

TD 2003/D9 - Income tax: When an additional tax loss is transferred pursuant to Subdivision 170-A of the Income Tax Assessment Act 1997 ('ITAA 1997') from the same 'loss company' to the same 'income company' in respect of the same income year as a previous loss transfer what is the amount to be specified in the written agreement to be made under paragraph 170-50(2)(b) of the ITAA 1997 for that transfer?

 This cover sheet is provided for information only. It does not form part of *TD 2003/D9 - Income tax: When an additional tax loss is transferred pursuant to Subdivision 170-A of the Income Tax Assessment Act 1997 ('ITAA 1997') from the same 'loss company' to the same 'income company' in respect of the same income year as a previous loss transfer what is the amount to be specified in the written agreement to be made under paragraph 170-50(2)(b) of the ITAA 1997 for that transfer?*

This document has been finalised by TD 2003/23.

Draft Taxation Determination

Income tax: When an additional tax loss is transferred pursuant to Subdivision 170-A of the *Income Tax Assessment Act 1997* ('ITAA 1997') from the same 'loss company' to the same 'income company' in respect of the same income year as a previous loss transfer what is the amount to be specified in the written agreement to be made under paragraph 170-50(2)(b) of the ITAA 1997 for that transfer?

Preamble

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

Answer

1. The further agreement should only specify the **additional** amount of tax loss being transferred.

Explanation

2. Paragraph 10 of Taxation Ruling TR 98/12 states that:
'A loss company may also enter into a further transfer document with an income company to which it has already transferred a part of its loss in the relevant income year. This is on the condition that a part of the total loss remains available for transfer and there is sufficient net assessable income within the income company to absorb the additional transfer. ...'
3. A further agreement cannot involve the revocation of any prior agreement between the relevant companies. As explained in paragraph 11 of TR 98/12:
'...There is no provision within section 80G (Subdivision 170-A) that permits the revocation of a valid transfer document...'
4. Any amount of tax loss transferred by the loss company is deemed not to have been incurred by the loss company to the extent of that amount (subsection 170-20(2) of the ITAA 1997) and therefore cannot be included in any further agreement. Thus the further

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agreement is a completely separate agreement from the initial agreement between the loss company and the income company.

5. To the extent that the principles in Subdivision 170-A are the same as those in:

- Subdivision 170-B of the ITAA 1997 (in respect of net capital losses);
- Section 80G of the ITAA 1936; or
- Section 160ZP of the ITAA 1936;

the above discussion of Subdivision 170-A applies equally to that provision.

Examples

(i) *'Increased income example' - Further Loss Transfer Agreement made on or before the day of lodgement of the income company's income tax return for the deduction year:*

- J Pty Ltd and T Pty Ltd are members of the same wholly owned group at all material times;
- J Pty Ltd had a tax loss available for transfer of \$2,000,000 in respect of an income year preceding the deduction year (for the deduction year it had neither a taxable income nor a tax loss);
- T Pty Ltd had a net assessable income of \$1,500,000 for the deduction year, prior to any loss transfer from J Pty Ltd; and
- Before the lodgement of T Pty Ltd's income tax return J Pty Ltd and T Pty Ltd entered into a loss transfer agreement for \$1,500,000.

Before the lodgement of T Pty Ltd's income tax return T Pty Ltd realised its net assessable income should have been \$1,750,000. J Pty Ltd and T Pty Ltd then agreed to make a further loss transfer.

For the purposes of paragraph 170-50(2)(b) the further loss transfer agreement should specify the amount of tax loss being transferred as \$250,000 **and not** \$1,750,000.

(ii) *'Increased tax loss example' - Further Loss Transfer Agreement made after the day of lodgement of the income company's income tax return for the deduction year:*

- D Pty Ltd and W Pty Ltd are members of the same wholly owned group at all material times;
- D Pty Ltd had a tax loss available for transfer of \$1,000,000 in respect of an income year preceding the deduction year (for the deduction year it had neither a taxable income nor a tax loss);
- W Pty Ltd had a net assessable income of \$1,250,000 for the deduction year, prior to any loss transfer from D Pty Ltd;

- Pursuant to Subdivision 170-A the companies entered into a valid loss transfer agreement whereby D Pty Ltd transferred all of its available tax loss (i.e. \$1,000,000) to W Pty Ltd. W Pty Ltd's taxable income was therefore \$250,000; and
- After the lodgement of the income company's income tax return for the deduction year D Pty Ltd realised that its tax loss should have been \$1,100,000 as it had inadvertently understated its deductions by \$100,000.

The companies then requested further time within which to make a loss transfer agreement for the transfer of an amount of tax loss of \$100,000 from D Pty Ltd to W Pty Ltd. Having regard to the facts of the case the Commissioner allows the extension of time to make the transfer.

For the purposes of paragraph 170-50(2)(b) the further loss transfer agreement should specify the amount of tax loss being transferred as \$100,000 **and not** \$1,100,000.

Date of Effect

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

Your comments

7. We invite you to comment on this draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

Comments by Date: 11 June 2003

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Commissioner of Taxation

14 May 2003

Previous draft:

Not previously issued in draft form

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Related Rulings/Determinations:

TR 92/20; TR 98/12

Subject references:

- accumulated tax losses
- capital losses
- carry forward losses
- Commissioner's discretion
- companies
- company losses
- current year losses
- group companies
- group company loss transfers
- group company transfers
- holding companies
- losses
- net capital losses
- parent companies
- prior year losses
- subsidiary companies

Legislative references:

- ITAA 1997 170-20(2)
- ITAA 1997 170-50(2)(b)
- ITAA 1997 170-50(2)(d)
- ITAA 1997 Subdiv 170-A
- ITAA 1997 Subdiv 170-B
- ITAA 1936 80G
- ITAA 1936 160ZP
- TAA 1953 Part IVAAA

ATO references

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