


TD 2005/D16 - Income tax: consolidation: can the transferee make more than one choice, under subsection 707-327(4) of the Income Tax (Transitional Provisions) Act 1997, to treat a value donor's loss as being included in another bundle of losses?

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This document has been finalised by TD 2005/51.



Draft Taxation Determination

Income tax: consolidation: can the transferee make more than one choice, under subsection 707-327(4) of the *Income Tax (Transitional Provisions) Act 1997*, to treat a value donor's loss as being included in another bundle of losses?

Preamble

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

1. No. Only one choice can be made by the transferee¹ under subsection 707-327(4) of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997), to treat a loss of the value donor as if it is included in a bundle of losses transferred from a real loss-maker.
2. Subdivision 707-C of the IT(TP)A 1997 contains the value and loss donor rules. The value donor rules allow the available fraction² for a bundle of losses³ transferred from an entity ('the real loss-maker'), under Subdivision 707-A of the *Income Tax Assessment Act 1997* (ITAA 1997), to be worked out as if an amount of the modified market value⁴ of another entity ('the value donor') were added to the modified market value of the real loss-maker. The loss donor rules allow a loss of the value donor to be treated as if it is included in the bundle of losses transferred from the real loss-maker, for the purposes of utilising the loss.
3. Subsections 707-327(1) to (3) of the IT(TP)A 1997 state the conditions that need to be satisfied in order for a choice to be made to treat a loss of the value donor as being included in the bundle of losses of the real loss-maker.

¹ The transferee mentioned in subsection 707-325(1) of the IT(TP)A 1997, will generally be the head company of a consolidated group or the head company of a MEC group.

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

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

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

4. Subsection 707-327(4) of the IT(TP)A 1997 states:

If the transferee mentioned in subsection 707-325(1) chooses, sections 707-310, 707-335 (except paragraph 707-335(2)(a)) and 707-340 of the *Income Tax Assessment Act 1997* (and subsections 707-315(3) and (4) of that Act, so far as they relate to those sections) operate as if, at the initial transfer time:

- (a) the bundle of losses included the loss; and
- (b) the loss was not included in any other bundle of losses.

Note: This section has the effect that the utilisation of the loss will be affected by the available fraction for the bundle of losses.

5. Subsection 707-327(5) of the IT(TP)A 1997 specifies the time period within which the choice has to be made and can be revoked.

6. Where the choice has been made by the transferee to treat the loss as if it is included in a bundle of losses transferred from a real loss-maker, and the time in which to revoke that choice has passed, an alternative choice cannot be made to include the loss in another bundle transferred from a different real loss-maker. The key effect of making a choice under subsection 707-327(4) of the IT(TP)A 1997 is to treat the loss as being included in the bundle of losses transferred from the real loss-maker to the exclusion of all other bundles of losses including that of the value donor itself (see paragraphs 707-327(4)(a) and (b)). The choice can therefore be only exercised once in respect of each loss of the value donor and only in favour of the particular real loss-maker's bundle of losses that is chosen.

Example

7. *Head Co forms a consolidated group on 1 July 2003. Donor Co and Loss Co are subsidiary members at the time that the consolidated group is formed.*

8. *Tax losses are transferred, under Subdivision 707-A of the ITAA 1997, from Head Co and Loss Co to Head Co (as the head company of the consolidated group) at the time the group forms. Also, a net capital loss is transferred, under Subdivision 707-A, from Donor Co to Head Co at the time the group forms.*

9. *Head Co chooses (as the remaining conditions in subsections 707-325(1) and 707-325(2) of the IT(TP)A 1997 are satisfied) for Donor Co to be a value donor in respect of working out the available fractions for the two bundles of losses, transferred from Head Co and Loss Co respectively.*

10. *Head Co, as the transferee, also chooses under subsection 707-327(4) of the IT(TP)A 1997, for the net capital loss transferred from Donor Co to be treated as if it is included in the Head Co bundle for the purposes of utilising that loss.*

11. *On 15 December 2004, Head Co lodges an income tax return for the 2003-04 income year and transferred losses are utilised in the return in accordance with the choices outlined above.*

12. *If it is later decided to utilise the net capital loss as if it was in the Loss Co bundle (and not the Head Co bundle), then Head Co would need to revoke the previous choice and make this different choice by the end of 31 December 2004 (refer to proposed legislative change – see below). After this time, the choice to utilise the net capital loss as if it was included in the Head Co bundle, cannot be revoked and therefore no other effective choice, under subsection 707-327(4) of the IT(TP)A 1997, can be made by Head Co in respect of the loss.*

Proposed Legislative Change

13. The Minister for Revenue and Assistant Treasurer announced in the Press Release (No. CO22/04 of 20 December 2004) *'More Time For Consolidated Groups To Make Elections'*, that the time for making or revoking certain elections will be extended to 31 December 2005. This included the choices in relation to the value and loss donor rules contained in Subdivision 707-C of the IT(TP)A 1997.

14. At the time of release of this draft Determination, this announcement had not become law and the draft reflects the legislation as currently enacted.

Date of Effect

15. 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

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

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Commissioner of Taxation

8 June 2005

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 92/20

Subject references:

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

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Legislative references:

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|-----------------------------|------------------------------|
| - ITAA 1997 Subdiv 707-A | - IT(TP)A 1997 707-325(1) |
| - ITAA 1997 707-310 | - IT(TP)A 1997 707-325(2) |
| - ITAA 1997 707-315 | - IT(TP)A 1997 707-327(1) |
| - ITAA 1997 707-315(3) | - IT(TP)A 1997 707-327(2) |
| - ITAA 1997 707-315(4) | - IT(TP)A 1997 707-327(3) |
| - ITAA 1997 707-320 | - IT(TP)A 1997 707-327(4) |
| - ITAA 1997 707-325 | - IT(TP)A 1997 707-327(4)(a) |
| - ITAA 1997 707-335 | - IT(TP)A 1997 707-327(4)(b) |
| - ITAA 1997 707-335(2)(a) | - IT(TP)A 1997 707-327(5) |
| - ITAA 1997 707-340 | - TAA 1953 Pt IVAAA |
| - IT(TP)A 1997 Subdiv 707-C | |
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ATO references

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