changes are therefore either 1 April 2017 or 1 April 2020. Another change, made by paragraph 12 of Schedule 8 FA 2021, concerns the calculation of the maximum amount of group deduction allowance that can be allocated to a group member by the nominated company. As the annual amount of group deductions allowance applies by reference to the nominated company's accounting period, a group member with a different accounting period can only benefit to the extent there is overlap between the two accounting periods with a day-count formula applying to determine the maximum amount available to be allocated to the other group member for the overlap period.[37] Paragraph 12 amends this formula to clarify that account is only taken of those days in the nominated company's accounting period on which it was in fact the nominated company. In practice this should have limited effect as most nominated companies will have that role throughout the entirety of their accounting period. But where this is not the

[32] FA 2021 Sch.8 para.17.
[33] CTA 2010 s.676EB.
[34] CTA 2010 s.719(4A).
[35] FA 2021 Sch.8 para.21.
[36] FA 2021 Sch.8 paras 7 and 10.
[37] CTA 2010 s.269ZV. An example of how this formula works is set out in HMRC, Internal Manual, *Company Taxation Manual* (published 16 April 2016; updated 1 April 2021), CTM05210, "Corporation tax: restriction on relief for carried-forward losses: maximum deductions allowance that can be allocated to a company".

case, these changes take effect for group allowance allocation statements submitted in respect of an accounting period beginning on or after 1 April 2021.[38]

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[38] FA 2021 Sch.8 para.20.
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