J. Y. Interpretation No.427（May 9, 1997）*

ISSUE: May pre-merger losses of the companies involved in a merger be applied as deductions in the calculation of the surviving company's business income, or should only post-merger profits and losses be considered as such?

RELEVANT LAWS:

Articles 24, Paragraph 1, and 39, the first sentence of the Income Tax Act（所得稅法第二十四條第一項、第三十九條前段）; Tai-Tsai-Shui-Tze-No. 35995 Directive of the Ministry of Finance dated September 6, 1977（財政部六十六年九月六日台財稅字第三五九九五號函）.

KEYWORDS:

income tax（所得稅）, tax deduction（稅捐扣除額）, tax returns（申報納稅）.**

HOLDING: Pursuant to Article 24, Paragraph 1, and the first sentence of Article 39 of the Income Tax Act, a company's business income of the current year is its net profit, calculated by deducting from the gross income of the company in the current year, against its costs, ex-

解釋文：營利事業所得之計算，係以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額，以往年度營業之虧損，不得列入本年度計算，所得稅法第二十四條第一項及第三十九條前段定有明文。同法第三十九條但書旨在建立誠實申報納稅制

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** Contents within frame, not part of the original text, are added for reference purpose only.

penditures, losses, taxes and donations incurred in the same year; business losses incurred in previous years shall not be taken into account when calculating the business income of the current year. The intention of the proviso to Article 39 of the Income Tax Act is to set up an honest tax return system and the deductions of losses provided thereunder are applicable only to companies not involved in a merger during the period in which the deductions are claimed. Where a company has been involved in a merger, the post-merger profits and losses of the surviving company shall only be calculated from the cut-off date of the merger, and shall not be retrospectively traced to pre-merger profits and losses of the respective merging companies for deductions. The Tai-Tsai-Shui-Tze-No. 35995 Directive of the Ministry of Finance dated September 6, 1977, is consistent with the statutory intention expounded above, and is not incongruous with the Constitution. As to whether tax benefits should be granted in relation to corporate mergers, this is within the plenary powers of the legislature to resolve.

度，其扣除虧損只適用於可扣抵期間內未發生公司合併之情形，若公司合併者，則應以合併基準時為準，更始計算合併後公司之盈虧，不得追溯扣抵合併前各該公司之虧損。財政部中華民國六十六年九月六日台財稅字第三五九九五號函與上開法條規定意旨相符，與憲法並無牴觸。至公司合併應否給予租稅優惠，則屬立法問題。

REASONING: Pursuant to Article 24, Paragraph 1, and the first sentence of Article 39 of the Income Tax Act, a company's business income of the current year is its net profit, calculated by deducting from the gross income of the company in the current year, against its costs, expenditures, losses, taxes and donations incurred in the same year; business losses incurred in previous years shall not be taken into account when calculating the business income of the current year. To encourage the honest filing of tax returns, the proviso to Article 39 of the Income Tax Act states that "taxation of a corporate business entity, which keeps complete sets of records and receipts of account, shall be made after deducting from its net profits of the current year, against its tax collection authority-verified losses of the 5 years (which was amended to 3 years on December 30, 1989) immediately preceding the date of examination by the tax collection authority, provided that the annual filings have been timely made with either the blue filing forms referred to in Article 77 or certifications from accountants upon audit."

解釋理由書：營利事業所得之計算，係以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額，以往年度營業之虧損，不得列入本年度計算，所得稅法第二十四條第一項及第三十九條前段定有明文。惟為鼓勵誠實申報納稅，所得稅法第三十九條但書乃規定：「公司組織之營利事業，會計帳冊簿據完備，虧損及申報扣除年度均使用第七十七條所稱藍色申報書或經會計師查核簽證，並如期申報者，得將經該管稽徵機關核定之前五年（七十八年十二月三十日修正前為前三年）內各期虧損，自本年純益額中扣除後，再行核課」。其本旨係認公司組織之營利事業，其前五年內各期虧損之扣除，須該公司本年度內有盈餘，且在可扣抵期間內未發生公司合併並符合上開要件時，始有適用；若公司合併者，則應以合併基準時更始計算合併後公司之盈虧，不得追溯扣抵合併前各該公司之虧損。財政部六十六年九月六日台財稅字第三五九九五號函釋：「依所得稅法第三十九條規定意旨，公司組織之營利事業前三年內各期虧損之扣除，以各該公司本身有盈餘時，才能適用，旨在使前三年經營發生虧損之公司，於轉虧為盈時，可以其盈餘先彌補虧損，俾健全其

The intention of this proviso is that, for a corporate business entity to deduct losses incurred in the 5 preceding years, the company must have a net profit in the current year, and must not have been involved in a merger that occurred during the period in which the deductions are claimed. Where a company has been involved in a merger, its profits accrued and losses incurred shall only be calculated from the cut-off date of the merger, and shall not be retrospectively traced to pre-merger profits and losses of the respective merging companies for deductions. The Tai- Tsai-Shui-Tze-No. 35995 Directive of the Ministry of Finance dated September 6, 1977, elaborates that "In line with the intention of the requirements of Article 39 of the Income Tax Act, deductions of losses incurred by corporate business entities in the preceding 3 years are applicable only to companies with net profits. The purpose of the foregoing is for a company to strengthen its financial footings, after the company has turned its position of loss into a profitable one, by applying its retained earnings to make up for business losses incurred in the preceding 3

財務。公司如因被合併而消滅，合併後存續之公司與合併而消滅之公司並非同一公司，自不得扣除因合併而消滅之公司前三年內經該管稽徵機關查帳核定之虧損」，符合上開立法意旨，於租稅法律主義並無違背，與憲法亦無牴觸。至公司合併應否給予租稅優惠，則屬立法問題，併此指明。

years. Where a company ceases to exist upon a merger, the surviving company remains separate from the merged company, and, as such, the tax collection authority-verified losses incurred by the merged company in the 3 years preceding the merger shall not be deductible." This is consistent with the statutory intention expounded above, and is not in contravention with the statutory principles of taxation or incongruous with the Constitution. As an obiter dictum, the issue of whether tax benefits should be granted in relation to corporate mergers is within the plenary powers of the legislature to resolve.