Supreme Court rules that unrealized losses can also be forfeited following a change in shareholders

On Friday, September 11, 2026, the Dutch Supreme Court rendered judgment in an important case concerning tax loss utilization. In short, the Supreme Court ruled that the change-of-control rules of Section 20a CITA 1969 also apply to unrealized losses existing at the time of a change in shareholders. Such unrealized losses may therefore no longer be deductible following a change in shareholders. In practice, these rules play an important role in acquisitions.

Background of Section 20a CITA 1969

Through Section 20a CITA 1969, the legislator aims to prevent trading in loss-making entities. Under these rules (generally referred to as the "change-of-control rules"), tax losses can no longer be offset against profits if the taxpayer's ultimate shareholding changes to a significant extent (at least 30%), unless certain exceptions apply.

Section 20a CITA 1969 was introduced in 2001 as the successor to Section 20(5) (old) CITA 1969, which had been in force since 1970. The main aim of this change was to introduce stricter change-of-control rules, under which losses would no longer be available for utilization in a broader range of cases. Under the old rules, the Supreme Court had held that also an unrealized loss existing at the time of a change in shareholders could not be offset against profits in future years.

Another important legislative change concerned the introduction of the loss determination decision. Since 1995, losses have been determined by the inspector by means of a formal decision, in order to provide legal certainty. This decision reflects only realized losses, and does not mention unrealized losses.

A long-standing question was whether the case law that was rendered under the old regulation also applied under the current rules. In other words, whether the current rules apply only to losses that have already been realized for tax purposes at the time of the change in shareholders, or whether losses that had not yet been recognized for tax purposes ('unrealized losses') also fall within the scope of these rules.

Policy of the Deputy Minister of Finance

The Deputy Minister of Finance had stated in a policy decree that, just as under the pre-2001 rules, unrealized losses also fall under the limitation of loss utilization. Nevertheless, there was discussion in the tax literature whether that position was correct. For example, it was argued that the case law that was rendered under Section 20(5) (old) CITA 1969 had lost its relevance because the legislator intended to provide legal certainty with the introduction of the loss set-off decision and prevent disputes in later years about the amount of losses. If unrealized losses were to be subject to the change-of-control rules, even though they are not mentioned in the formal decision, would undermine that objective.

The case: loss realized on the sale of real estate following a change in shareholders

In the case before the Supreme Court, the shares in a company taxpayer were sold to a third party at the end of 2015. As a result of that change in shareholders, Section 20a

CITA 1969 applied for that company. At the time of the change of control, the company owned several real estate properties. Although the total transaction price was lower than the aggregate tax book value of the properties, the unrealized result differed for each property. In respect of some properties an unrealized loss applied, while to other properties had an unrealized gain applied.

In 2017, the company sold several properties, each sale individually resulting in a loss. In total, the transactions resulted in a loss of €4.3 million. At issue was whether this loss was deductible for tax purposes or whether, as a result of Section 20a CITA 1969, this loss would no longer be taken into account after the change of control. The central question was whether Section 20a CITA 1969 applies only to losses already incurred and determined by formal decision, or also to unrealized losses.

The decision of the Supreme Court

In a brief and concise judgment, the Supreme Court has now ruled that unrealized losses may also fall within the scope of Section 20a CITA 1969. Accordingly, and in line with the old case law, the change-of-control rules also apply to the extent that losses are realized for tax purposes after the change in shareholders but effectively arise from facts and circumstances that occurred before that change of shareholders.

Accordingly, the unrealized losses that were already present in 2015, but not realized until 2017, also fall within the scope of Section 20a CITA 1969. The losses of €4.3 million are therefore not deductible. There was no further discussion in this case as to whether any exception applied that would allow the losses to be offset after the change of control.

Finally, it is noteworthy that the Supreme Court explicitly addressed the argument concerning the legal certainty intended to be provided by the loss determination decision. The Supreme Court observed that, in this respect, it would have been logical for the legislature to have provided rules governing the determination and treatment of unrealized losses at the time of the change of control.

Comments by KPMG Meijburg & Co

Section 20a CITA 1969 has always been an important provision in practice, particularly in connection with the acquisition of a company or group of companies. Its importance has increased because this judgment confirms that the change-of-control rules have a very broad scope. The Supreme Court has now clearly ruled that, in accordance with the old case law, unrealized losses also fall within the scope of the provision. However, the rules effectively apply only to the extent that those unrealized losses are actually realized.

However, this does not mean that all issues concerning Section 20a CITA 1969 have been resolved. It remains unclear, for example, how unrealized losses affect the exceptions under which losses may still be available for offset, i.e. the investment test and the activities test. For those tests, the year in which the losses were incurred is relevant, whereas for unrealized losses it may be uncertain when they were incurred. Nor does the Supreme Court provide further guidance on which facts and circumstances should be considered when determining whether an unrealized loss existed before the change of control. In the present case, the commercial valuation and transaction value appeared relevant, but the Supreme Court did not explicitly rule on this point. In that respect, potentially case law concerning the principle of sound business practice (*goed koopmansgebruik*) may be relevant, as it clarifies to what extent facts and circumstances arising before the balance sheet date are relevant for tax purposes.

If you would like to know more, please feel free to contact us or your usual Meijburg advisor.

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