PART B The Collection of Taxation Debts

Chapter 35
COLLECTION OF CONSOLIDATED GROUP LIABILITIES

The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.

Date of effect: 24 July 2008 (This version replaces the 2006 version.)
Key legislation: Division 721 of the *Income Tax Assessment Act 1997*; Part 3-90 of the Income Tax Assessment Act 1997; Part 4-15 of Schedule 1 to the *Taxation Administration Act 1953*

PURPOSE

1. The chapter outlines the Commissioner's policy in relation to:

- the collection of income tax-related liabilities from head companies of consolidated groups, member entities and entities that have left the group
- tax sharing agreements (TSA), including their form and basis of apportionment of liabilities amongst members, and
- requirements for an entity to leave the group clear of certain liabilities.

INTRODUCTION

2. The legislative rules dealing with consolidated groups are contained in Part 3-90 of the *Income Tax Assessment Act 1997* (ITAA 1997).

3. The legislative rules dealing with the liability of subsidiary members of consolidated groups are contained in Division 721 of the ITAA 1997.

4. Liabilities of the head company and its subsidiaries are tax-related liabilities and recoverable using the general collection provisions contained in Part 4-15 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

Professional advice

5. Certain aspects of this chapter relate to events that will generate relatively complex legal obligations between group members and impact on creditors, financiers of group members as well as prospective purchasers of group companies and other third parties. The Tax Office cannot provide legal or accounting advice on these issues and it is strongly suggested that appropriate professional advice be sought on these matters.

Groups

6. From 1 July 2002, the head company of a wholly-owned group of entities can elect to consolidate and thereafter be treated as a single entity for income tax purposes. Broadly, this means that the subsidiary entities lose their individual income tax identities and are treated as parts of the head company of the consolidated group for the purposes of determining income tax liability during the period in which they are members of the group.

7. Although consolidation is optional, if a group elects to consolidate, all of the holding company's eligible resident wholly-owned companies, trusts and partnerships, including entities acquired in the future, must be included in the consolidated group. However, certain entities that receive different tax treatment compared to ordinary Australian resident companies cannot be members of a consolidated group.

8. A decision to enter into the consolidation regime is irrevocable. In addition to the head company, there needs to be at least one subsidiary member for a group to be eligible to consolidate. However, if at some point after consolidation the consolidated group no longer has subsidiary members, the consolidated group (although consisting only of the head company) will continue to exist.

9. Where the head company no longer satisfies the prerequisites for being a head company, the consolidated group will cease to exist. An example of this is where the head company becomes a subsidiary member of another consolidated group.

10. It should be noted that each member of the consolidated group remains separately liable for its tax-related liabilities that do not fall within the scope of the consolidation regime. This includes income tax-related liabilities in respect of any period up to the time of consolidation ('pre-consolidation debts').

11. Special rules allow a foreign-owned group of Australian entities to consolidate despite the group not having a single Australian head company. The resulting group, known as a multiple-entry consolidated (MEC) group, is treated as a consolidated group.

12. The Australian-resident companies that constitute the ultimate foreign parent's first tier of investment into Australia are referred to as tier-1 companies. One of the eligible tier-1 companies in the MEC group will be treated as the head company of the group. The remaining members of the MEC group will be treated as subsidiary members of the group.

Interposed Entities

13. Generally, a consolidated group ceases to exist when the head company no longer satisfies the conditions for being a head company. An exception to this rule will occur where, in certain circumstances, another company is interposed between the head company and its shareholders.

14. Sections 703-70 to 703-80 of the ITAA 1997 set out the effects when a company (the interposed company) chooses that a consolidated group is to continue in existence after the completion time. Broadly, the completion time is when the last of the shareholders in the former head company have disposed of their shares to the new head company or those shares were cancelled or redeemed.

15. Broadly, section 703-75 provides that the interposed entity is treated as being substituted for the original head company at all times before the completion time - the 'substitution rule'. It applies specifically for the head company core purposes that is, working out the head company income tax liabilities or losses. This section also has effect for the purpose of determining the respective balances of the franking accounts of the interposed and original head companies.

Group liabilities - head companies and subsidiaries

16. Liability to pay the income tax attributable to group activities rests with the head company. Although the head company ultimately controls all the members of the consolidated group, the Commissioner could be disadvantaged in some situations if the law did not provide for direct recovery from member entities. In an attempt to align the Commissioner's position to that in a non-consolidated group of entities, members may in certain circumstances become wholly or partially liable for the group's income tax-related liabilities (the group liabilities).

17. If the head company does not pay a group liability by the due date (the head company's due time) all entities that were members of the group for a part of the liability period (the contributing members) become jointly and severally liable for that group liability. However, joint and several liability is avoided by the contributing members if, just before the head company's due time, the particular group liability was covered by a tax sharing agreement (TSA) that reasonably allocated the liability amongst the parties to that agreement, and that agreement is produced when requested by the Commissioner. Where a group liability is covered by a TSA, a particular contributing member may have no liability or be liable for only a portion of the group debt.

18. A contributing member is excluded from being jointly and severally liable for a group liability if at the head company's due time it was prohibited according to the effect of an Australian law from entering into any arrangement under which it could become subject to such a liability - subsection 721-15(2) of the ITAA 1997.

19. A contributing member's full joint and several liability or allocated liability under a TSA does not become due and payable until 14 days after the Commissioner gives the entity notice - subsections 721-15(5) and 721-30(5) of the ITAA 1997.

20. In all situations, the head company remains liable for the full amount of the unpaid group liability and these rules do not operate to change the time at which that amount was due and payable.

21. An entity that leaves a consolidated group can exit clear of a group liability that has not become due and payable if, before the time it ceases to be a member of the group (the leaving time), it pays to the head company the amount, or a reasonable estimate of the amount, that would otherwise be payable under the relevant TSA. An exited member however, remains exposed to group liabilities that are due and payable by the head company prior to the date of exit.

22. When a group is created during a liability period (for example, part way through an instalment quarter) a contributing member's joint and several liability is limited to the proportion of the group liability that is reasonably attributable to the consolidation period - section 721-15 of the ITAA 1997.

23. Whereas a head company has a right to object, appeal or seek any other review under Part IVC of the TAA in regard to the ascertainment of a group liability, a contributing member has no such rights under Part IVC.

POLICY

Head Company

24. It would be expected that a head company would pay its group liabilities by the relevant due date. If, for whatever reason, the head company cannot make payment by the due date the onus will remain with the head company to initiate contact with

the Tax Office in order to explain its situation and seek to come to an arrangement to pay.

25. If no contact is made or an acceptable arrangement is not entered into, the Commissioner will initially pursue action against the head company. Such action would be in accordance with the general policy regarding collection of liabilities.

Recovery action against subsidiary members

26. However, where it is clear that timely recovery from the head company is unlikely the Commissioner may seek to recover from one or more member entities immediately. Even where there is a reasonable possibility of eventually recovering from the head company, the Commissioner may still seek to recover from one or more member entities in certain circumstances before exhausting all recovery avenues against the head company. These circumstances could include but are not limited to:

   - a head company with a history of non-payment of tax debts
   - a consolidated group with a history of payment only being made after action is initiated against subsidiary member entities
   - where it is known that action against the head company will not be successful in achieving full payment, will not be cost effective, or would result in undue delays
   - where it is known that assets are being dissipated by members of the group and this dissipation puts collection of unpaid group liabilities at risk, or
   - where the Commissioner needs to make a claim in an insolvency administration of a member entity.

Recovery action against exited members

27. Action to recover a group liability from an exited member will depend on the circumstances in each case. Where an exited member is liable to pay an amount under the joint and several liability provisions, recovery action would generally only commence after action against the head company and other group entities that were members of the group when the liability arose, had concluded or was at the point when the Commissioner believed that action against those entities would not result in full payment of the liability.

28. Where an exited member is liable to pay an amount under the TSA provisions, recovery action would generally only commence after action against the head company had concluded or was at the point when the Commissioner believed that action against the head company would not result in full payment of the liability.

29. An example of where action against an exited member would be taken at an earlier point is where its leaving had prejudiced the Commissioner's ability to collect the full liability from the remaining members (for example where the exited member has been sold for less than market value so the net value of the group has been reduced or where the equivalent amount of its TSA liability was unlikely to be recovered from the head company).

30. Similarly, where a joint and several liability is due to an amendment of a group liability, action against the exited member would only be taken after it was considered that recovery from remaining group members would not achieve full payment in a timely manner.

31. However where the exited member is liable under a TSA for an amended group liability action may be commenced after determining that it is unlikely that the head company would meet the obligation in a timely manner. That is, as the other members liability is limited to their contribution amount under the TSA their ability to pay is not relevant to the Commissioner's ability to readily collect the group liability.

32. Where an exited member enters into a formal insolvency administration, the Commissioner will make a claim for any liability in that administration.

Deferring the payment time of a group liability

33. The Commissioner may defer the time for payment of a group liability in accordance with the policy outlined in Chapter 9 'Deferring the time for payment'. It would be rare for the Commissioner to grant a deferral because the group has not made adequate arrangements to ensure that the group's taxation liabilities are met on time. A deferral would not be available solely because a group has not completed a TSA relating to that particular debt. Where a deferral has been granted general interest charge (GIC) on any unpaid amount will begin to accrue from the deferred date.

Arrangements to pay tax-related liabilities by instalments

34. The Commissioner may grant an arrangement to pay the group liability by instalments in accordance with the policy in Chapter 10 'Payment arrangements'. It would be unusual for the Commissioner to grant such an arrangement where the group continually neglects to make adequate arrangements to ensure that the group's taxation liabilities are met on time.

35. When considering an arrangement proposal, the Commissioner will look to the position of the entire group and the situation and actions of all the contributing members as well as those of the head company.

36. Unlike a deferral of time to pay, an arrangement to pay by instalments does not alter the date from which GIC begins to accrue, that is, the head company's due time. The GIC component of the debt should be factored into any arrangement to pay by instalments.

Contributing members' liabilities - general considerations

37. If a notice is given to a contributing member either in respect of a joint and several liability (subsection 721-15(5) of the ITAA 1997) or a contribution amount under a TSA (subsection 721-30(5)), and that member is unable to make full payment by the due and payable date, the member should contact the Tax Office to discuss alternative payment options.

38. Generally, the liability of the member entity would be treated as any other tax-related liability and this policy as it relates to the collection of liabilities would apply. When applying this policy, the member entity's circumstances would at first instance be considered in isolation. Submissions that other members of the group (including the head company) are in a better position to meet the liability would not be given great weight in reaching any decision regarding collection of the liability from a particular contributing member.

39. An arrangement to pay, a deferral of recovery action or any other agreement entered into with a particular contributing member does not affect the Commissioner's rights in respect of, nor prevent action being taken against, other members liable for all or part of the same group liability.

40. To simplify the negotiation process, it would be acceptable if representations were made on behalf of one or more contributing members through the head company, provided the head company is properly authorised in writing to do so. It is understood that for various reasons, entities, particularly exited entities may prefer to have separate representation. However:

- the Tax Office would need to ensure that the secrecy and privacy concerns of all entities were addressed;
- the representatives would need to ensure that there was no conflict of interest, and
- the entities may need to ensure that they have a legal right of access to the relevant records, for example, of the head company, for the purposes of negotiation.

Disputed debts

41. Where a group liability is subject to a dispute and legal action for recovery against the head company has been deferred in accordance with an arrangement as detailed in Chapter 28 'Recovering disputed debts', the Commissioner will also defer commencing action against contributing members.

42. However, even when a 50/50 arrangement has been accepted or any other agreement is in place to defer recovery action, it will be a condition that the Commissioner may rescind that agreement and commence recovery action where it is considered that the associated risk requires such action for example, dissipation of assets. (See Chapter 3 'Risk management'). When considering the risk, the Commissioner will look to the position of the entire group and the situation and actions of all the contributing members as well as the head company.

Limit on liability where group first comes into existence

43. If a group comes into existence during a period to which a group liability relates, the joint and several liability of the contributing members is limited to the proportion of the group liability that is reasonably attributable to the consolidated period.

44. In most cases, the Commissioner would expect the head company to be able to determine its taxable income for the pre-consolidated period and, from this, calculate the group liability attributable to the consolidated period.

45. If the head company refuses or otherwise fails to provide, when requested, a reasonable attribution of the group liability, the Commissioner will use whatever information is available to make a reasonable attribution and use this figure as the basis for any recovery action against the contributing members.

46. PAYG instalments payable by the head company for quarters prior to the head company being given its initial head company instalment rate are not taken to be group liabilities. Therefore, subsidiary members cannot become liable under Division 721 of the ITAA 1997 for all or part of these amounts - subsection 721-10(3). The PAYG amounts of subsidiary members are, however, a liability of the subsidiaries.

Joint and several liabilities

47. If the Commissioner has determined that a particular group liability is not covered by a valid TSA or the TSA is not produced as required under subsection 721-25(3) of the ITAA 1997, all of the contributing members are jointly and severally liable for

that debt, and one or more of those members may be pursued for payment of that group liability.

48. The joint and several liability of a particular contributing member only becomes due and payable 14 days after the Commissioner gives written notice to that entity. The Commissioner may give written notice to one or more of the contributing members, depending on the potential for recovery from those members. Notice may be given to different contributing members at different times. If, for example, the Commissioner gives a notice to two different contributing members on different days, the two contributing members will have different due and payable dates for the same liability. Once the full amount of the group liability and related GIC has been collected, recovery action would cease against all members in respect of that liability.

49. If the Commissioner has information regarding the financial position of the contributing members, action will usually be taken against those contributing members from which, in combination, recovery would be expected to be achieved in the most timely way. However, where the Commissioner's knowledge of the group is limited, it may be necessary to initiate action against all contributing members or, if the circumstances permit, to seek further information. The circumstances in which action would be taken to recover a group liability from exited entities is outlined above under the heading 'Recovery actions against exited members'.

Exclusion from joint and several liability

50. The prospect of joint and several liability will only arise if a valid TSA does not exist or is not produced to the Commissioner if and when required. A TSA may be invalid if all relevant entities are not party to the TSA even if that entity is excluded by law from a joint and several liability. If an entity is, at the head company's due time, prohibited according to the effect of an Australian law from entering into any arrangement under which the entity becomes subject to a joint and several liability, that entity is, by operation of subsection 721-15(2) of the ITAA 1997, excluded from the operation of the joint and several liability provisions. However, this statutory exclusion would not prevent such an entity entering into, and being liable to an amount under, a TSA.

51. An example of an entity that would be considered to fall within the exemption in subsection 721-15(2) of the ITAA 1997 is one that is prevented by statute or regulation from giving a cross guarantee, or was a participant in a financial market or clearing and settlement facility licensed under parts 7.2 or 7.3 of the *Corporations Act 2001*.

52. Further, certain assets that are regulated by law may not be available to the Commissioner in recovery proceedings regardless of whether the entity is exempted or not.

53. The effect of the *Life Insurance Act 1995 (Cth)* is that where a contributing member is a life insurance company, the assets of a statutory fund of the company are only available to meet liabilities or expenses (which includes tax liabilities) *related to the business of the fund*.

54. While a life insurance company may be a member of a consolidated group, the group liability of the group (being the collective tax liability of the head company and members) cannot be said to be attributable to the business of the life insurance company's statutory fund. Therefore, the Commissioner may not be able to enforce the recovery of group liability against the assets of the statutory fund of the company, but may enforce recovery against its other assets.

Possible rights of contribution between entities

55. If the Commissioner decides not to sue a subsidiary member of a consolidated group because he takes the view that an entity comes within the subsection 721-15(2) of the ITAA 1997 exclusion (the excluded entity) and this view is ultimately found to be incorrect as a matter of law, the creditors of other subsidiary members of the consolidated group could be disadvantaged relative to the creditors of the excluded entity. However, this risk would be ameliorated to the extent that the other subsidiary members of the consolidated group who have paid an amount of the group liability would have a right of contribution under section 265-45 of Schedule 1 to the TAA against the excluded entity that was not sharing the burden for which it was jointly and severally liable as a matter of law. This statutory right would operate in addition to any common law rights of contribution, but would not apply in relation to a TSA debt. The fact that the joint and several liability was not assumed voluntarily but arose from a revenue law would not preclude a right of contribution from also arising under equitable principles (*Armstrong v. Commissioner of Stamp Duties* (1967) 69 SR (NSW) 38; 86 WN (Pt 2) (NSW) 259).

56. Section 265-40 of Schedule 1 to the TAA would enable a contributing member, that could demonstrate that they have paid a joint and several or TSA liability for or on behalf of another entity in the group, to recover an appropriate amount from that other entity.

57. The risk of joint and several liability would be avoided if the group liability was covered by a valid tax sharing agreement - subsection 721-15(3) of the ITAA 1997.

Tax sharing agreements

58. If a particular group liability is covered by a valid TSA, the law does not operate to make the contributing members jointly and severally liable for that group liability. Instead, depending on the allocation of the group liability under the TSA, a contributing member may be liable for all, part or none of the group liability. Those subsidiary members not party to the TSA would also be excluded from joint and several liability for the group liability covered by the agreement.

59. Notwithstanding that an agreement may exist which would otherwise provide that a group liability is covered by a TSA, if a copy of that agreement is not provided in accordance with subsection 721-25(3) of the ITAA 1997 then the group liability is taken never to have been covered by a TSA - see discussion below under 'Formal notice requesting a copy of a TSA' and in the 'Clear exit' section under 'Provision of a TSA by exited member'.

A. Directors' responsibilities

60. Directors of contributing members would be aware that they need to consider their statutory and common law responsibilities as directors of that entity when becoming a party to a TSA. In particular, they would need to be aware of any obligation to the head company and/or the Commissioner that may result from them entering into the agreement.

61. As the TSA is an agreement between the head company and group members (that is, the Tax Office is not a party to the agreement), it is expected that the resolution of the content of the document and the finalisation of the arrangements to pay the head company's debt by the due date will be resolved by the relevant directors.

62. Given the issues that may need consideration in compiling TSAs, it may be prudent for directors to seek legal and accounting advice in relation to all aspects of Division 721.

B. Liabilities covered by a tax sharing agreement

63. The table at subsection 721-10(2) of the ITAA 1997 outlines various group liabilities. Although the law deals with each liability of the head company as a separate group liability and for which a single TSA is required, the Commissioner will also recognise a document that covers multiple group liabilities as a separate TSA for each group liability. Accordingly, even if one TSA is found to have an unreasonable allocation of one group liability (and thus be invalid) this would not mean that other TSAs covered by the document would be invalid.

64. Similarly, the Commissioner will recognise a document that covers multiple periods of group liabilities as a separate TSA for each period. Accordingly, even if one TSA is found to have an unreasonable allocation of one group liability in one period (and is thus invalid) this would not mean that other TSAs covered by the document would be invalid.

65. In relation to TSAs that cover multiple periods, there is a possibility that the TSA will be 'updated' from time to time in relation to future liabilities. Considerable care will be required in drafting the TSA and amending a TSA (refer to the later section on 'Amending a TSA').

66. As the TSA must make a reasonable allocation of an entire liability, an unreasonable allocation of part of the debt to one contributing member will invalidate the entire TSA. It is not the intended outcome of the law to have one or more members jointly and severally liable for the entire debt while others have liabilities limited by the TSA.

67. The most common specific liabilities that should be addressed in a TSA are:

- the final income tax liability on assessment
- the PAYG instalment liabilities that arise throughout the year and are separate liabilities from the income tax assessment, and
- the GIC.

68. The law imposes GIC for late payment on the head company debt and it is a distinct group liability and separate from the group liability upon which it accrues. Therefore, if it was intended that a TSA cover any potential GIC, this would need to be specified in the agreement, as well as how that GIC is to be allocated between the TSA contributing members. For example, a TSA might specify that any GIC incurred by the head company in relation to an unpaid group liability is allocated to contributing members in proportion to the allocation of the primary liability. As the rules relating to GIC vary slightly from those relating to other group liabilities, it is important to read the section on 'General interest charge' below.

69. It is important to note that there is only one liability for a period (*Trautwein v. FCT* (1936) 56 CLR 63) and *DCT v. Faint* (1987) 19 ATR 365). At times it is necessary to amend that liability for example by issuing a amended assessment. However, where possible, the Commissioner is prepared to distinguish between the debt arising under an assessment and *another debt* that results from an amendment of that assessment.

C. Amendment of a liability

70. The possibility of future amendments to liabilities should be a consideration of all parties entering into a TSA as well as prospective purchasers in due diligence considerations in company acquisitions. For further discussion on amended liabilities, refer to the section 'Amendment of group liabilities' below.

D. Single group liability not covered by multiple agreements

71. The object of the tax sharing agreement provisions is that there should be a reasonable allocation of a group liability among one or more group members in accordance with a single agreement. Where a group liability is dealt with in two or more agreements that liability cannot be considered to be covered by a tax sharing agreement for the purposes of Division 721 - subsection 721-25(1B) of the ITAA 1997.

E. Form of tax sharing agreement

Background

72. If a TSA is required to be given to the Commissioner under subsection 721-25(3) of the ITAA 1997, it must be given in the 'approved form' and within 14 days. Section 388-50 of Schedule 1 to the TAA allows the Commissioner to specify the information to be provided in an 'approved form'. Further paragraph 388-50(1)(c) requires that the approved form contains not only the information the Commissioner requires, but also 'any further information statement or document as the Commissioner requires, whether in the form or otherwise.'

73. However, in recognising that the TSA is primarily an agreement between members of the group, the Commissioner has only specified below the minimum requirements for a TSA to be produced in the 'approved form', that is, the requirements listed below must be met but the actual form of the agreement (for example, Deed) is open to the taxpayers and their advisors provided the TSA legally binds the parties concerned.

Production of a valid TSA in the approved form - requirements to comply

74. Each TSA:

- must be in writing
- must show the date of execution
- must specify the names of the head company and each TSA contributing member
- must specify what group liability or liabilities it covers
- must specify the method used to allocate that/those group liability or liabilities which must provide for a reasonable allocation of the **entire** group liability or liabilities
- must be properly executed by or on behalf of the head company and each contributing member that is a party to the agreement (that is, the TSA contributing members), and
- must either
    a. specify the exact contribution amount for each contributing member for the relevant liability, or

b. **if and when required to be produced to the Commissioner**, include a schedule signed by the head company:

(i) specifying the relevant liability or liabilities and period/s as specified in the Commissioner's notice to produce

(ii) stating the name and ABN or ACN of the head company and each TSA contributing member

(iii) stating the contribution amount of each TSA contributing member in respect of that liability or each of the liabilities, and

(iv) declaring that *'the schedule includes the names of all the TSA contributing members in relation to that liability or liabilities for that/those period/s and the contribution amount or amounts as calculated under the TSA'* .

- must, *if and when required to be produced to the Commissioner* , include any Deeds of Assumption in relation to the particular liability or liabilities for the particular period/s.

(For production of a TSA by an exited member, please refer to the section titled: *'Provision of a TSA by exited member'* below.)

Production of a valid TSA in the approved form - explanation

75. It is acceptable that one document could cover multiple group liabilities. For example, the document could refer to a specific liability or liabilities such as the PAYG instalment for the quarter ended 30 September 2003. Alternatively, it could refer to a class of liabilities such as all PAYG instalment group liabilities that become due and payable after 1 July 2002. Nevertheless, the document would be considered to be a separate TSA for each group liability it purports to cover.

76. Execution of the TSA by a person properly authorised or, if appropriate, under a Power of Attorney would be acceptable as per standard commercial practice provided it is legally binding. Section 127 of the *Corporations Act 2001* may be relevant in certain cases.

77. Specific amounts (which can be 'nil' amounts if appropriate) can be shown in the TSA as being the relevant contribution amounts of each TSA contributing member for the relevant group liability/liabilities.

78. However, if these specific amounts are not shown in the TSA, then, if and when the TSA is produced to the Commissioner, the head company must produce the TSA, the schedule and, if Deeds of Assumption or similar documents are used, those documents. The working papers used to calculate the contribution amounts **do not** have to be produced at that time but may be requested by the Commissioner if necessary. To emphasise, the non-provision of the working papers when a TSA is requested does not impact on whether or not a group liability is covered by a TSA. However, the non-provision of the working papers following any formal request under section 263 of the ITAA 1936 or section 353-10 of Schedule 1 to the TAA at a later date would be a prosecutable offence. (Refer also to the comments in the 'Amendment of group liabilities' section below).

79. To emphasise, the schedule referred to above **does not** have to be in existence just before the due time, (but groups may find it convenient to compile the schedule at that time). That a schedule may not be in existence just before the head company's due time does not impact on whether or not a group liability is covered by a TSA.

80. Secondly, a schedule would need to be provided in all cases except where specified amounts were allocated to each TSA contributing member in the TSA itself.

81. Head companies will need to take particular care in allocating the [section 204](#) of the ITAA 1936 end of year group liability, that is, the annual assessment, in the schedule. In particular, they will need to:

- determine whether the TSA is to allocate the full section 204 liability or that liability reduced by the relevant PAYG instalments/credits (the law allows both)
- be clear as to which credits form part of the assessment (for example, imputation credits), and which credits are post section 204 assessment credits for example, foreign tax credits and PAYG instalments/credits

or the total liability allocated in the schedule may be mis-stated.

82. The figures provided in the TSA or the schedule are to be definitive; that is, any discussions between the head company and subsidiaries as to the correctness of the liability will need to be resolved prior to the production of the TSA and schedule. A deferral of time to lodge the TSA and/or schedule while these matters are resolved is unlikely to be granted.

83. While all members of a group do not have to be a TSA contributing member, it is suggested that groups review their TSAs regularly in case some adjustment is required due to members exiting or new members joining the group. These exits and entries may affect the reasonableness of an allocation methodology used in a pre-existing TSA. The question of whether all group companies should enter into a TSA may also be of relevance to prospective purchasers of these group companies in their due diligence considerations.

84. Even if a contributing member does not trade or generate income during a particular period, this may not preclude it from being a party to a TSA. Nor would its participation in a TSA necessarily affect the reasonableness of the allocation of a group liability under that TSA. For example, a method that results in a 'nil' allocation to a non-trading entity would, of itself, have no bearing on whether the group liability was considered to have been reasonably allocated amongst the head company and all the TSA contributing members.

F. Timing

85. For a group liability to be covered by a TSA, the TSA must be in place just before the head company's 'due time' (that is, when the head company's debt becomes due and payable). The Commissioner has no power to allow execution of a TSA after this date. However, if the Commissioner defers the head company's due time for payment then the TSA must be in place at that later date. (Refer chapter 9 'Deferring the time for payment').

86. If a TSA in respect of a particular group liability is executed after the head company's due time, it has no effect on any joint and several liability of the contributing members that may have arisen just after the head company's due time.

87. The Commissioner would not accept that a TSA, executed on a particular date, has effect from an earlier date. While the law enables a decision to consolidate to be effective from an earlier date, for example, 1 July 2002, there is no similar provision in respect of tax sharing agreements.

88. However, a valid TSA that is finalised just before the due time of a particular liability, covers that liability for the entire liability period; that is, a valid TSA that is finalised

by 30 November 2003 in relation to an annual assessment liability due on 1 December 2003 covers the period 1 July 2002 to 30 June 2003.

89. Further, a TSA that covers multiple periods and which has been executed on a particular date - but purports to have effect from an earlier date - would not be acceptable in relation to any debt that was due and payable prior to the date of execution. That in itself will not prevent it being accepted in relation to relevant debts that became due and payable after the date of execution.

G. Amending a TSA

90. The effect of 'amending' a TSA may be that a new or updated agreement replaces the previous agreement. Where an agreement covering multiple group liabilities (that is, multiple TSAs) is amended, taxpayers need to ensure that the 'old' TSA does not cease to have effect with respect to pre-existing liabilities and that any amended TSA does not create adverse consequences with respect to pre-existing liabilities or clear exit arrangements which have already taken place etc.

91. Tax Sharing Agreements may need to be amended for a number of reasons for example:

- the introduction of a new entity to the group
- the introduction of new entities after former entities have exited
- the interposition of a new Head Company.

92. Considerable care will be needed in drafting the original TSA if groups are to avoid (where possible) the necessity for all current and former TSA parties to sign all amendments and to ensure that the TSA remains valid. It will also be necessary to address (when drafting or redrafting) the impact of amended assessments on entities that were part of the group for a relevant tax period, even if not at the same time.

93. If it is intended to replace an existing TSA dealing with a particular group liability that has a future due date with a new TSA dealing with the same future liability, it should be clear that the new TSA completely voids the earlier TSA as otherwise it may be considered that the group liability is dealt with by two agreements and so both would be void by operation of subsection 721-25(1B) of the ITAA 1997. It also needs to be remembered that if the existing TSA is already dealing with pre-existing group liabilities, then the existing TSA is only void with respect to future liabilities, not with respect to pre-existing liabilities.

94. It is important to note that, if the Commissioner requires a TSA to be produced in relation to a particular group liability, taxpayers will need to produce the TSA *as it existed just prior to the due time of that relevant liability for the relevant period.* This will require careful attention to document controls.

H. Execution of TSAs by exited or liquidated members

95. As discussed above, for a TSA to be in the approved form it needs to be legally executed by or on behalf of each contributing member that is a party to the agreement.

96. If, before the head company's due time, a TSA is to be entered into or amended after an entity has left the group, and that entity needs to be a party to the TSA as otherwise:

- the exited entity could not obtain a clear exit; and possibly

- a reasonable allocation of the group liability could not be achieved.

The exited entity will need to execute the TSA along with the head company and the other TSA contributing members.

97. The failure of the exited member to be a party to the TSA will potentially result in all contributing members, including itself, being jointly and severally liable for the group liability should it remain unpaid (that is, the group liability would not be covered by a TSA). Similarly, any change to the methodology used in a TSA could mean that an entity that exited 'clear' before the change no longer has that status.

98. A difficulty arises if a TSA needs to be signed by a member that has been liquidated and thus no longer legally exists. Clearly that former member cannot sign the TSA nor can it authorise anyone to sign on its behalf.

99. Depending on the TSA methodology used and the financial position of the entity throughout the relevant tax period this may not be an issue. For instance, if the notional taxable incomes methodology was used in the TSA for the annual assessment group liability and the former member had a notional tax loss, notional nil taxable income or was dormant for the period, then an allocation of nil would have been reasonable so their inability to sign the TSA may not be material to the question of the reasonableness of the TSA. Note also that not every member of the group has to be a party to a TSA.

I. Determination of the contribution amount - the 'reasonable allocation'

100. The contribution amounts for each of the TSA contributing members in relation to the group liability must represent a reasonable allocation of the total amount of the group liability between the head company and the TSA contributing members **'just before the head company's due time'** - subsection 721-25(1) of the ITAA 1997.

101. This does not require the TSA to specify a 'particular amount'. It could show each TSA contributing member's contribution amount as:

- a fixed or variable percentage of the group liability
- an amount based on the 'notional' contributions to taxable income, or
- an amount based on some other formula.

However, if the TSA does not show each TSA contributing member's contribution amount as a specified sum, a schedule will need to be produced with a copy of the TSA, if and when required, showing the contribution amount for each TSA contributing member as determined by applying the method provided in the TSA relating to that group liability.

102. While the ultimate determination of what is a 'reasonable allocation' rests with the Courts, the Commissioner is mindful that one of the expected benefits of the consolidations regime was to avoid the need to calculate 'notional liabilities' of all members as if the group had not been formed. While some of the methods suggested below may require such calculations, they are not the only methods the Commissioner would consider as being examples of a reasonable basis for the allocation of a group liability.

103. Without prescribing the method that a group may adopt for allocation of the group liability, examples of what the Commissioner would consider as being possible bases of allocation are:

- Allocations of a proportion of unquantified group liabilities by using historical information if at the time a TSA is put in place the group liability or liabilities, which it is intended to cover, haven't been determined for example, a prospective TSA. For instance, the amount allocated to a TSA contributing member could be calculated using the average contribution of that entity to the group profits over the last 12 months.

However, changes in the consolidated group's structure, for example, because of entries and/or exits, or changes to individual member's operations, may mean that the contribution amounts calculated under this method would need to be adjusted to account for these movements. Depending on the timing and significance of these changes, a new TSA using a different methodology may need to be executed.

- Allocations on the basis of each contributing member's accounting profit as a percentage of the overall group accounting profit. Note that these *accounting* profits could be either before or after accounting consolidation elimination entries. Note also, that accounting loss companies could receive a 'nil' allocation and accounting profit companies would receive an allocation in proportion to their accounting profits.

- Allocations on the basis of each contributing member's ability to pay that liability. For instance, this could be based on the shareholder equity in each contributing member. However, if, at the time of allocation, the directors were aware that events would occur that would severely affect one or more member's ability to pay their allocation, but the directors ignored that information, then the allocation may be viewed as unreasonable.

  If it was the case that, at the head company's due time, the entire group lacked sufficient funds to meet the group liability, an allocation may be considered reasonable despite one or more TSA contributing members being incapable of paying their contribution amount (for example, the entire group was insolvent as opposed to only one or more contributing members being insolvent).

- Allocations on the basis of each contributing member's actual or expected contribution to that group liability. The requirement that the 'group liability' (no more and no less) be allocated would mean that tax losses of members need to be (notionally) transferred between group members so that the loss companies receive a "nil" allocation and the profitable companies receive an allocation of a share of the exact group liability.

  This approach might be summarised as follows:

  (i) determine the notional tax liability or notional taxable income for each TSA contributing member on the basis that the group was not a consolidated group

  (ii) apportion any notional tax losses to notional taxable companies or allocate the notional loss companies 'Nil' liability under the TSA, and

  (iii) allocate to each TSA contributing member (that still has a notional tax liability or taxable income) a portion of the group liability on a pro rata basis.

- If the taxpayer has opted to use the new PAYG instalments offset provisions in Section 721-25(1A) of the ITAA 1997, the net section 204 liability (that is net of PAYG instalments credits) could be allocated in proportion to the notional tax payable of the contributing member after deducting its PAYG amounts allocated under the TSA in respect of the relevant income year. In situations where the contributing member has

PAYG amounts allocated under the TSA greater than its notional tax payable, then it would receive a nil allocation of the net section 204 liability

- For PAYG instalments liabilities, it would be reasonable to use a proportional allocation of group PAYG instalments liabilities based on one-quarter of each entity's prior year notional tax liability (adjustments would be required to address entries and exits).
- Another example of how to proportionately allocate PAYG instalments liabilities might be by using a notional PAYG instalment for each entity for the quarter.
- PAYG instalments liabilities might also be allocated by using actual PAYG instalment income for each entity for the relevant quarter.

104. An allocation to a contributing member of 'nil' would be seen as 'reasonable' if the circumstances of that company warranted such an allocation, for example, 'tax loss' or 'accounting loss' companies, trustee companies of some super funds or employee share schemes.

105. These methods are not intended to be prescriptive and other methods using financial information normally available to the group may be acceptable. For example, unaudited profit figures could be used instead of notional tax liabilities.

106. It is accepted that allocations as outlined above may result in certain entities being liable for less than or more than they would if they were not members of a consolidated group.

J. Not a 'reasonable allocation' - example

107. If a group decides to use a methodology of allocation based on contributions to group profit, and certain members were excluded from the TSA, but those members were the major contributors to the group's profit, then the TSA would be seen as invalid in that it contains an unreasonable allocation of the group debt.

K. Consideration for head company's contribution

108. In some cases, for example where the head company is a contributor to the group's profits, the amount allocated to the TSA contributing members (other than the head company) may be less than 100% of the group liability because a portion of the group liability could be notionally attributable to the head company.

L. Amendment of a liability

109. For discussion on amended liabilities generally and their impact on the allocation of group liabilities under a TSA refer to the section 'Amendment of group liabilities' below.

M. Intra-group transactions

110. Generally, there is no need to adopt post-elimination entries in calculating the accounting profits on which a TSA may be based, but both pre and post elimination entries may be used.

111. Post elimination entries might be the better option to use in respect of dividends, but this is not mandatory. Dividend payments do not reduce the profit of the paying entity and these dividends could be streamed through a succession of companies. It

may be necessary to notionally reduce profits by dividend receipts to ensure that the final liabilities match the final group liability.

N. The final liability (on assessment)

112. The head company's liability for assessed income tax is a group liability and therefore can be covered by a TSA (refer item 25 in the table at subsection 721-10(2)) of the ITAA 1997.

113. The quantum of income tax is determined by reference to the taxable income less tax offsets (subsection 4-10(3) of the ITAA 1997). Although the entitlement to credit for PAYG instalments arises at the time of assessment of the relevant year's income tax, as it is not a tax offset it does not from part of the calculation of the assessed liability as such. That is, the credit entitlement and the assessed tax are separate and distinct sums.

114. However when allocating an assessed income tax liability under a TSA a group can choose to either allocate the total amount of the assessed tax payable or that amount less the PAYG instalment credits available to the head company (refer to subsection 721-25(1A)) of the ITAA 1997.

115. As it is only PAYG instalment credits that are specifically dealt with in subsection 721-25(1A) of the ITAA 1997 other credits which do not form part of the assessment, such as foreign tax credits and PAYG withholding credits, cannot be taken into account when determining the amount of the assessed income tax liability to be allocated under a TSA. A list of credits and rebates that form part of the assessment is attached at Appendix A.

116. Where it is decided to allocate (in the TSA) the assessed income tax liability without allowance for PAYG instalment credit entitlements, it is probable that the total of the TSA allocation of PAYG instalments plus the TSA allocation of the gross income tax liability may exceed the net amount payable by a subsidiary.

117. However, the amount owing by the head company is the net amount of final liability (ie tax payable less PAYG instalment and other credits), and the Commissioner cannot recover an amount greater than that from the head company and the subsidiaries. Accordingly, the Commissioner will only pursue that part of the gross tax TSA allocation to a subsidiary that is equal to or less than the net amount of the final group liability. If the TSA PAYG instalment allocation/s or any penalties is/are also unpaid, that amount will also be pursued.

118. It is also conceivable that an entity could be allocated a greater liability to PAYG instalments during a year under a TSA than its 'share' of gross tax on the final assessment under a TSA. In itself, this would not constitute an unreasonable allocation as the methodology used may be acceptable but the commercial fortunes of the company over time may have resulted in this scenario arising. For example, this could occur where the first three quarters of the year are extremely profitable and a sudden, severe loss occurs in the final quarter resulting in a refund on assessment to the head company because the PAYG instalment credits exceed the annual assessment. It is also conceivable that the methodology used in allocating PAYG instalments under the TSA differs from the methodology used for allocating the tax payable on assessment.

O.'Entire liability'

119. References in this chapter to the allocation of an 'entire liability' are references to the liabilities as listed in the table in section 721-10 of the ITAA 1997. It is

recognised that the financial position of individual companies may change between the date on which the TSA is executed and the date (if any) on which the contribution amount is pursued by the Commissioner. Accordingly, and in particular where the contribution amount is pursued some years after the due date, it is conceivable that a contributing member may not be able to pay the full contribution amount.

120. Provided that the original allocation was in accordance with the methodology of the TSA and was reasonable at the head company's due time and provided, also, that there are no adverse circumstances relating to the validity of the TSA (for example, the TSA was part of an arrangement to prejudice recovery), the Commissioner will recognise the TSA as being valid and would not be entitled to seek to recover any of the unpaid TSA contribution amount of that subsidiary from other subsidiaries.

P. Arithmetic errors

121. Accidental arithmetic errors in determining the actual TSA contribution amount for a member, by applying the TSA to the group liability, would not of themselves make the TSA allocation unreasonable. However, an adjustment would be required to the schedule to ensure that the correct liabilities were reflected. In respect of non-arithmetic mistakes, the Tax Office may also accept the TSA if the mistake is not material, but this would also depend largely on the circumstances of the case.

Q. International Financial Reporting Standards

122. If a TSA methodology is based on accounting performance and is applied to taxable income in a year where a company is required to keep comparative accounts under the International Financial Reporting Standards and the Australian Generally Accepted Accounting Principles, then allocations to members under the TSA can also be calculated using either accounting standard.

R. Other contractual arrangements in Tax Sharing Agreements

123. Groups may decide to use the TSA for other purposes. Provided those do not affect the reasonableness of the allocation under the TSA or prejudice the rights of the Commissioner to recover the debt, this would be of no concern to the Commissioner. For instance, if the group's *internal* arrangements for:

- financing ongoing tax liabilities (even if this requires different contributions from group members than would be ascertained under the 'reasonable allocation' clauses)
- the treatment of refunds received (see below), or
- the requirements for balancing adjustments between the TSA liabilities and tax liabilities as shown in entities' accounts

are included in the TSA, this is not relevant to determining whether there has been a 'reasonable allocation'. However, while a tax funding or other arrangement may have no bearing on the determination of whether there has been a 'reasonable allocation', if it is designed to frustrate the ability of a subsidiary to pay its TSA allocation, it would be seen to "prejudice recovery" under subsection 721-25(2) of the ITAA 1997. This is discussed further in the following paragraphs.

Tax sharing agreement part of an arrangement to prejudice recovery

124. As per subsection 721-25(2) of the ITAA 1997 a group liability is not covered by a TSA if:

- the TSA was entered into as part of an arrangement, and
- a purpose of the arrangement was to prejudice the recovery by the Commissioner of some or all of the amount of the group liability or liabilities of that kind.

125. Examples of such arrangements could be:

- where the allocation to a TSA contributing member was based on capacity to pay and seemed reasonable at the time the TSA was made and remained so at the head company's due time, but it was always known that, by the time the Commissioner may attempt to collect from that member, its circumstances would be such that it would not be in a position to meet its liability; and
- where the allocation to a TSA contributing member was based on notional tax liability, but the individual amounts were artificially distorted by selective allocations of losses, unwarranted administration or management fees, interest payments or other intra group transactions that appeared designed to shift the TSA liabilities to entities which are less likely to be able to pay the liability.

126. Some of the factors to be taken into account in determining whether an arrangement had a purpose of prejudicing recovery include:

- disposing of interests (while retaining control) in solvent or asset-rich members of the group to the extent that they are no longer considered to be part of the consolidated group
- allocation to members where a foreseeable event would cause it to become unable to pay for example litigation in progress, and
- uncommercial sale of assets.

127. The existence of a TSA in itself would not be seen as an arrangement to prejudice recovery.

Formal notice requesting a copy of a TSA

128. The notice to provide the TSA is issued to the head company and it is the head company's responsibility to provide the TSA. It is highly likely that the head company would be the only entity with the current TSA, because previous versions may have been superseded, and if it decides not to provide the TSA on request, that is an issue between the head company and the subsidiaries.

129. As the existence of a TSA has liability implications only at the head company's due time or the time an entity leaves the group, the Commissioner will not issue a notice under subsection 721-25(3) of the ITAA 1997 that requires the head company to provide a copy of that TSA at a time before those aforementioned dates. This is because, until those times (ie the leaving time or the head company's due time), a TSA may not exist.

130. The Commissioner may defer the time for lodgment of an approved form - in this case a TSA - through the operation of section 388-55 of Schedule 1 to the TAA. For the policy on deferring the lodgment time, refer to Chapter 55 'Deferral of the due date for lodgment or suspension of lodgment enforcement action'. In accordance with that policy, if the head company's due time has passed, a deferral of time to lodge the TSA would be very unlikely, particularly if delays would exacerbate the

recovery position or the group was non-cooperative in attending to its obligations. Generally, the granting of a deferral would be unlikely in cases other than where compliance could not be effected due to circumstances that were beyond the control of the head company and its officers. An example may be where a liquidator has been appointed and all the records of the group are unable to be located immediately.

131. It should be noted that a deferral of the time to provide a copy of a TSA does not alter the time that a TSA needs to be in place.

132. In some circumstances, such as when negotiating a payment arrangement, the Commissioner may informally request a copy of any TSA to which an entity is a signatory or request the TSA under section 353-10 of Schedule 1 to the TAA. These requests and the compliance or non-compliance by the requested party to provide a copy of a TSA have no impact on the liability status of the contributing members.

Commissioner's review of a TSA

133. As liabilities determined under a TSA are only enforced once a head company defaults on its obligations, the Commissioner does not expect to require the production of a significant number of TSAs. Further, while a TSA could provide a reasonable allocation of a group liability at a particular point of time, depending on the allocation methodology used, the reasonableness of the allocation may change due to later events. Accordingly, it would be of questionable benefit to taxpayers for the Commissioner to review TSAs as they are compiled and it would be administratively impossible to review all TSAs in a meaningful way in a reasonably brief time.

134. Accordingly, the fact that the Commissioner may have received a copy of a TSA (either informally or through a request under subsection 721-25(3) of the ITAA 1997) and has taken no further action does not imply that the Commissioner considers that the TSA is valid or provides a reasonable allocation of the relevant group liabilities.

135. Similarly, if the Commissioner took steps for recovery on the basis that there was a TSA as per section 721-25 of the ITAA 1997, but at some future point it is concluded that the particular group liability was not covered by a TSA, for example, because the allocation of the group liability under the TSA was not reasonable, the previous actions of the Commissioner do not prevent the law operating as if the group liability was not covered by a TSA (that is all contributing members are jointly and severally liable for the group liability).

Credits and refunds

136. Credits may arise in a number of circumstances for example from amended assessments, variations to PAYG instalments and remission of penalties. As it is the head company which is primarily liable under the law to pay group liabilities, it follows that it is the entity entitled to receive such credits. Therefore, any excess credit not applied against other liabilities is refundable to the head company.

137. However, the original group liability may have been paid by subsidiary members, including exited subsidiary members, under the joint and several liability provisions or the TSA provisions.

138. Where during a consolidation transitional year a subsidiary member is directly entitled to a credit under the law, for example under section 45-215 of the TAA as a

result of a varied instalment rate, that credit can only be applied against liabilities of the subsidiary member and any excess will be refunded to that subsidiary member.

Payment by a subsidiary to head company not sufficient

139. It should be noted that a payment made by a subsidiary to the head company does not extinguish the liability of a subsidiary to the Commissioner that is, the subsidiary could still be required to make a payment to the Commissioner of their TSA contribution amount or of a joint and several liability. This applies even if the amount paid to the head company equals what would be required under the TSA. (However, also refer to later commentary in the 'Clear exit' section).

140. For this reason, the characterisation of payments (to head companies or otherwise) may need to be considered by subsidiaries, for example, whether it is a loan, or paid in escrow.

Clear exit

141. In accordance with section 721-35 of the ITAA 1997, a TSA contributing member (the exited member) is able to leave a group clear of a specific group liability if:

- the actual liability was covered by a TSA to which it was a party
- it ceased to be a member of the group on or before the due date of the group liability, **and**
- before the leaving time, it had paid to the head company an amount equal to either the contribution amount or (if that amount could not be determined) a reasonable estimate of that amount.

142. Therefore, the following liabilities cannot be subject to the clear exit rules:

- a group liability not covered by a valid TSA, and
- a group liability which has already become, or is considered to be due and payable by the head company prior to the leaving time (for example, income tax under subsection 204(1A) of the ITAA 1936.

Summary of Tax Office collection action against exited entities

143. Broadly:

- An exited entity which has a joint and several liability for a group debt or amended debt that was due and payable prior to its exit will **generally** be pursued as a 'last resort' that is, if it is unlikely that the debt can be recovered from other entities (The law does not allow a clear exit in relation to this debt).
- An exited entity which has a TSA liability for a group debt that was due and payable **prior** to its exit will probably **need to be** pursued to enable full collection of the group debt. (The law does not allow a clear exit in relation to this debt).
- An exited entity which has a TSA liability for a group debt arising entirely from an amendment issued after the exit but that was due and payable **prior** to its exit will generally not be pursued unless its activities contributed to the need for the amendment or it had (notionally) used losses that were extinguished in whole or part by that amendment, **and** the wording in the TSA provides such a limitation. (The law does not allow a clear exit in relation to this debt).

- An exited entity which has a joint and several liability for a group debt that was due and payable **after** its exit will **generally** be pursued as a 'last resort' if it has **not** exited 'clear'.
- An exited entity which has a TSA liability for a group debt that was due and payable **after** its exit will **need to be** pursued to enable full collection of the group debt if it has **not** exited 'clear'.
- An exited entity which has a TSA liability for a group debt that was due and payable after its exit will **not be** pursued if it has exited 'clear'.
- An exited entity which has a TSA liability for a group debt arising entirely from an amendment issued and due and payable **after** its exit will not be pursued unless:
    - its activities contributed to the need for the amendment, or
    - it had (notionally) used losses that were extinguished in whole or part by that amendment, or
    - it had expected, or should have expected, that an amended assessment would issue, and
    - in any case the circumstances are such that this effected its clear exit.

Exit

144. A member will have exited from a group when it ceases to be a member of the group. Often, this will occur when the member departs from the group. There may, however, be other circumstances in which a member/members are considered to have exited from the group.

145. For example, when a group deconsolidates, all members of the group will each effectively have 'ceased to be a member of the group'. If the time of the deconsolidation (the 'leaving time' in this case) occurs before the due time of a group liability of that group, it is possible for the member to achieve a clear exit in respect of that liability by complying with the requirements of section 721-35 of the ITAA 1997.

146. In the scenario outlined in Subdivision 705-C of the ITAA 1997 which concerns the acquisition, or 'takeover' of a consolidated group by another, such an acquisition results in a deconsolidation of the *acquired* group because the head company of that group no longer qualifies as a 'head company' after the takeover.

147. In these cases, it is possible for a subsidiary member of that acquired group to achieve a clear exit in respect of a group liability incurred by that group where the due time of the liability has not yet passed at the date of the takeover. For the purposes of section 721-35 of the ITAA 1997, the 'leaving time' is the time of the takeover/ deconsolidation and the member must have paid its contribution amount, or reasonable estimate thereof, to the head company of that (acquired) group prior to this time.

Provision of a TSA by exited member

148. If an exiting member makes a payment of a reasonable estimate to the head company to cover its estimated liability under the TSA, that exiting company may still become jointly and severally liable for that group debt if the TSA is not provided by the head company as required under subsection 721-25(3) of the ITAA 1997.

149. However under subsection 721-15(3A) of the ITAA 1997:

- if a group liability is taken never to have been covered by a TSA due to the failure of the head company to give to the Commissioner a copy of the agreement as required under subsection 721-25(3) of the ITAA 1997, and
- the Commissioner gives the exited member a notice under subsection 721-15(5) of the ITAA 1997 in respect of the group liability (that is a notice determining the day on which the joint and several liability of a member becomes due and payable) and
- apart from the operation of subsection 721-25(3) of ITAA 1997 (the failure of the head company to give a copy of the TSA to the Commissioner) the exited member would have left the group clear of the group liability in accordance with section 721-35; and
- the exited member gives to the Commissioner a copy of the relevant TSA in the approved form within 14 days of the notice under subsection 721-15(5) of the ITAA 1997 being given

then the joint and several liability in respect of that particular contributing member is taken never to have arisen.

150. The provision by an exited member of a copy of a TSA in the approved form in accordance with subsection 721-15(3A) of the ITAA 1997 does not affect the joint and several liability of other contributing members, including other exited contributing members.

151. The provision by an exited member of a copy of a TSA in the approved form in accordance with subsection 721-15(3A) of the ITAA 1997 must meet the requirements set out above in the section titled 'Production of a valid TSA in the approved form - requirements to comply' adjusted as follows:

The schedule is to be signed by *the exited entity only* and must:

(i) specify the relevant liability or liabilities and period/s as specified in the Commissioner's *notice to pay*

(ii) state the name and ABN or ACN of the head company and the exited entity

(iii) state its contribution amount of the exited entity in respect of that liability or each of the liabilities, and

(iv) make a declaration that *'the schedule includes the names of the head company and the exited entity in relation to that liability or liabilities for those period/s and the exited entity's contribution amount or amounts as calculated under the TSA'* .

The only Deed of Assumption required (if it exists) is the Deed of Assumption signed by or on behalf of the exited entity.

TSA found to be invalid

152. If the TSA in respect of the group liability to which the exited member intended to leave clear of is found to be invalid (for example, because the allocation of the group liability was unreasonable), then the exited member will be jointly and severally liable for the total of the group liability.

153. This joint and several liability will arise regardless of whether the allocation under the TSA to the exited member itself was reasonable or the payment made in

accordance with section 721-35 of the ITAA 1997 would otherwise have enabled the entity to leave clear of the group liability.

Clear exit not limited by TSA methodology

154. A clear exit is available to a TSA contributing entity regardless of the allocation methodology used provided that the allocation is reasonable and the other requirements of the law are met that is, a payment of the relevant contributing amount or a reasonable estimate of that amount is made by the exiting entity to the head company prior to exit.

Reasonable estimate of contribution amount

155. If an exiting entity wishes to leave the group clear of a particular group liability and before the leaving time its contribution amount for that group liability cannot be determined, a reasonable estimate of that contribution amount must be made. The reasonableness of the estimate will be determined, and depends on the circumstances, at the time of the exit.

156. For a reasonable estimate of the contribution amount to be made, the estimate needs to relate to, and be based on, the relevant TSA.

157. Other methods could make use of actual income figures, projected cash flows or a combination of this data from group accounts or the member's own accounts.

158. Where a notional income methodology is used and there is prior knowledge of an event which may impact on the reasonableness of the amount, then this needs to be factored into the estimate calculation. Such events could include:

- adjustments for taxable extraordinary or abnormal transactions
- an audit (or notice of an intended audit) by the Tax Office, the result of which would require that the subsidiary modify its treatment of certain transactions, or
- pending court cases that may impact on the subsidiary's financial or taxation position.

159. The contribution amount (or reasonable estimate of that contribution amount) required to be paid will in most cases need to be calculated in consultation with the head company. The head company will have access to group records and greater knowledge of the expected quantum of the relevant group liability as well as the exiting member's likely allocation under a TSA.

Payment of contribution amount to head company on exit

160. Documentary evidence that the leaving member had paid to the head company the contribution amount, or a reasonable estimate of that amount, would need to be retained by the leaving entity in the event that it is later needed to prove that it had left the group clear of a particular group liability. Generally, standard commercial documentation would suffice.

161. If a payment is meant to cover two liabilities, for example, the fourth quarter PAYG instalment and the final income tax liability, then accounting records should disclose the amount of each component.

162. If payment of an amount is made to the head company by the leaving entity as required by paragraph 721-35(c) of the ITAA 1997, and the head company

subsequently fails to pay this amount to the Commissioner, this alone does not affect the clear exit of the entity.

163. The payment of the reasonable estimate needs to be made by the 'leaving time' which, for the purposes of this provision, will mean that the transfer of the payment must be made prior to the date that the entity can no longer be a member of the group.

164. The term 'paid' has been considered in case law (for example, *Brookton Co-operative Society Ltd v. FCT* (1981) ATC 4346) and may mean:

- an actual payment, that is, a sum of money or a bill of exchange, is handed over directly to a head company to extinguish a liability
- a payment by agreed set-off where cross-liabilities in money exist (see Spargo's case; *Re Harmony and Montague Tin and Copper Mining Co.* (1873) 8 Ch. App. 407 and *FC of T. v. Steeves Agnew & Co. (Vic.) Pty Ltd* (1951) 82 CLR 408 at 420-1), or
- a transfer of property other than money or a bill of exchange, that is by a transfer in kind.

165. In regard to the above points it must be remembered that paragraph 721-35(c) of the ITAA 1997 requires payment to be made by the leaving TSA contributing member to the head company. Therefore, payment made by the purchaser or payment made to a vendor, being an entity other than the head company, would not meet the statutory requirement.

166. A 'mere book entry' is not considered a form of payment. Any such book entry must result from a clear contractual arrangement between the parties which establishes a debt. (*Manzi v. Smith* (1975) 49 ALJR 376 at 377; 7 ALR 685 at 687-688; see also *Commissioner of Stamp Duties (NSW) v. Perpetual Trustee Co Ltd (Saxton's Case)* (1929) 43 CLR 247). The establishment and recording of a debt cannot be considered as payment.

Contribution amount 'nil'

167. If the contribution amount (or the reasonable estimate of that amount) that otherwise would be required to be paid to the head company under section 721-35 of the ITAA 1997 is determined to be 'nil' then no payment is necessary to allow the exiting member to leave the group clear of the relevant group liability. However, documentation demonstrating the calculation of the 'nil' amount would need to be retained to support the assertion of a clear exit should that claim later need to proved to the Commissioner or a court.

Adjustment of contribution amount upon completion of sale

168. Payment of the contribution amount to the head company must occur before the leaving time. However, it may not be until after the leaving time that all accounts relating to the sale of the exiting member are completed. Only then may it be realised that the contribution paid to the head company was too much or too little compared to the actual contribution amount as calculated under the TSA at a later date.

169. If the estimate of the contribution amount paid to the head company was found to be too much, then a repayment by the head company to the exited member (or the purchaser) can occur without impacting on any clear exit, provided the resulting net amount paid to the head company still represents a reasonable estimate of that contribution amount.

170. As the contribution amount needs to be paid to the head company before the leaving time any extra amounts paid by the exited member after the leaving time cannot be taken into account when determining whether the amount paid was a reasonable estimate of the contribution amount. That is not to say that if an adjustment amount is required to be paid by the exited member to the head company under their own contractual arrangements, that the original amount paid was not a reasonable estimate of the contribution amount.

Reasonable estimate of contribution amount different to final contribution amount calculated under TSA

171. If the 'reasonable estimate' of the contribution amount paid to the head company before the leaving time is less than the contribution amount that was later determined under the TSA just before the company's due time (for example, when all data is available for determination of the various contribution amounts), there is no need to make any compensatory adjustments to the contribution amounts of any other TSA contributing members to make up the shortfall.

172. For example, if the exiting entity leaves the group on 1 September and makes a reasonable estimate that its annual assessment contribution for the year under the TSA would be $125,000, but upon completion of the yearly income tax return and applying the TSA the amount should have been $125,500, there is no need to reallocate the additional '$500' to other members.

173. No adjustment is necessary to the other TSA contributing members' contribution amounts as under the TSA an amount would still be allocated to the exited TSA contributing member. However a reallocation of this amount in the TSA to other members would not, in itself, invalidate the TSA. If this amount (notwithstanding that it is more than the amount paid to the head company under the clear exit rules) and the other allocations represented a reasonable allocation of the total amount of the group liability, then the requirements in paragraph 721-25(1)(c) of the ITAA 1997 would be met.

174. On the other hand one element of the clear exit test is that the amount paid to the head company is a reasonable estimate of the exiting TSA contributing member's contribution amount. Therefore, providing the amount paid to the head company at the time of exit can be shown to be a reasonable estimate of the final contribution amount then a clear exit is still possible.

If leaving the group prejudices recovery

175. A TSA contributing member will not leave the group 'clear' of a group liability if the cessation of membership was part of an arrangement, a purpose of which was to prejudice the recovery by the Commissioner of some or all of the amount of the group liability or liabilities.

176. An example of such an arrangement may be where an entity has been sold for less than its market value. The intent of the arrangement is the relevant consideration.

177. The sale of the business of a company for fair market value rather than a company itself is not, in itself, considered part of an arrangement designed to prejudice the recovery by the Commissioner.

Amended liabilities - effect on exited members

178. An amended assessment can affect an exited member:

- by requiring a further payment towards a debt that is deemed due and payable before the member left the group, and
- by affecting whether there has been a 'clear exit'.

179. For discussion on amended liabilities generally and the impact on clear exit refer to the section 'Amendment of group liabilities' below.

Commissioner's review of a clear exit

180. The Commissioner may at any time review claims that an entity has left the group clear of a group liability and, if necessary, take action against that entity if it is considered that it had not actually left clear of the liability. However, the Commissioner is not in the position to review an exit on request of the entity or other interested parties to verify that an entity exited 'clear'.

Amendment of group liabilities

181. If a group liability previously notified or assessed is found to be incorrect it may be necessary to amend the amount payable. A common example is where an amended income tax assessment is issued following a request by the taxpayer or an audit by the Commissioner.

182. For income tax assessments in relation to the years ended 2003–04 and prior, amendments to the originally notified liabilities do not alter the time the amended liabilities become due and payable. That is, the date the amended liability is due and payable remains the same as the due date of the liability stated in the original assessment, despite the fact that the amended assessment was issued after that original due date.

183. However, for income tax assessments in relation to the years 2004–05 and later income years, the due date for amended assessments is 21 days from when the taxpayer is given notification of the amendment.

184. All contributing members (that is, entities who were members of the group during all or part of the period to which the liability relates which includes those entities that have since left the group) are potentially exposed to the amended liability.

Amended liability not covered by a TSA

185. Where the amended group liability is not covered by a TSA then all contributing members would be jointly and severally liable for the entire group liability.

Amended liability covered by a TSA

186. Despite the fact that, for 2004–05 and later income years, an amended assessment has a different due date from the due date of the original assessment, both assessments relate to the same group liability. As such, there must be only one TSA dealing with the debts arising from both original and amended assessments. The TSA must be in existence before the due time of the original assessment.

187. A liability resulting from an amendment will be considered to be addressed by a TSA if the TSA refers to the underlying liability to which the amendment relates. For example, a reference to a 'group liability for income tax relating to the year ended 30 June 2003' would also encompass any amendment to that liability, provided fixed amounts weren't specified elsewhere in the body of the TSA.

188. If, for example, the notional tax methodology outlined in the TSA section is used as the basis for allocation under a TSA, the effect would be to allocate the increased liability from the amendment to those entities whose transactions resulted in the amendment. This additional allocation may be an indirect allocation if losses are reduced in one company and, therefore, those companies that used those losses will have their incomes increased.

189. If other methods are used, for example, the group liability is allocated using either the pre- or post-tax accounting methodologies, then a liability arising from an amendment will be allocated to all members with an accounting profit, regardless of whether the amendment related to their transactions.

190. In such cases, it would not be considered unreasonable if a clause in a TSA provided that any amount of increased liability arising from an amendment is allocated to those entities whose allocations from the original assessment were understated. It is important to note two issues:

- this would mean that if losses are disallowed in one company then those companies that 'used' those losses would be affected as well as the loss company itself, and
- the TSA must be internally consistent, that is, this clause cannot contradict the other clauses allocating the original amount of liability.

191. It is conceivable that the Commissioner may have required the production of the TSA prior to issuing the amended assessment because the original assessment was also unpaid. Accordingly, it is unlikely that any schedule showing the actual TSA liabilities derived from the application of the TSA methodology to the original group liability would include the distribution of the amended liability.

192. For assessments relating to the income tax years 2003–04 and prior (where the original due date and the amended due date are the same), the Commissioner may require the production of the TSA with an amended schedule within 14 days of the amendment issuing showing the distributions to members arising from the TSA methodology being applied to the debt arising from the amended assessment. For assessments relating to the income tax year 2004–05 and later years, the Commissioner may require the production of the TSA with an amended schedule within 14 days of the (new) due date of the amended assessment.

Amended liability and clear exit

193. As a general principle, the effect of any amendment on a clear exit could be due to:

- the allocation under that TSA no longer being considered reasonable and thus invalidating the TSA, for example, if the original allocation was of a specific amount or based on the specific taxable income of the group, or
- the amount paid by the exited entity no longer being considered a reasonable estimate, for example, the amendment was due to its activities and it ought to have been aware of the possible amendment at the time of leaving that is, it was unlikely that the directors actually believed they were making a 'reasonable estimate' in view of other matters known to them but not other relevant parties.

194. Note that if the exited entity had no knowledge of other entities' activities that led to the amendment, then its clear exit may be unaffected, that is, it still may have paid a reasonable estimate of its liability at the time of leaving.

195. A TSA will not be considered to have made an unreasonable allocation because it limits the exposure of an exited entity under an amendment of the head company assessment to that part of the increased debt that arose from the exited member's own activities. The term 'own activities' would need to include the inability to further use losses transferred to it from another group member regardless of the origin of those losses.

196. For amended assessments issued in respect of the income years 2003–04 and prior, in which the due dates of the original and amended assessments are the same, the position of an exiting TSA contributing member is as follows:

- <u>If the entity leaves the group *before* the due time of *both* the original *and* amended assessments</u>, any payment it made to the head company prior to its exit ***may not*** be sufficient to gain a clear exit if it does not take into account the increase in its contribution amount following the amended assessment.

  A clear exit can only be achieved in this case if the entity made a payment of that contribution amount, or a reasonable estimate of that amount, to the head company prior to its departure.

  A clear exit may also be obtained if the entity could not have expected that an amended assessment would issue at a later time and makes a payment of its *pre-amendment* contribution amount, or a reasonable estimate of that amount - that is, it doesn't contribute to, and could not have expected, the increased amount arising from the amendment.

  As to whether the entity could have expected an amended assessment, note paragraph 159. Usually, the exiting entity will need to consult with the head company in calculating its contribution amount or a reasonable estimate of that amount. The head company will often be in a better position to anticipate any future amended assessments of the group liability and, therefore, to advise accordingly of any likely increase in the contribution amount. However, an unexpected amended assessment resulting, for example, from undisclosed activities of another subsidiary of which neither the exiting entity nor the head company were (at the time of exit) aware, may not affect the 'reasonableness' of the entity's pre-amendment contribution amount.

  Conversely, a clear exit would not be obtained if the entity could have expected that an amended assessment would issue at later time and doesn't make any contribution on exit towards the additional liability.

- <u>If the entity leaves the group at any time *after* the due time of the original assessment of the relevant group liability</u>, the clear exit provisions will not apply to that liability. This is even if the amended assessment may not yet have issued at the time of departure.

  This is because section 721–35 of the ITAA 1997 requires the 'leaving time' of the entity to be '*before* the head company's due time' for that group liability. For income years 2003–04 and prior, the due date of amended assessments is the same date as the due date of the original assessment. Therefore, an entity that departs *after* this date cannot achieve a clear exit for that liability.

- <u>If the contribution amount for the entity is a fixed sum under the TSA, and does not allow for a variation following the issue of an amended assessment, the allocation may not be considered to be 'reasonable'</u>

pursuant to paragraph 721-25(1)(c) of the ITAA 1997. The group liability in question may therefore not be taken to be covered by the TSA.

197. For amended liabilities in respect of income years 2004–05 and later (where the due and payable date of amended assessments is 21 days after notification of the amendment) a company which left the group between the due date of the original assessment and the due date of the amendment can achieve a clear exit in relation to the amount of the amended assessment in certain limited circumstances:

- If the entity leaves the group before the due time of *both* the original and amended assessments, its 'clear exit' position is similar to the position of an entity in relation to 2003-04 and earlier income tax assessments.
- However, an entity that leaves the group *after* the due time of the original assessment, but *before* the amended assessment is due, may still have the benefit of the clear exit provisions in respect of amended assessments for 2004–05 and later years.

  This is because the due time of an amended assessment for these years is prospective, such that the leaving time of an entity in this situation can be said to be 'before the head company's due time'.

  A clear exit can be achieved in this case if the entity made a payment of its (anticipated) *post-amendment* contribution amount (that is, the contribution amount that takes into account the anticipated amended assessment), or a reasonable estimate of that amount, to the head company prior to its departure.

  However, if payment was not made of this amount before the leaving time of the entity, then clear exit would not be achieved in respect of that debt.

198. Note the distinction drawn between 'liability' and 'amounts payable' in paragraph 69. Note also paragraphs 141 et seq for the other requirements to achieve a 'clear exit' and in particular, 154 et seq for factors to be considered when calculating and making the payment of a reasonable estimate (of the exiting entities contribution to the amended assessment amount) on exit.

Allocation of payments received by the Commissioner

199. The Commissioner may receive payments from the head company or, following a demand being issued to a subsidiary member, from that member. Payments in respect of group liabilities or TSA contribution amounts by the head company or subsidiary members will be allocated as follows:

- a payment to the Commissioner by a subsidiary member where an effective TSA exists will be offset against that subsidiary member's liability and the head company liability
- a payment to the Commissioner by a subsidiary member where members are jointly and severally liable will be offset against all subsidiary members' liabilities and the head company liability
- a payment to the Commissioner by the head company where members are jointly and severally liable will be offset against the head company liability and all the subsidiary members' liabilities, and
- a payment to the Commissioner by the head company where an effective TSA exists will be offset against the head company liability and the subsidiary members' liabilities but only to the extent that it reduces each subsidiary member's liability to an amount equalling the (reduced) head

company liability (that is, in some cases there will be no reduction in the subsidiary member's liability).

200. The total amount recovered from the members of the group will be no more than the head company liability plus associated GIC.

Franking account consequences of payment

201. Generally, the franking accounts of subsidiaries become inactive on joining a consolidated group.

202. Item 2 of the table in section 205-15 of the ITAA 1997 provides that a franking credit arises in the franking account of an entity if the entity pays income tax, satisfies the residency requirement and is a franking entity. The credit arises on the day on which the payment is made. Subsection 205-20(3) provides that an entity is taken to pay income tax if it has a liability to pay the tax and either pays it or applies a credit or an RBA surplus to reduce the liability.

203. However, section 709-65 of the ITAA 1997 provides that a subsidiary member's franking account does not operate during the period that it is a member of a consolidated group. Section 709-70 then provides that if a credit would have arisen in the franking account of a subsidiary if that account were not made inoperative because of section 709-65, then a credit of the equivalent amount arises instead in the head company's franking account. It should be noted that the payment of a TSA debt is not a payment of income tax regardless of the underlying liability covered by the TSA.

Payment of deferred COIN or pre-consolidation income tax liabilities by a subsidiary

204. Where a subsidiary pays a liability for income tax attributable to the period before it became a subsidiary member of a consolidated group (for example, any deferred Company instalments payments), no credit arises in the subsidiary's franking account but, instead the credit arises in the head company's franking account.

General interest charge

205. If the head company fails to pay a group liability by the due and payable date, GIC will accrue under the normal provisions. For example, if a PAYG instalment is not paid by the due date, the combination of section 45-80 of Schedule 1 to the TAA and Division 1 of Part IIA of the TAA imposes daily the general interest charge on the head company up until the time the group liability and the GIC is paid in full.

206. Requests for remission of the GIC will be considered in accordance with the policy in Chapter 93 'General interest charge'. When considering requests for remission, the circumstances of the entire group may be taken into account. It would be unusual for the Commissioner to grant such a remission where the group continually neglects to make adequate arrangements to ensure that the group's taxation liabilities are met on time.

207. Any GIC payable by the head company that is relevant to another group liability is a group liability itself. It follows that GIC can be subject to a TSA. Should the head company fail to pay the GIC and that GIC liability is not covered by a TSA, each contributing member would be jointly and severally liable.

208. If the Commissioner gives a contributing member written notice under subsection 721-15(5) of the ITAA 1997 of a group liability that is GIC, the joint and several liability relating to the GIC becomes due and payable at the end of the day the written notice is given. (Note: for other types of group debts, a joint and several

liability does not become due and payable until 14 days after the subsection 721-15(5) notice is given.)

209. In addition, section 721-17 of the ITAA 1997 provides that the contributing member's joint and several liability relating to any GIC that the head company may continue to incur in respect of the same unpaid group liability becomes due and payable each subsequent day without the need for a further subsection 721-15(5) notice to be given.

210. Alternatively, if the GIC group liability is covered by a TSA, the liability of the TSA contributing members would be calculated in accordance with the terms of that TSA.

211. The liability of a TSA contributing member relating to a group liability that is GIC, becomes due and payable at the end of the day on which the Commissioner gives the member written notice under subsection 721-30(5) of the ITAA 1997. (Note: for other types of group debts the liability under a TSA does not become due and payable until 14 days after the subsection 721-30(5) notice is given.)

212. Further, section 721-32 of the ITAA 1997 provides that liabilities arising under a TSA in respect of GIC that the head company may continue to incur in respect of the same unpaid group liability, become due and payable by a TSA contributing member each subsequent day without the need for a further subsection 721-15(5) notice to be given.

213. A contributing member has no standing to seek a remission of the head company's GIC. Although the liability of the contributing member may be attributable to GIC payable by the head company, there is no legislative basis for remitting that portion of the contributing member's liability as if it were GIC.

214. Should a remission of the head company's GIC occur, the liability of the contributing members will be reduced accordingly.

215. Special considerations apply to the remission of GIC and tax shortfall penalties where a group seeks an amendment to its 2003-04 and prior income tax assessments as a result of one of the following circumstances:

- in respect of the 2002–03 year of income, the group has incorrectly applied law that was enacted by the time of lodgment of its original 2002–03 return
- in respect of the 2002–03 year of income, the group has relied upon announced but unenacted changes when lodging its original 2002–03 return
- the group has followed an ATO view provided in the Consolidation Reference Manual or similar product in its original return
- the group has followed a ruling or determination in its original return, or
- the group waited for a public ruling or determination before lodging an amendment request.

216. In any such circumstances, reference will be made to the particular considerations specified in Law Administration Practice Statement PS LA 2005/9 in the determination of whether a remission should be granted, and, if so, the extent of the remission.

Notification to liquidators and receivers

217. When a company in liquidation is, or has been, a member of a consolidated group, the Commissioner will include in the notification required to be given to the

liquidator under subsection 260-45(3) of the TAA any liability the company has incurred as head company or as a contributing member under the joint and several liability and TSA liability provisions.

218. A subsection 260-45(3) notice will not be provided until the Commissioner is satisfied that all liabilities to which the company may be exposed have been established or otherwise forms the view that no other liabilities will arise.

219. If a copy of a TSA and an estimate of the TSA liability/ies of that entity under the TSA/s is requested to enable the issue of a notice under subsection 260-45(3) of the TAA, generally it will be requested on an informal basis from either the liquidator or the head company, but may be requested formally using the powers under section 353-10 of Schedule 1 to the TAA. The provision of the TSA and the estimate of the insolvent entity's share of the group liabilities may assist in reducing the Commissioner's claims in the administration for the benefit of other creditors, and as well as expediting the administration.

220. These considerations also apply to the issue of a subsection 260-75(3) of the TAA notice to receivers and to the lodgment of Proofs of debt in insolvency administrations.

Goods and Services Tax and Division 721

221. In certain circumstances, where an entity:

- makes a supply because it enters into a valid TSA or into a tax funding agreement, or
- receives a supply because it is released from an obligation to pay a contribution amount when obtaining a 'clear exit'

those supplies are not taxable supplies to the extent outlined in sections 110-20 to 110-30 of the *A New Tax System (Goods and Services Tax) Act 1999*.

TERMS USED

Contributing member – is an entity that was a subsidiary member of a group for at least part of the period to which the group liability relates.

Contribution amount – in respect of a particular group liability is the amount allocated to a TSA contributing member under a TSA.

Group liability – is one of the tax-related liabilities referred to in subsection 721-10(2) of the ITAA 1997. A group liability includes a PAYG instalment and an annual income tax assessment.

Head company's due time – is the time a group liability becomes due and payable by the head company.

Leaving time – is the time a member ceased to be a member of a group.

TSA contributing member – is a contributing member that is a party to a TSA.

APPENDIX A

Tax offsets that form part of the assessment - Tax offsets/rebates

- tax offsets in relation to franked distributions received either directly or indirectly through partnerships and trusts. (Division 207 of the ITAA 1997)
- tax offsets for bonuses and certain other amounts received under short-term life insurance policies taken out after 27 August 1982. (Section 160AAB of the ITAA 1936)
- tax offsets for interest on certain government and semi-government securities issued before 1 November 1968. (Sec.160AB of the ITAA 1936)
- tax offsets to resident lenders for interest derived from approved borrowings for infrastructure projects under the land transport facilities tax offset scheme. (Division 396 of the ITAA1997)
- tax offsets for interest derived from approved pre-14 February 1997 infrastructure borrowings where the lender has elected to include interest in assessable income. (Division 16L of the ITAA 1936)
- franking deficit tax offset. (Section 205-70 of the ITAA 1997)
- R&D tax offset. (Section 73I of the ITAA 1936)
- film tax offset. (Division 376 of the ITAA 1997)

Tax offsets that do not form part of an assessment - Tax offsets/Credits

- foreign tax credits. (Division 18 of the ITAA 1936)
- credits in respect of overseas tax paid on certain film income. (Division 18A of the ITAA 1936)
- credits in respect of overseas tax paid on certain shipping income (Division 18B of the ITAA 1936)
- credits allowable by virtue of the International Tax Agreements Act 1953.

Other credits that are not tax offsets and which do not form part of an assessment

- credit for PAYG instalments
- credit for interest on early payments
- credit for tax withheld where ABN not quoted
- credit for amounts withheld from investment income by an investment body because the company did not provide a TFN or ABN
- a company's share of credit from a partnership or trust for tax withheld where an ABN was not quoted.

Chapter 35 - Archived version

Version 4 – July 2006 (will link to chapter 35 pdf)