

Via email: LossCarryBack@treasury.gov.au

The General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

6 August 2012

Dear Sir/Madam

"IMPROVING ACCESS TO COMPANY LOSSES"

BDO welcomes the opportunity to provide a submission on the *Discussion Paper: Improving access to company losses* (the Discussion Paper), released by Treasury for public consultation on 18 July 2012.

We are of the view that, overall, the proposal detailed in the Discussion Paper represents a welcome change to Australia's income tax laws. In relation to the design features of the proposed changes, we are of the view that, as elaborated upon in the appendix to this letter:

- concerns about simplicity and consistency dictate that the same integrity measures that apply to the carry forward of losses should apply to the carry back of losses
- such integrity measures are in urgent need of review, and such review, particularly in relation to the "same business test" (SBT) should be undertaken, as a matter of urgency
- to the extent Part IVA of the *Income Tax Assessment Act 1936* has to be modified to address tax avoidance involving carry back of losses, this should be limited to amending the definition of "tax benefit" and the ordinary "dominant purpose" threshold should continue to be applied, and.
- in order to provide consistent relief to all small businesses, the loss carry back rules should be extended to all types of entities.

Should you have any questions, or wish to discuss any of the comments made in the attached submission, please do not hesitate to contact Lance on 02 9240 9736 or lance.cunningham@bdo.com.au or Matthew on 02 9240 9760 or matthew.wallace@bdo.com.au

Yours faithfully



Lance Cunningham
National Tax Director



Matthew Wallace
National Tax Counsel

APPENDIX

This document sets out the submission of BDO in relation to the *Discussion Paper: Improving access to company losses* (the Discussion Paper), released by Treasury for public consultation on 18 July 2012.

Unless otherwise indicated, statutory references are to the *Income Tax Assessment Act 1936*.

1. Consistent integrity rules should be used for both carry forward and carry back of losses

We submit that applying differential integrity tests for carry forward and carry back of losses, on the grounds of simplicity, would, in fact add to uncertainty and lead to undesirable inconsistency between the availability of carry forward losses, on the one hand, and carry back losses, on the other. Consistent rules should be applied, in each case. Different rules applying for carry back of losses, to those that apply for carry forward of losses would, potentially, increase the complexity of the Australian tax system

2. There is a pressing need for a review of the current integrity rules that apply to carry forward of losses (and which, if our above submission were accepted, would apply to carry back of losses).

The Discussion Paper, in proposing simpler integrity rules for carry back of losses, as compared to those applying to carry forward of losses, implicitly acknowledges that the latter are unnecessarily complicated and restrictive. It follows that such rules are in need of reform.

Our submission, set out above, that the same integrity rules apply for carry back of losses as apply to the carry forward of losses, is proposed, subject to the condition that such rules are reviewed, on an urgent basis. In particular, the same business test, as it is administered by the Australian Taxation Office, places undesirable and unnecessary restrictions on corporate tax entities with tax losses that are acquired by third parties.

3. Changes to Part IVA, as a consequence of the implementation of the loss carry back proposals, should be limited to extending the concept of tax benefit to the offset arising from a loss carry back

As addressed above, we are of the view that the integrity measures in respect of the loss carry back measures should mirror those applicable the existing loss carry forward measures. Accordingly, the only change that should be made to Part IVA is to extend the definition of "tax benefit" therein to include the tax offset that arises from a carry back of losses. In particular, the relevant test of purpose should be the existing general "dominant purpose" test under s177(5).

4. Extend the carry back of losses to non-corporate entities

We understand one of the main purposes of introducing the carry back of losses is to assist small businesses that are suffering temporary business downturns. While there are many small



businesses operating through companies that can benefit from this measure, most small businesses operate through trusts, partnerships or as sole traders. Therefore to provide relief consistently to all small businesses, the carry back of losses should be extended to all entities.

If the extension of carry back of losses to all entities is not possible at this time due to the current Federal budgetary constraints, we suggest it be considered in the near future once the budgetary constraints are not as relevant.