



Draft Taxation Determination

Income tax: consolidation: can the transferee make a choice under subsection 707-327(4) of the *Income Tax (Transitional Provisions) Act 1997* to treat part of a loss transferred, under Subdivision 707-A of the *Income Tax Assessment Act 1997*, from a value donor as being included in another bundle of losses?

Preamble

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVA of the **Taxation Administration Act 1953**. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. No. A choice made by the transferee¹ under subsection 707-327(4) of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997) applies to treat a loss transferred from a value donor as if it is included in a bundle of losses transferred from a real loss-maker. The choice cannot be made in respect of part of that loss.
2. Subdivision 707-C of the IT(TP)A 1997 contains the value and loss donor rules. The value donor rules allow the available fraction² for a bundle of losses³ transferred from an entity ('the real loss-maker') under Subdivision 707-A of the *Income Tax Assessment Act 1997* (ITAA 1997) to be worked out as if an amount of modified market value⁴ of another entity ('the value donor') were added to the modified market value of the real loss-maker. The loss donor rules allow a loss of the value donor to be treated as if it is included in the bundle of losses transferred from the real loss-maker, for the purposes of utilising the loss.

¹ The transferee will generally be the head company of a consolidated group or MEC group.

² Within the meaning of section 707-320 of the ITAA 1997.

³ Within the meaning of section 707-315 of the ITAA 1997.

⁴ Within the meaning of section 707-325 of the ITAA 1997.

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3. Subsections 707-327(1) to (3) of the IT(TP)A 1997 state the conditions that need to be satisfied in order for a choice to be made to treat a loss transferred from the value donor as being included in the bundle of losses transferred from the real loss-maker. Specifically, paragraph 707-327(1)(b) of the IT(TP)A 1997 requires that the loss (under consideration) was transferred, under Subdivision 707-A of the ITAA 1997, at the initial transfer time from the value donor.
4. Subsection 707-327(4) of the IT(TP)A 1997 provides that, where the transferee chooses, the utilisation of the loss is determined by reference to the available fraction for the bundle of losses transferred from the real loss-maker.
5. The loss donor rule in section 707-327 of the IT(TP)A 1997 is drafted so that it applies on a loss by loss basis, with each loss being referable to the loss that was transferred under Subdivision 707-A of the ITAA 1997 from the value donor. There is no specific provision which allows a part of a loss to be subject to the loss donor rule. This means that it is not possible to split up a loss and have multiple applications of the loss donor rule in respect of the loss. Therefore, the transferee is not able to choose to treat one part of the loss as being included in the bundle of losses transferred from one real loss-maker and another part of the loss as being included in the bundle of losses transferred from a different real loss-maker.
6. The requirement in subsection 707-327(3) of the IT(TP)A 1997, that it must have been possible for the value donor to transfer an amount (greater than a nil amount) of the loss to each company covered by subsection 707-327(2) of the IT(TP)A 1997, is not authority to permit the multiple application of the choice in respect of the same loss. Instead, that precondition to the exercising of the loss donor choice relates only to the ability of the value donor to transfer the loss, under Division 170 of the ITAA 1997, to each of those companies (the real loss-maker and other value donors to that real loss-maker) had the conditions in section 707-328 of the IT(TP)A 1997 existed.

Example

7. *Head Co forms a consolidated group on 1 July 2003. Donor Co, Loss 1 Co and Loss 2 Co are subsidiary members at the time the consolidated group is formed. Tax losses are transferred, under Subdivision 707-A of the ITAA 1997, from Donor Co, Loss 1 Co and Loss 2 Co to Head Co at the time the group forms.*
8. *Under separate applications of the value donor rule, modified market value is added from Donor Co to both Loss 1 Co and Loss 2 Co. Head Co, as transferee, seeks to split up a \$100 tax loss in the bundle of losses transferred from Donor Co and 'donate' \$60 of the loss to the Loss 1 Co bundle of losses and 'donate' \$40 of the loss to the Loss 2 Co bundle of losses.*
9. *Under the loss donor rules, Head Co can choose to either treat the \$100 loss as being included in the bundle of losses transferred from Loss 1 Co or the bundle of losses transferred from Loss 2 Co. Head Co cannot choose to have parts of the loss treated as being included in both of those two bundles of losses.*

Date of Effect

10. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

11. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

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Commissioner of Taxation

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 92/20

Subject references:

- available fraction
- bundle of losses
- consolidation - formation
- consolidation - losses
- head company
- head company of a MEC group
- real loss-maker
- transferred losses
- utilise a loss
- value donor

Legislative references:

- ITAA 1997 Div 170
- ITAA 1997 Subdiv 707-A
- ITAA 1997 707-315
- ITAA 1997 707-320
- ITAA 1997 707-325
- IT(TP)A 1997 Subdiv 707-C
- IT(TP)A 1997 707-327
- IT(TP)A 1997 707-327(1)
- IT(TP)A 1997 707-327(1)(b)
- IT(TP)A 1997 707-327(2)
- IT(TP)A 1997 707-327(3)
- IT(TP)A 1997 707-327(4)
- IT(TP)A 1997 707-328
- TAA 1953 Pt IVAAA

ATO references

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