LOSS UTILIZATION IN ARM’S-LENGTH BUSINESS COMBINATIONS

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This article discusses certain arm’s-length business combinations that involve the utilization of a corporation’s accumulated losses against income from a new, unrelated source. These transactions commonly avoid the application of the loss-streaming rules contained in subsection 111(5) and other provisions of the Income Tax Act, by ensuring that the corporation is not subject to an acquisition of control by any person or group of persons. The focus of the article is whether avoidance of an acquisition of control in the context of loss-utilization transactions should constitute abusive tax avoidance under the general anti-avoidance rule (GAAR) in section 245 of the Act. The author discusses the concept of control and the meaning of the phrase “group of persons,” and describes several typical transactions that are structured so as to avoid an acquisition of control of a loss-generating corporation. He then reviews the provisions of section 245 as applied in recent court decisions, and examines the potential application of GAAR to these transactions, using principles and observations drawn from those decisions.

KEYWORDS: losses • acquisitions • arm’s-length transactions • control • avoidance • GAAR

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