[Insert DD month YYYY]

|  |
| --- |
|  |

[Insert client name]

[Insert client position]

[Insert company name]

[Insert company address]

[Suburb state postcode]

Dear [insert client name],

**Re: Recoupment of company tax losses**

We note that at 30 June 2021, [insert company name] had carried forward revenue losses of $[insert amount] and capital losses of $[insert amount] AND/OR We note that [insert company name] is expecting to incur a revenue loss in the year ended 30 June 2022.

**Executive Summary**

For a company to carry forward and subsequently utilise revenue and capital losses, the company needs to satisfy at least one of three tests in the year ended 30 June 2021:

1. the continuity of ownership test (**COT**)
2. the business continuity test – carrying on the same business (referred to as the same business test or **SBT**) or
3. the business continuity test – carrying on a similar business (referred to as the similar business test)[[1]](#footnote-1).

Each of these tests are discussed below.

Where [insert company name] paid income tax in the 2019 or 2020 income year, recently enacted temporary loss carry back rules may allow the company to utilise its losses incurred in the 2020 to 2022 income years against the income tax previously paid. The temporary loss carry back rules are discussed in further detail below.

**Carry forward and utilisation of losses**

**COT**

Under the COT (contained in Division 165 of the *Income Tax Assessment Act* 1997(***ITAA 1997***)), shares carrying more than 50% of all dividend, voting and capital rights must essentially be beneficially owned by the same persons at all times during the ‘ownership test period’[[2]](#footnote-2). The ownership test period starts at the beginning of the loss year and ends at the end of the year of recoupment. Furthermore, the majority underlying ownership must be satisfied in relation to the same shares.

The tracing of such beneficial ownership can be done under a primary test where shares are beneficially owned directly by the individual shareholders in a company, or under an alternate test where it is reasonable to assume that shares in a company are beneficially owned by individuals through an interposed company at any time during the ownership test period.

For companies with discretionary trusts as shareholders, a single notional entity will be taken to beneficially own the shares held by the discretionary trust, provided a family trust election (**FTE**) has been made. If an FTE has not been made, the shares owned by the discretionary trust cannot be taken into account in determining if COT has been satisfied.

In addition, certain concessional COT tracing tests are available to widely held and/or listed companies.

**SBT**

If a company fails to satisfy the COT, it may nevertheless be allowed a deduction for prior year losses if it satisfies the SBT (set out in section 165-210 of the *ITAA 1997*) at the time of recoupment.

The business continuity test period under the SBT commences immediately before the test time, being the date on which the COT test is failed following a change in 50% or more of the underlying beneficial ownership of shares in the company, and ends at the end of the year of income in which the loss is recouped.

For a company to pass the SBT and recoup a loss it must satisfy all the following conditions:

* the company must have carried on the same business at all times throughout the test period that it carried on immediately before the test time
* the company must have only derived income from business of a kind during the test period that it carried on before the change in ownership
* the company must have only derived income from transactions of a kind that it had entered into in the course of its business operations before the change of ownership.

Further details on the practical application of the SBT can be found in Taxation Ruling TR 1999/9.

The ruling provides that a company may contract or expand its activities without necessarily ceasing to carry on the same business. Accordingly, a company’s adoption of new compatible operations or its discarding of other operations will not necessarily cause it to fail the SBT provided the business retains its identity. However, where there is a change in the essential character of the business the SBT will be failed such as would arise where there was a sudden and dramatic change resulting in the acquisition or loss of activities on a considerable scale.

Anti-avoidance measures also apply to prevent companies entering into arrangements before a change in ownership that are specifically implemented to ensure that the SBT will be met. Such arrangements include carrying on a business not previously carried on or entering into a transaction of a kind not previously entered into prior to the COT test being breached, which were undertaken for the purpose of complying with the SBT from the date on which there was a change in majority underlying beneficial ownership.

**The similar business test**

Where a company does not satisfy either the COT or the SBT it may nonetheless be able to satisfy the similar business test.

A company will satisfy the similar business test (contained in section 165-211 of the *ITAA 1997*) if it carries on a similar business at all times in the year in which the loss is recouped to that carried on immediately before the test time being the date on which there was a change in 50% or more of the underlying beneficial ownership of shares in the company.

In working out whether a business carried on immediately before the test time (i.e. the former business) is ‘similar’ to the business carried on throughout the income year in which the company wants to recoup the loss (i.e. the current business) it will be necessary to consider the following factors:

* the extent to which the assets (including goodwill) that are used in the current business to generate assessable income were also used in the former business to generate assessable income
* the extent to which the activities and operations for which the current business generates assessable income were also the activities and operations from which the former business generated assessable income
* the identity of the current business and the identity of the former business
* the extent to which any changes to the former business resulted from the development or commercialisation of assets, products, processes, services or marketing or organisational methods of the former business.

Further clarity on the operation of the similar business test is in Law Companion Ruling LCR 2019/1.

As an overarching comment it would appear that the similar business test requires that the overall business in the year in which the loss is recouped must be sufficiently similar to the business carried on before there was a change in control or ownership of the company. Accordingly, it may be more difficult to satisfy the similar business test if substantial new business activities and transactions did not evolve from, and complement, the business carried on before the test time. In contrast, if a company develops a new product or function from the business activities already carried on, and this development opens up a new business opportunity or allows it to fill an existing gap in the market, the business as a whole is likely to satisfy the similar business test.

Like the SBT there are integrity measures to prevent companies making changes to their business prior to the change in ownership or control the company which are only undertaken so the company can satisfy the similar business test after the change in ownership or control.

However, unlike the SBT there are no negative limbs which would prevent the similar business test being satisfied where the company derives assessable income from new business activities or from new transactions of a kind that it did not enter into before the test time.

**Other considerations**

The public officer should be satisfied that [insert company name] has passed the COT, or failing that, has passed the SBT or similar business test, in order to carry forward and recoup the prior year revenue and capital losses.

We note also that where a company fails the COT, SBT and similar business test during a year, special rules in Subdivision 165-B of the ITAA 1997will apply to determine what deductions can be claimed in respect of such current year losses.

You should note that capital losses may only be offset against future capital gains. In contrast, revenue losses may be applied against both revenue profits and capital gains.

**Loss carry back rules**

In the 2020-21 Federal Budget, the government announced the introduction of a temporary loss carry back. The loss carry back rules have now been enacted and provide companies with an aggregated turnover of less than $5 billion the option to carry back a tax loss for the 2020, 2021 or 2022 income years and apply it against tax paid in a previous year (as far back as the 2019 income year). In the 2021-22 Federal Budget it was announced the loss carry back will be extended to the 2023 income year.

For example, this may be beneficial where [insert company name] has taken advantage of the temporary full expensing of depreciable assets resulting in the company incurring a revenue loss for the 2021 income year.

The amount of the loss carry back is limited to the lesser of the amount of tax paid in the earlier income year (as relevant) and the amount of the franking account balance at the end of the current income year.

The losses that can be carried back are multiplied by the prevailing company tax rate in the loss year. For example, if [insert company name] has a tax loss of $1,000,000 in the 2021 income year and is subject to a 26% tax rate, it would be entitled to a loss carry back tax offset of $260,000 (assuming the tax paid in the earlier year and the franking account balance at 30 June 2020 were at least $260,000).

The loss carry back can only be claimed in the 2021, 2022 and 2023 income tax returns. It is important to note that the loss carry back for the 2020 income year is claimed in the 2021 income tax return.

There are a number of requirements and integrity rules that have been introduced to ensure the measure applies appropriately, and it should be noted that the loss carry back rules only apply to revenue losses, not capital losses.

To arrange a meeting to further discuss the loss recoupment rules, please do not hesitate to contact me on [insert telephone number of partner].

Yours faithfully,

**[Insert partner name]**

1. The similar business test only applies to tax losses and capital losses incurred in income years commencing on or after 1 July 2015. [↑](#footnote-ref-1)
2. The COT allows companies with unequal rights to dividends, capital distributions or voting power to satisfy the COT where certain conditions relating to unequal share structures are met under Division 167 of the *ITAA 1997*.. [↑](#footnote-ref-2)