

Income/Franchise:

Delaware High Court Affirms in Taxpayer's Favor that NOL Limitation Policy is Invalid

Case No. 18, 2021, Del. (11/29/21). The Delaware Supreme Court (Court) affirmed a trial court's summary judgment in favor of a taxpayer that challenged the validity of the Delaware Division of Revenue's (Division) net operating loss (NOL) limitation policy as it applies to certain entities filing separate-company Delaware corporate income tax returns but which file as part of a consolidated corporate income tax return for federal income tax purposes. However, unlike the lower court, the Court declined to reach the taxpayer's constitutional claims and instead held that the Division's policy exceeded the authority granted to it by the General Assembly in 30 Del. C. §§ 1901 – 1903. Specifically, the Court held that the Division's policy manipulated the tax base "by requiring only certain taxpayers to use a consolidated net operating loss deduction based on aggregate income and deductions reported by a group of multiple companies" in violation of the plain meaning of General Assembly in 30 Del. C. §§ 1901 – 1903 requiring corporations to file as single entities based solely on their own income.

URL: <https://courts.delaware.gov/Opinions/Download.aspx?id=326850>

Note that recently enacted Delaware legislation codifies the Division's practice of limiting a Delaware corporate taxpayer's NOL deductions to those deductions that were claimed on its federal income tax return [see H.B. 171 (2021), and *State Tax Matters*, Issue 2021-32, for more details on this new law]. Under the new law, any NOL that exceeds the amount claimed on a corporate taxpayer's federal income tax return is not permitted in the calculation of its Delaware corporate income tax. Please contact us with any questions.

URL: <https://legis.delaware.gov/BillDetail?legislationId=68653>

URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/STM/210813_3.html

— Kenn Stoops (Philadelphia)
Managing Director
Deloitte Tax LLP
kstoops@deloitte.com

Stacy Ip-Mo (Philadelphia)
Senior Manager
Deloitte Tax LLP
sipmo@deloitte.com

Bob Kovach (Pittsburgh)
Senior Manager
Deloitte Tax LLP
rkovach@deloitte.com

John Damin (Philadelphia)
Senior Manager
Deloitte Tax LLP
jdamin@deloitte.com

This document contains general information only and Deloitte is not, by means of this document, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This document is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte shall not be responsible for any loss sustained by any person who relies on this document.

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organization”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.