



## German Constitutional Court Held Parts of Loss Forfeiture Rules are Unconstitutional

The German Constitutional Court held that a provision of the loss forfeiture rules, in effect from January 1, 2008, through December 31, 2015, is unconstitutional. The provision stipulates a proportional forfeiture of current tax losses and tax loss carry forwards if more than 25 percent, but no more than 50 percent of the shares in a German corporation were directly or indirectly transferred to a new shareholder or a group of shareholders with aligned interest. (For example, if 30 percent of the shares of a company are transferred, 30 percent of the loss carry forwards would be lost.) An additional provision, which was not addressed directly by the court's decision, provides for a forfeiture of all losses carried forward in transfers of more than 50 percent of the shares.

The court did not repeal the unconstitutional provision with immediate effect, but granted the legislature a grace period until December 31, 2018, to pass a replacement provision with retroactive effect as of January 1, 2008. It is expected that the legislature will limit the scope of the unconstitutional provision in a manner so that losses are not forfeited if the taxpayer's business remains unchanged after the acquisition. Such a rule would be consistent with a change in law that the German legislature has enacted prospectively with effect from January 1, 2016.

Since the scope of the changes is still unclear, taxpayers who are subject to loss forfeiture due to share transfers of between 25 and 50 percent during the period between January 1, 2008, and December 31, 2015, are advised to preserve their rights by appealing against any tax assessments they may have received, to the extent they are still appealable. In addition, taxpayers should consider challenging tax assessments in cases that were not addressed directly by the court, such as where the share transfer exceeded 50 percent or occurred after December 31, 2015. The court's decision did not confirm (or allude) that such rules warranting forfeiture of tax losses and tax loss carry forwards are constitutional.

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