Special Taxation for Partnership Firms

(Article 10-14~20 of Restriction of Special Taxation Act)

Jul. 8, 2016

1. Overview of Taxation for Partnership Firms

- (1) The Definitions of the Terms
- 'Partnership Firm' and 'Partner'

The conceptual component of 'partnership firm' is a firm which consists of 2 or more than 2 partners (character of organization), running for profit and having the profit allocated (profitability) and being in nature of association or personal company (character of association).

And the 'partner' means investors categorized into different types, i.e., a resident, non-resident, domestic corporation or foreign corporation who has invested in a partnership firm. Those are in different types of taxation structure (tax rate, classification of income, taxation method of global taxation, classified taxation, separate taxation, etc.)

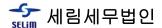
Allocation and Distribution

The terms of Allocation and Distribution should be used strictly separated as the taxation for partnership firms is to avoid the double taxation (or double deduction) on the actual distribution process after the taxation on income (or deficit deduction) was already made in the process of allocation.

- ① The term "Allocation" means an action to imputing the income, deficit, or similar of a partnership firm to the partners' income, deficit, or similar, regardless of whether or not any asset is actually distributed, at the end of each taxable year.
- 2 'Distribution' " means an act of actually conveying an asset of a partnership firm to its partners.
- Calculation of Amount of Income or Deficit allocable to a partner group

The calculation of the amount of income or deficit by each partner group according to each tax law is to get rid of issues which occur from applying differently on the same income in nature from the partnership firm income for a resident, non-resident, domestic corporation or foreign corporation who has different taxation structure for each.

Value of Equity Shares



The term "value of equity shares" is regarded as base amount for the taxable income computation, external value of equity shares as Outside Basis or Interest Basis. This means a book value of "equity shares in a partnership firm" held by partners for the purpose of taxation as "equity of shares of the partnership firm" of each partner. This amount is to be adjusted continuously as per the allocation of income amount or deficit amount in each business years. The adjusted value amount of the equity share become a basis for of taxable income computation at the time of transferring the equity shares in the partnership firm or distributing assets of the partnership firm or allocation of deficits.

* Transferring the equity shares: the taxable income (capital gains) is to be calculated as the transaction value exceeding value of equity shares

Distributing assets: the taxable income is to be calculated as the market value of the

distributed assets exceeding the value of stakes held by the partner (distribution of the liquidation assets, the deficit presumed amount is the market value of the distribution assets exceeding the value of equity

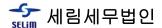
shares.)

Allocation of deficits: regarded as a Ceiling amount for the allocation of the deficit

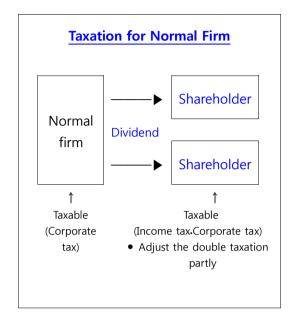
(2) Overall Comments

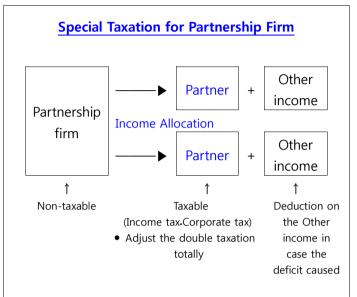
The special taxation for partnership firms (Partnership Taxation) is <u>simply to take the partnership</u> <u>firm as a pass-through</u> unlike other normal firms. The partnership firm is not to be taxed on the generated income at the partnership level, instead, income generated by a partnership firm is imputed to each partner and taxed at the individual partner level each.

In case of normal firm, the corporate tax is to be imposed at the level of firm, and the other profits are paid to shareholders as dividend. The shareholder who is paid the dividend should include the dividend income in shareholder's gross income or amount of income, and pay income tax or corporate tax. At this time, the corporate tax imposed on the level of corporate taxation could be partially deducted at the level of shareholder. But under the special taxation for partnership firms applied, the tax burden is to be reduced as much as the unsolved amount of double taxation problem at the level of shareholder of normal firm because no tax is imposed at the level of corporate taxation.



[Comparison of Taxation for Normal Firm vs Special Taxation for Partnership Firm]

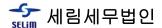




The taxation could be neutral no matter what kind of business type is selected for partnership firm as the partnership firm is recognized as an Entity for the calculation of income and filing. This provides the opportunities for the free choice on the business type, private business or corporate business. This also enables partners to pay taxes in appropriate level with performance generated from overall business operation, as the deduction could be made on the business income, etc. of partner on the deficit allocated in case the partner of the partnership firm with deficit is a corporation or an individual with business income when the type of partnership firm is unlimited partnership company or limited partnership company.

The special taxation for partnership firm prescribed in the Restriction of Special Taxation Act applies where the application for eligibility is filed for the special taxation for partnership firms to the head of the competent tax office by the association established under the Civil Act or by the Personengesellschaft including unlimited partnership company and limited partnership company incorporated under the Commercial Act for the purpose of business running for profits with investments of asset or labor from two or more persons. No corporate tax or income tax is to be imposed at the level of taxation on the income generated from the partnership firm, but those are to be imposed at the level of individual partner level as per the ratio of allocation profits and losses. And the deficit of partnership firm which is allocated to each partner as per the ratio of allocation profits and losses also could be deducted from the other income of each partner.

And the Section 10-3 of Restriction of Special Taxation Act is to be applied in preference to the provisions of respective tax-related Acts pertaining to the partnership firms eligible for the special taxation for partnership firms and their partners. (Article 100-15 of Restriction of Special Taxation Act)



For the purpose of adjusting the double taxation on the income generated by partnership firms, the partners have obligation to pay tax for income tax or corporate tax on the income allocated by partnership firms while the partnership firms are exempted from income tax on the individual income amount (domestic source income for the non-resident) or corporate tax on the income amount from the business year and liquidation income.

But the partnership firms keep the obligations to pay withholding tax for employees, value added tax, gross real estate tax for which the double taxation adjustments are not required.

<Summery>

Partnership Firm: not obligated to pay corporate tax and income tax

Partner: obligated to pay corporate tax and income tax on the income allocated

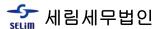
- A. The income or deficit of a partnership firm should be calculated and allocated to each partnership group which has same tax structure.
- B. The tax base for corporate tax and income tax of the income or deficit allocated should be calculated by partnership group. The deficit of partnership firm should be allocated to each partner in the amount not exceeding the value of equity shares. The deficit allocated could be deducted from the business income, etc. of partner.
- C. The taxes related to the partnership firm, e.g. tax credits, tax amount reduced or exempted, the tax withheld and additional tax, etc. should be calculated at the partnership firm level and allocated to each partners. And the partners should deduct or add those taxes allocated when the partners file and pay taxes.

2. Scope of Application (Article 100-15 Restriction of Special Taxation Act)

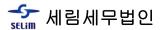
(1) Area for Application (Article 100-15-①, Enforcement Decree of the Restriction of Special Taxation Act)

A partnership firm and its partner is eligible for the special taxation if such firm is an organization falling under any of the following cases and files an application for eligibility. But a partner of a partnership firm is ineligible, as a partnership firm, for the special taxation for partnership firms (vertical double application is not allowed)

① An association established under the 「Civil Act」 (excluding an investment scheme in the form of an association defined in Article 9 (18) 5 of the 「Financial Investment Services and Capital Markets Act」)



- ② A partnership firm and an undisclosed association established under the 「Commercial Act」 (excluding a collective investment scheme in the form of an association and a collective investment scheme in the form of an undisclosed investment association defined in Article 9 (18) 5 and 6 of the 「Financial Investment Services and Capital Markets Act」)
- 3 An unlimited partnership company and a limited partnership company incorporated under the 「Commercial Act」 (excluding an investment limited partnership company defined in Article 9 (18) 4 of the 「Financial Investment Services and Capital Markets Act」, which is not a private equity fund defined in subparagraph 7 of the same paragraph)
- 4 An organization similar to any organization listed above or an organization engaging mainly in providing human resources services among the organizations in the list below.
 - 1. A law firm or law cooperatives under Articles 40 and 58-18 of the 「Attorney-at-Law Act」
 - 2. A patent firm established under Article 6-3 of the 「Patent Attorney Act」 and Article 14 of the Enforcement Decree of the same Act;
 - 3. A labor affairs consulting firm established under Article 7-2 of the 「Certified Public Labor Attorney Act」
 - 4. A joint judicial scriveners firm established under Article 33 of the 「Certified Judicial Scriveners Act」
 - 5. Any of the following firms or corporations that provide specialized personal services:
 - (a) A (limited) law firm established under Article 58-2 of the 「Attorney-at-Law Act」
 - (b) A patent (limited) firm established under Article 6-12 of the 「Patent Attorney Act」
 - (c) An accounting firm established under Article 23 of the 「Certified Public Accountant Act」
 - (d) A tax accountant firm established under Article 16-3 of the 「Certified Tax Accountant Act」
 - (e) A customs broker firm established under Article 17 of the 「Licensed Customs Broker Act」
- (§) A foreign corporation defined in Article 1-3 of the 「Corporate Tax Act」 or the organization similar to an organization falling under the Article 1 ~ Article 4 defined non-juristic organizations regarded as non-resident defined in article 2-3 in the 「Income Tax Act」 which is being applied as **foreign organization** (The domestic place for the business is regarded as partnership firm and the special taxation for partnership firm is to be applied limited to the imputed income to the domestic place for the business or income actually related with relevant domestic place for the business.)
- * The foreign organization means any of the following organizations
 - 1. A foreign organization similar to an organization falling under Article 100-15 (1) 1 through 4 of the Act (excluding an investment limited partnership company among the organizations referred to in subparagraph 3)
 - 2. A foreign organization running a business with a domestic place of business under Article 94 of the Corporate Tax Act or Article 120 of the Income Tax Act



3. A foreign organization to which a system similar to the special taxation for partnership firms is applied in a country where it was established (limited to a country with which the Republic of Korea has entered into a tax treaty).

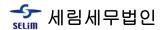
[Application Case of Article 100-15 (a) of Restriction of Special Taxation Act]

Horizontal Duplicate: allowed Vertical Duplicate: not allowed AB AB BC Α В В C Α **A2 A1** • Partner B could benefits from the special taxation • Partner A who is partner of partnership firm AB could not in duplicate as a partner for a partnership firm AB benefits from the special taxation in duplicate for a and partnership firm BC. partnership firm which consists of partner A1 and A2

(2) Relations with other Tax Acts (Article 100-15-2) Restriction of Special Taxation Act)

The special taxation for partnership firms applies in preference to the provision of respective taxrelated Acts pertaining to the partnership firms eligible for the special taxation for partnership firms and their partners.

- (3) Duties of Partnership Firms and partners to Pay Taxes (Article 100-16 Restriction of Special Taxation Act, Article 100-16 Enforcement Decree of the Restriction of Special Taxation Act)
 - ① Notwithstanding Article 2 (1) of the 「Income Tax Act」 and Article 2 (1) and (2) of the 「Corporate Tax Act」, partnership firms shall be exempted from the income tax or corporate tax on the incomes referred to in Article 3 of the 「Income Tax Act」 and the subparagraphs of Article 3 (1) of the 「Corporate Tax Act」.
 - 2 Partners shall be liable to pay the income tax or corporate tax on the partnership firm's income as allocated under Article 100-18 of the 「Restriction of Special Taxation Act」.



3 Where a domestic corporation benefits from the special provisions on taxation for partnership firms, the domestic corporation (hereinafter referred to as "corporation converted into a partnership firm") shall be liable to pay the amount calculated by applying the tax rate under Article 55 (1) of the "Corporate Tax Act to the tax base calculated, as prescribed by Presidential Decree, based on the amount of the liquidation income by dissolution under Article 79 (1) of the "Corporate Tax Act as corporate tax (corporate tax on quasi-liquidation income).

A corporation converted into a partnership firm is required to file on corporate tax base and tax amount on the quasi-liquidation income accompanied by the documents prescribed by Ordinance of the Ministry of Strategy and Finance with the head of tax office having jurisdiction over the place of tax payment.

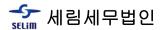
- 1. Balance Sheet of the domestic corporation as of guasi-liquidation day
- 2. Reconciliation sheet of capital and reserve on tax purpose as of quasi-liquidation day

Corporate Tax on quasi-liquidation income

- = (the value of remaining assets as of the end (quasi-liquidation day) of the business year immediately preceding the first business year in which special taxation on partnership firm applies to the relevant domestic corporation Total amount of equity capital) x Tax rate in Corporate Tax Act
- * Value of remaining assets = total amount of assets total amount of liabilities (except evaluation marginal profit and loss, calculated based on the book value)

Total amount of equity capital = Capital + (Surplus - Balance of deficit carried forward (Excess amount of Surplus to lapse) + Corporate Tax Refund)

- 4 A corporation converted into a partnership firm shall file a return on his/her tax base and tax amount of the corporate tax on quasi-liquidation income to the head of a tax office having jurisdiction over the place of tax payment by no later than three months after the ending date of the business year immediately preceding the first business year in which it benefitted from the special provisions on taxation for partnership firms.
- ⑤ A corporation converted into a partnership firm shall pay the tax amount of the corporate tax on quasi-liquidation income in at least the equal amount for three years from the filing deadline under paragraph (4).
- (3) Application for Eligibility for or Waiver of Special Taxation for partnership Firms (Article 100-17 Restriction of Special Taxation Act, Article 100-16 Enforcement Decree of the Restriction of Special Taxation Act)



A. Application for Eligibility for Special Taxation for Partnership Firms

A firm which desires to become eligible for the special taxation for partnership firms should submit the application to the head of the competent tax office before (within one month from the start of the taxable year where it seeks such benefit from the taxable year in which the establishment date of the enterprise falls if an enterprise is established) the start of the first taxable year in which it intends to benefit from such special taxation to partnership firms.

(Example) In case a partnership firm established within Dec. 31, 2014 desires to become eligible for the special taxation for partnership firms effective Jan. 1, 2015, the application is required to be submitted by Jan. 31, 2015, within one month from the start day of the taxable year.

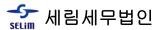
B. Application for Waiver of Special Taxation for Partnership Firms

A partnership firm eligible for the special taxation for partnership firms can waive such special taxation. It should submit the application to the head of the competent tax office before the start of the first taxable year in which it intends waive the special taxation to partnership firms. But it is not allowed to waive the special taxation for partnership firms during the period of time between the taxable year in which it benefits from the special taxation initially and the taxable year that ends within four years from the first day of the taxable year immediately following the aforementioned first taxable year.

- ① This is to be applied only when the eligible partnership firm make an application
- ② The period is an obligatory period to prevent the tax evasion via the partnership firm's arbitrary changes of the taxation method.

3. Calculation and Allocation of Income of Partnership Firms

- (1) In principle, the ratio of allocation profits and losses reported should be applied for the calculation and allocation of income of partnership firms. In this timing, the unitary ratio should be applied. (i.e. the ratio of allocation profits and losses or ratio for each profit and expense should not be applied differently). In case no agreed ratio of allocating profits and losses exists, it should be pursuant to the ratio of equity shares.
- (2) When any reason occurs because it is recognized that there is apprehension of tax evasion, the ratio of allocating profits and losses of the immediately preceding taxable year is to be applied.
- (3) In case the ratio of equity shares between partners of the special relationship exceeds 50% of the total amount of investment, the ratio of equity shares is required to be applied. (the ratio of allocation profits and losses reported should be applied for the partner and the other.)

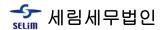


- (4) When the relevant partnership firm is a private equity fund, the rate of distributing profits or the rate of allocating losses decided in accordance with the rate, order, etc. determined by the articles of incorporation, agreement or investment contract reported as the agreed ratio of allocating profits and losses is to be **applied irrespective of any apprehension of tax evasion.**
- (5) When the ratio of allocating profits and losses changes because a new partner is admitted into the partnership firm or a partner withdraws from the partnership firm in the taxable year, the ratio of allocating profits and losses of previous taxable year is to be applied only to the partner group of no changes during the year. New allocation ratio of the income or loss could be applied for the existing partner group and new partner group.

4. Deficit Allocation Limits and Allocation of the Deficit carried over

(1) The deficit of partnership firm should be allocated to each partner in the amount not exceeding the value of equity shares held by each partner as of the end of the pertinent taxable year of the partnership firm. The portion of the deficit exceeding the value of equity shares could be carried over to, and allocated over the taxable years that end within ten years. The deficit amount carried over could be allocated additionally within the extent of the deficit only when the deficit of each taxable year of the partnership falls short of the value of equity shares.

Reference: 동업기업 과세특례 \ 법인세신고업무 및 업무사례 \ 신고&세무실무)



동업기업 과세특례

(조세특례제한법 제 100 조의 14~26)

1. 동업기업 과세특례제도의 개요

- (1) 용어의 정의
- 동업기업 및 동업자

동업기업(Partnership)은 2 인 이상의 동업자로 구성될 것(단체성)과 수익사업을 영위하고 그 결과를 배분받는 것(영리성), 아울러 조합 또는 인적회사적 성격을 가질 것(조합적 성격)을 그 개념 요소로 한다.

또한 동업자(Partner)는 동업기업을 구성하는 출자자를 뜻하며, 과세체계(세율, 소득구분, 종합과세·분류과세·분리과세 등의 과세방법)가 상이한 거주자·비거주자·내국법인 및 외국법인의 4 가지 유형으로 구분한다.

● 배분 및 분배

동업기업 과세특례제도는 배분 당시 배분된 소득금액을 과세(또는 결손금 공제)하고, 실제 분배시에는 기과세(또는 기공제)된 금액이 다시 과세(또는 공제)되지 않도록 함으로써 이중과세(또는 이중공제) 문제를 조정하므로, 배분(Allocation)과 분배(Distribution)는 엄격히 구분하여 사용하여야 한다.

- ① '배분'이란 동업기업의 소득금액·결손금 등을 각 과세기간의 종료일에 자산의 실제 분배 여부에 관계없이 동업자의 소득금액·결손금 등으로 귀속시키는 것을 말한다.
- ② '분배'란 동업기업의 자산을 동업자에게 실제로 이전하는 것을 말한다.
- 동업자군별 소득금액 및 결손금 계산

아울러, 동업자군(群)별로 각각의 군에 적용되는 세법에 따라 동업기업 소득금액 또는 결손금을 각각 계산하도록 하는 것은 <u>과세체계가 상이한</u> 거주자·비거주자·내국법인 및 외국법인이 동업기업을 통해 얻은 소득과 성격이 동일한 소득을 개인적으로 얻는 경우와 다르게 전환되는 문제가 없도록 하기 위해서다.

● 지분가액

지분가액은 파트너십 과세제도의 Outside Basis 또는 Interest Basis 에 해당하는 것으로서 과세기초가액, 외부지분가액 등으로 해석되며, 이는 각 동업자의 "동업기업 지분"이라는 자산의 세무상 장부가액을 의미한다. 이는 매 사업연도 소득금액 및 결손금의 배분 등에 따라 지속적으로 가감 조정되고, 그 조정된 지분가액이 <u>지분의 양도, 자산의 분배 또는 결손금의 배분시</u> 과세소득산정의 기초가 되는 역할을 하게 된다.

* 지분양도 시: 과세소득(양도차익)은 지분가액을 초과한 양도가액으로 계산 자산 분배 시: 과세소득은 지분가액을 초과한 분배자산의 시가로 계산 (청산자산분배 시 결 손금 인정 금액은 지분가액에 미달한 분배자산의 시가로 계산)

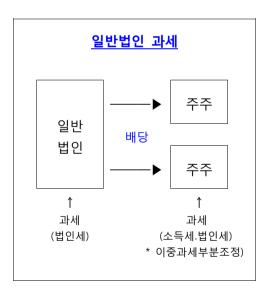
결손금 배분 시: 결손금 배분한도로 작용

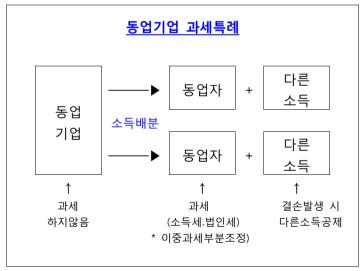
(2) 전반적인 사항

동업기업 과세특례(Partnership Taxation) 제도란 <u>동업기업(Partnership)</u>을 일반법인과 달리 <u>단순한</u> <u>도관(Pass-through)으로 보아</u> 동업기업에서 발생한 소득에 대해 <u>동업기업 단계에서 과세하지 않고</u> 이를 구성원인 각각의 동업자(Partner)에게 귀속시켜 **동업자별로 과세**하는 제도이다.

일반법인의 경우 해당 법인단계에서 법인세로 과세되고 남은 소득을 주주에게 배당하게 되며, 주주는 그 배당소득을 받는 과세연도의 익금 또는 소득금액에 산입하여 소득세 또는 법인세를 부담하게 되는데 이때 법인단계에서 부과된 법인세 중 일부분만이 주주단계에서 공제를 받게 되는 반면, 동업기업 과세특례를 적용받는 경우에는 법인단계에서의 과세가 이루어지지 않기 때문에 일반법의의 주주단계에서 이중과세문제가 완전 조정되지 아니한 금액만큼 세부담의 경감을 가져오게 된다.

[일반법인 과세제도와 동업기업 과세특례 제도 비교]





동업기업의 소득계산 및 신고에 있어서는 당해 동업기업을 하나의 실체(Entity)로 인정함으로써 공동사업 형태를 선택함에 있어 조세가 중립적이 되어 개인·법인 중 자유로운 사업형태의 선택이 가능해 질뿐만 아니라, 합명·합자회사 등의 경우 결손이 발생한 동업기업의 동업자가 법인이거나 사업소득이 있는 개인인 경우에는 그 결손금을 배분받아 동업자의 사업소득 등과 공제할 수도 있게 되어, 사업의 전체적인 성과에 부합하는 과세가 가능해진다.

조세특례제한법에서 도입한 동업기업 과세특례제도는 2 명 이상의 동업자가 재산·노무 등을 출자하여 영리를 목적으로 하는 사업을 영위하기 위하여 설립한 민법에 따른 조합, 상법에 따른 합명회사 및 합자회사 등 인적회사의 성격을 가진 단체가 관할 세무서장에게 동업기업과세특례의 적용을 신청하는 경우 적용하고, 동업기업의 소득에 대하여는 법인세나 소득세를 과세하지 아니하고, 이를 손익배분비율에 따라 각 동업자에게 배분하여 소득세 또는 법인세를 과세하며, 동업기업의 결손금에 대하여도 이를 손익배분비율에 따라 각 동업자에게 배분하여 각 동업자에게 배분하여 각 동업자의 다른 소득에서 공제할 수 있도록 하고 있다.

또한 동업기업 과세특례를 적용받는 동업기업과 그 동업자에 대해서는 각 세법의 규정에 우선하여 조세특례제한법 제 10 절의 3 의 규정을 적용한다.(租法 100 의 15②)

동업기업 소득에 대한 이중과세를 조정하기 위하여 동업기업에 대해서는 개인소득(비거주자인 경우국내원천소득)에 대한 소득세 및 각 사업연도의 소득, 청산소득에 대한 법인세 납세의무를 면제하는 대신, 동업자에 대해 동업기업으로부터 배분받은 소득에 대한 소득세 또는 법인세 납세의무를 부여하고 있다.

다만, 이중과세의 조정이 필요 없는 종업원 등에 대한 원천징수세액, 부가가치세, 종합부동산세 등은 동업기업이 납세의무를 부담한다.

<정리>

동업기업: 법인세 및 소득세 납세의무 없음

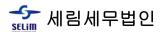
동업자: 배분 받은 소득에 대해 법인세 및 소득세 납세의무 부담

- 가. 과세체계가 동일한 동업자군별로 동업기업 소득금액 또는 결손금을 계산하여 동업 자에게 배분한다.
- 나. 배분 받은 소득금액 또는 결손금을 동업자군별로 법인세 및 소득세 과세표준을 계산한다. 동업기업의 결손금은 동업자에게 지분가액을 한도로 배분한다. 동업자는 배분 받은 결손금을 다른 사업소득 등과 공제 가능하다.
- 다. 세액공제, 감면금액, 원천징수세액, 가산세 등 동업기업 관련 세액은 동업기업 단계에서 세액을 계산하여 동업자에게 배분한다. 동업자는 배분 받은 세액을 신고 및 납부 시 공제, 가산한다.

2. 적용범위(조특법 100 의 15)

(1) 적용대상(조특령 100 의 15 ①)

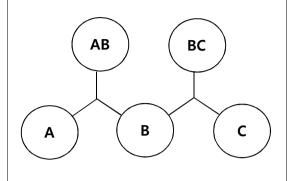
동업기업과세특례는 동업기업으로서 다음 중 어느 하나에 해당하는 단체가 동업기업과세특례 적용신청을 한 경우 해당 동업기업 및 그 동업자에 대하여 적용한다. 다만, 동업기업과세특례를 적용받는 동업기업의 동업자는 동업기업의 자격으로 동업기업과세특례를 적용받을 수 없다(수직적 중복 적용 안됨).



- ① 「민법」에 따른 조합(「자본시장과 금융투자업에 관한 법률」제 9 조 제 18 항 제 5 호의 투자조합은 제외)
- ② 「상법」에 따른 익명조합(「자본시장과 금융투자업에 관한 법률」제 9 조 제 18 항 제 5 호 및 제 6호의 투자익명조합은 제외)
- ③ 「상법」에 따른 합명회사 및 합자회사(「자본시장과 금융투자업에 관한 법률」제 9 조 제 18 항 제 4 호의 투자합자회사 중 같은항 제 7 호의 사모투자전문회사가 아닌 것은 제외)
- ④ 위의 단체와 유사하거나 인적용역을 주로 제공하는 단체로서 다음 중 하나에 해당하는 단체
 - ② 「변호사법」제 40 조 및 제 58 조의 18 에 따른 법무법인 및 법무조합
 - ⊕ 「변리사법」제 6 조의 3 및 같은법 시행령 제 14 조에 따른 특허법인
 - ⑤ 「공인노무사법」제 7 조의 2 에 따른 노무법인
 - ❷ 「법무사법」제 33 조에 따른 법무사합동법인
 - @ 전문적인 인적용역을 제공하는 법인으로서 다음 중 어느 하나에 해당하는 것
 - 「변호사법」제 58 조의 2 에 따른 법무법인(유한)
 - ◎ 「공인회계사법」제 23 조에 따른 회계법인
 - ◎「세무사법」제 16 조의 3 에 따른 세무법인
 - ◎ 「관세사법」제 17 조에 따른 관세법인
- ⑤ 「법인세법」제 1 조제 3 호의 외국법인 또는 「소득세법」제 2 조제 3 항에 따른 비거주자로 보는 법인 아닌 단체 중 제 1 호부터 제 4 호까지의 규정에 따른 단체와 유사한 단체로서 아래의 기준에 해당하는 외국단체(국내사업장을 하나의 동업기업으로 보아 해당 국내사업장과 실질적으로 관련되거나 해당 국내사업장에 귀속하는 소득으로 한정하여 동업기업과세 특례를 적용함)
- * 다음에 모두 해당하는 외국단체를 말함
- 1. 법 제 100 조의 15 제 1 항 제 1 호부터 제 4 호(제 3 호에 따른 단체 중 사모투자전문회사는 제외)까지의 규정에 해당하는 단체와 유사한 외국단체
- 2. 「법인세법」제 94 조 또는 「소득세법」제 120 조에 따른 국내사업장을 가지고 사업을 경영하는 외국단체
- 3. 설립된 국가(우리나라와 조세조약이 체결된 국가에 한정)에서 동업기업과세특례와 유사한 제도를 적용받는 외국단체

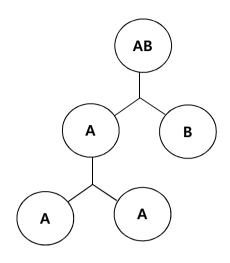
[조세특례제한법 제 100 조의 15 조 제 1 항 적용사례]

수평적 중복적용 가능



● 동업자 B는 동업기업 AB와 BC의 동업자로서 특혜를 중복적용 받을 수 있음.

수직적 중복적용 불가



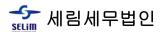
• 동업기업 AB의 동업자인 A는 동업자 A1과 A2의 동업기업으로서 과세특례를 중복적용 받을 수 없음.

(2) 다른 세법과의 관계(조특법 100의 15 ②)

동업기업과세특례를 적용받는 동업기업과 그 동업자에 대하여는 각 세법의 규정에 우선하여 동업기업과세특례를 적용한다.

- (3) 동업기업 및 동업자의 납세의무(조특법 100의 16, 조특령 100의 16)
- ① 동업기업에 대하여는 「소득세법」제 2 조 제 1 항 및 「법인세법」제 2 조 제 1 항·제 2 항에도 불구하고 「소득세법」제 3 조 및 「법인세법」제 3 조 제 1 항 각 호의 소득에 대한 소득세 또는 법인세를 부과하지 아니한다.
- ② 동업자는 「조세특례제한법」제 100 조의 18 에 따라 배분받은 동업기업의 소득에 대하여 소득세 또는 법인세를 납부할 의무를 진다.
- ③ 내국법인이 **동업기업과세특례를 적용받는 경우**, 해당 내국법인(동업기업 전환법인)은 「법인세법」제 79 조 제 1 항의 '해산에 의한 청산소득'의 금액에 준하여 다음의 산식에 따라 계산한 과세표준에 「법인세법」제 55 조 제 1 항에 따른 세율을 적용하여 계산한 금액을 법인세(준청산소득에 대한 법인세)로 납부할 의무가 있다.

이때 법인은 준청산소득에 대한 법인세 과세표준 및 세액신고서에 다음 각각의 서류를 첨부하여 납세지 관할세무서장에게 제출하여야 한다.(租令 100-16⑦ 및 租則 45-7)



- 1. 준청산일 현재의 해당 내국법인의 재무상태표
- 2. 준청산일 현재의 해당 내국법인의 자본금과 적립금조정명세서

준청산소득에대한 법인세

- = (동업기업과세특례 적용받는 최초 사업연도의 직접사업연도의 종료일(준청산일) 현재 잔여재산가액 - 자기자본 총액) x 법인세법상 세율
- * 잔여재산가액=자산총액-부채총액 (평가차손익 제외, 장부가액으로 계산) 자기자본총액=자본금+(잉여금-이월결손금잔액(잉여금 초과분은 소멸)+환급 법인세)
- ④ 동업기업 전환법인은 **동업기업과세특례를 적용받는 최초 사업연도의 직전 사업연도 종료일이후 3 개월이 되는 날까지** 준청산소득에 대한 법인세과세표준 및 세액신고서에 부속서류를 첨부하여 납세지관할세무서장에게 신고하여야 한다.
- ⑤ 동업기업 전환법인은 준청산소득에 대한 법인세의 세액을 위 ④의 신고기한부터 3 년간 균등액이상 납부하여야 한다.
- (3) 동업기업과세특례의 적용 및 포기신청(조특법 100의 17, 조특령 100의 16)
- 가. 과세특례 적용신청

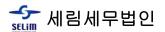
동업기업과세특례를 적용받으려는 기업은 동업기업과세특례를 적용받으려는 최초의 과세기간의 개시일 이전(기업을 설립하는 경우로서 **기업의 설립일이 속하는 과세기간부터 적용받으려는 경우에는 그 과세기간의 개시일부터 1 개월 이내)**에 동업기업과세특례 적용신청서를 납세지관할세무서장에게 제출하여야 한다.

- (예) 2014.12.31. 이전에 설립된 동업기업이 2015.1.1. 개시하는 과세연도부터 적용받고자 하는 경우에는 과세연도 개시일부터 1개월 이내인 2015.1.31.까지 제출
- 나. 과세특례 적용 포기

동업기업과세특례를 적용받고 있는 동업기업은 동업기업과세특례의 적용을 포기할 수 있다. 동업기업이 동업기업과세특례의 적용을 포기하려면 동업기업과세특례를 적용받지 아니하려는 최초의 과세연도의 개시일 이전에 동업기업과세특례포기신청서를 납세지관할세무서장에게 제출하여야 한다.

다만, 동업기업과세특례를 최초로 적용받은 과세연도와 그 다음 과세연도의 개시일부터 4 년 이내에 종료하는 과세연도까지는 동업기업과세특례의 적용을 포기할 수 없다.

- ① 적용대상 동업기업이 적용신청을 한 경우에 한해 적용
- ② 과세방법의 자의적 변경을 통한 동업기업의 조세회피를 방지하기 위한 의무부여 기간임



3. 동업기업의 소득계산 및 배분

- (1) 원칙적으로 동업기업 소득 계산 및 배분 시 신고한 약정 손익배분비율을 적용하여야 한다. 이때 단일의 손익배분비율을 적용한다.(즉 이익, 손실 배분비율을 달리 정하거나 개별 수익, 비용항목별 비율을 달리 정할 수 없다.) 신고하지 않은 경우 지분비율 적용
- (2) 조세회피가 우려되는 사유 발생시 직전 과세연도 손익배분비율을 적용한다.
- (3) 특수관계자 동업자간 출자지분 합계가 출자총액의 50%를 초과하는 경우 그 동업자간에는 지분비율을 적용한다.(그 동업자와 다른 동업자간에는 신고한 약정 손익배분비율 적용)
- (4) 사모투자전문회사의 경우 정관/약관/투자계약서에서 정한 비율, 순서에 따라 결정된 이익배당, 손실배분비율을 약정 손익배분비율로 신고 시 조세회피 우려 사유에 관계없이 해당 비율을 적용한다.
- (5) 동업자의 가입, 탈퇴로 해당 과세연도 중 동업자가 변경된 경우에는 변경되지 않은 동업자만을 대상으로 전년도 배분비율을 그대로 사용한다. 기존동업자와 새 동업자간에는 새로운 손익배분비율 적용 가능하다.
- 4. 결손금의 배분한도 및 이월배분
- (1) 동업기업의 결손금은 해당 과세연도 종료일 현재 해당 동업자의 지분가액을 한도로 배분한다. 배분한도 초과결손금은 10 년간 이월배분 허용된다. 단, 이월된 금액은 지분가액에 미달할 때만 그 미달 금액 범위 내에서 추가로 배분 가능하다.