TR 2004/11 - Income tax: consolidation: the meaning and application of the single entity rule in Part 3-90 of the Income Tax Assessment Act 1997

Taxation Ruling

Income tax: consolidation: the meaning and application of the single entity rule in Part 3-90 of the *Income Tax Assessment Act 1997*

Contents Para

Preamble

*The number, subject heading, **What this Ruling is about** (including **Class of person/arrangement** section), **Date of effect**, and **Ruling** parts of this document are a 'public ruling' for the purposes of **Part IVAAA of the Taxation Administration Act 1953** and are legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

***[Note:** This is a consolidated version of this document. Refer to the Legal Database (ato.gov.au/law) to check its currency and to view the details of all changes.]*

What this Ruling is about

1. This Ruling explains what the single entity rule (SER) in section 701-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) is and how it applies to members of a consolidated group. In particular, the Ruling considers the scope of the SER and the income tax consequences that flow from its application to dealings between group members.

Date of effect

2. This Ruling applies to years of income commencing both before and after its date of issue. However, the Ruling does 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 Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Ruling

The SER principle

3. Section 701-1 of the ITAA 1997 is a key provision of the consolidation regime. It is the means by which the members of a consolidated group are treated as a single entity (being the head company) for income tax purposes.

4. The SER operates for the purposes set out in subsections 701-1(2) and (3) of the ITAA 1997 (the core purposes). These purposes are to work out the amount of the head company and subsidiary member's liability for income tax and the amount of a loss for a relevant period. They include all matters relevant and incidental to those calculations. The intended operation of the SER is to apply the income tax laws to a consolidated group as if it were a single entity.

5. The SER works not only in relation to the calculation of taxable income or losses but also in respect of matters such as the application of credits and offsets, record keeping requirements and penalties.

6. The SER does not apply where a tax law requires a member of a consolidated group to do something in relation to the income tax affairs of a non-group entity (for example, a group member's obligation to collect the income tax payable by a third party).

Consequences of the SER

7. For income tax purposes the SER deems subsidiary members to be parts of the head company rather than separate entities during the period that they are members of the consolidated group.

8. As a consequence, the SER has the effect that:

(a) the actions and transactions of a subsidiary member are treated as having been undertaken by the head company;

(b) the assets a subsidiary member of the group owns are taken to be owned by the head company (with the exception of intra-group assets) while the subsidiary remains a member of the consolidated group;

(c) assets where the rights and obligations are between members of a consolidated group (intra-group assets) are not recognised for income tax purposes during the period they are held within the group whether or not the asset, as a matter of law, was created before or during the period of consolidation (see also paragraph 11 and paragraphs 26-28); and

(d) dealings that are solely between members of the same consolidated group (intra-group dealings) will not result in ordinary or statutory income or a deduction to the group's head company.

9. An example of an intra-group dealing is the transfer of a capital gains tax (CGT) asset from one group member to another. This transfer is not treated for income tax purposes as a disposal or acquisition in the hands of the head company. Although the legal transfer of the CGT asset between the subsidiary members occurs at general law, it has no income tax consequences as the group's head

company is taken to be the owner of the asset both before and after the transfer.

10. Another example is the payment of a dividend from one member of a consolidated group to another group member. For income tax purposes this transaction is treated as a movement of funds between two parts of the same entity (the head company), rather than the payment of a dividend. The members of the group paying and receiving the dividend are not seen as separate entities for income tax purposes.

Intra-group assets transferred to a non-group entity

11. Transactions where intra-group assets are transferred to a non-group entity are recognised as a transfer by the head company. For example, the disposal of an intra-group CGT asset will ordinarily result in CGT event A1 (section 104-10 of the ITAA 1997) happening to the head company. The cost base of the asset in such a case will only be incidental costs incurred by the group to non-group members in relation to the transfer. However, in the case of the transfer of an intra-group debt, because the transfer is in substance equivalent to borrowing money or obtaining credit from another entity, no CGT event happens (see Taxation Determination TD 2004/33).

Entities outside the consolidated group not affected by SER

12. The SER ensures that the members of a consolidated group are treated as a single entity for the purpose of applying income tax laws to that group. The SER does not affect the application of those laws to an entity outside of the consolidated group. The income tax position of entities outside of the group will not be affected by the SER when they deal or transact with a member of a consolidated group.

Parts of an entity expressly recognised

13. If an income tax provision expressly allows for the recognition of part of a single entity for income tax purposes then that provision will apply on the same basis to the head company of a consolidated group. This achieves a broad parity between the income tax position of a head company of a consolidated group and a company carrying on a business through divisions.

Modification of the SER in certain circumstances

14. Section 701-85 of the ITAA 1997 has the effect that the operation of the SER is subject to any other provision of the Income Tax Assessment Act 1997 and the *Income Tax Assessment Act 1936* (ITAA 1936) (and certain related Acts) that so require, either expressly or impliedly.

MEC groups

15. The views expressed in this Ruling apply equally to a multiple entry consolidated (MEC) group where appropriate.

Explanation

The SER principle

16. The SER in section 701-1 of the ITAA 1997 provides that:

> (1) If an entity is a *subsidiary member of a *consolidated group for any period, it and any other subsidiary member of the group are taken for the purposes covered by subsections (2) and (3) to be parts of the *head company of the group, rather than separate entities, during that period.
>
> *Head company core purposes*
>
> (2) The purposes covered by this subsection (the ***head company core purposes***) are:
>
> (a) working out the amount of the *head company's liability (if any) for income tax calculated by reference to any income year in which any of the period occurs or any later income year; and
>
> (b) working out the amount of the head company's loss (if any) of a particular *sort for any such income year.
>
> *Entity core purposes*
>
> (3) The purposes covered by this subsection (the ***entity core purposes***) are:
>
> (a) working out the amount of the entity's liability (if any) for income tax calculated by reference to any income year in which any of the period occurs or any later income year; and
>
> (b) working out the amount of the entity's loss (if any) of a particular *sort for any such income year.

17. The principle underlying the SER is to treat a consolidated group as a single entity, with the head company being that entity for income tax purposes. To this end the SER deems the subsidiary members of the consolidated group to be parts of the head company rather than separate entities.

18. The SER principle operates for the head company and entity core purposes (see subsections 701-1(2) and (3) set out above). In interpreting these subsections, consideration needs to be given to the context in which they appear. This context is determined by considering the guide material to Part 3-90 of the ITAA 1997, specific provisions in that Part and statements in the Explanatory

Memorandum to the New Business Tax System (Consolidation) Bill (No. 1) 2002 (the EM).

19. The scope of the core purposes is expressed in the opening statement in the Guide to the consolidation regime at section 700-1. It states '[t]his Part allows certain groups of entities to be treated as single entities for *income tax purposes*.' [emphasis added].

20. The EM at paragraph 2.22 supports this scope:

> Some examples of the effect of absorption of the subsidiaries into the head company (for the purposes of working out its income tax liability or losses) are that during consolidation:
>
> - the taxable income of the taxpayer under section 4-15 of the ITAA 1997 refers to that of the head company. This calculation is made on the basis that income and deductions are assessed or allowable under the ITAA 1997 to the head company only;
> - a provision such as section 262A of the ITAA 1936 (which refers to record keeping requirements) should be read as requiring the head company to adopt those obligations insofar as they relate to the assessment of its income tax liability. Under the single entity rule, those obligations rest with the head company as it is regarded as the taxpayer during the period of consolidation;
> - …

21. Specific provisions in Part 3-90 of the ITAA 1997 also support this approach. For example, Division 721 (about liability for payment of tax where the head company fails to pay on time) is premised on the basis that the head company is liable for certain 'income tax related liabilities' because of the operation of the SER.

22. This is supported by paragraph 11.13 of the EM:

> The head company of a consolidated group is solely liable, in the first instance, for group liabilities. This is because, *as an implication of the single entity rule*, an income tax-related liability of a consolidated group is, in fact, an income tax-related liability of the head company. [emphasis added]

23. Accordingly, the references to *income tax purposes* in the Guide to Part 3-90 of the ITAA 1997 and to *income tax-related liabilities* in Division 721 of the ITAA 1997, along with the explanations in the EM support the view that the core purposes allow the SER to operate on the basis that income tax laws apply to a consolidated group as a single entity.

24. This ensures that working out the consolidated group's taxable income and losses and all matters relevant and incidental to that calculation, such as the application of credits and offsets, record keeping requirements and penalties, are addressed on the basis that the group is a single entity with the head company as that entity. Broadly, this provides parity of income tax treatment between a

consolidated group, treated as a single entity, and a non-consolidated company.

25. The SER does not apply where a tax law requires a member of a consolidated group to do something in relation to the income tax affairs of a non-group entity (for example, a group member's obligation to collect the income tax payable by a third party) – see paragraph 2.25 of the EM. This is because such laws do not relate to the income tax position of the group. That is, they do not fall within the core purposes. They are more relevant to the non-group entity's income tax affairs.

Application of the SER principle

26. With the single entity rule Parliament, has expressed its intended policy outcome in broad and simple language, in this case by equating a consolidated group with a single entity. A necessary feature of this drafting approach is the omission of statutory mechanisms for effecting the policy for each provision of the income tax law (although in some cases they are provided). In construing a rule drawn this way, like in all cases of statutory interpretation, the fundamental object is to ascertain the legislative intent by reference to the language of the instrument as a whole: *Cooper Brookes (Wollongong) v. FCT* (1981) 35 ALR 151 at 169-170 per Mason and Wilson JJ. See also the legislated approach to statutory interpretation in the *Acts Interpretation Act 1901* (Cth).

27. Accordingly, relying on these established approaches to statutory interpretation, (and notwithstanding the operation of section 701-85 – itself an interpretive directive), interactions with other provisions in the Income Tax Assessment Acts need to be taken into account in applying the SER. For example, a mechanical application of the SER should not defeat the policy underpinning the SER by producing results in relation to transactions that would not occur for a single company that operates by division.

28. Rather, when considering transactions or dealings the correct use of the rule is to indicate when, and for what purposes, transactions or parts of transactions are to be regarded or disregarded in determining the income tax position of the head company of the consolidated group. For this reason, the way the rule applies will depend on the purpose for which a transaction is being considered and the perspective of the relevant taxpayer (also see paragraphs 36 to 39).

Consequences of the SER

29. The Guide to the consolidation regime at section 700-1 expresses the intention of the law to treat a consolidated group as a single entity. It provides '[f]ollowing a choice to consolidate, subsidiary members are treated as part of the head company of the group rather than as separate income tax identities'.

30. To the extent the SER applies to the consolidated group to treat the group as a single entity, with the head company as that entity, any consequences flowing from this deeming are to be treated as the actual state of affairs of the head company. *Marshall (Inspector of Taxes) v. Kerr* [1993] STC 360 at 366, which was subsequently approved in the appeal decision in the House of Lords, supports this position (per Gibson, J):

> …I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

31. A consequence flowing from the SER is that while an entity is a subsidiary member of a consolidated group, actions and transactions of that member are treated as having been undertaken by the head company. In addition, the assets owned by subsidiary members of the group are taken to be owned by the head company (other than assets where the rights and obligations are between members of the group) [see the EM – paragraphs 2.12, 2.20 and 2.26].

32. A further consequence of the SER is that intra-group dealings are not recognised for income tax purposes. This is clearly the intent of the legislation as indicated in the EM. For example, paragraph 2.18 states that intra-group transactions are not recognised:

> Transactions between members of a consolidated group will be ignored for income tax purposes. For example, payment of management fees between group members will not be deductible or assessable for income tax purposes. In addition, intra-group dividends will not be assessable or subject to the franking regime.

33. The EM at paragraph 2.12 also concludes that an intra-group transfer of an asset could not have income tax consequences as an entity cannot transact with itself.

34. This is also the basis for paragraph 2.9 of the EM which provides that 'when an entity becomes a subsidiary member of a consolidated group the membership interests in the entity held by the group are ignored'. As a result, the intra-group rights and obligations that are derived from the holding of membership interests within a group are no longer recognised. Dealings solely within the consolidated group in respect of these rights and obligations cannot trigger income tax consequences in respect of the head company.

35. In summary, the SER ensures that the income tax laws will apply to a consolidated group on the basis that the group is a single entity with all of the actions and transactions undertaken by the subsidiary members of the group being imputed to the head company. This allows for the proper administration of the income tax laws to the consolidated group. The SER, broadly speaking, allows for parity between the income tax position of a consolidated group, treated as a single entity, and of a company carrying on business in divisions.

Intra-group assets transferred to a non-group entity

36. The transfer of intra-group assets to non-group entities will have income tax implications for the head company. The SER gives effect to the legislative intention that the consolidated group (being the head company) should be treated in a similar way to a single company for income tax purposes. An analogy used is that the income tax outcomes of transactions within the group should be similar to the outcomes for a single company that operates through divisions. However, the intra-group assets of a consolidated group represent rights between members of the group. Such rights could not exist between divisions of a divisional company. Accordingly, the income tax law has regard to intra-group assets on being transferred to a non-group entity.

37. The tax cost of an intra-group asset, whilst recognised as an asset of the head company on its transfer, will be limited to the costs incurred by the group to non-group entities in relation to the transfer.

Entities outside the consolidated group not affected by SER

38. The SER is not concerned with the income tax position of an entity that is not a member of a consolidated group. Therefore, the fact that the SER treats a consolidated group as a single entity does not mean that an entity outside the consolidated group cannot have regard to intra-group dealings and assets of the group where such dealings and assets are relevant for that entity's income tax purposes.

39. There are some exceptions to this proposition, for example, in sections 715-215 and 715-410 of the ITAA 1997. The latter section extends the SER for all the purposes of Part 3-95 (value shifting). This means that from the perspective of an entity outside the consolidated group, economic benefits provided by or to a subsidiary member of a consolidated group are treated as having been provided by or to the head company of the group.

Parts of an entity expressly recognised

40. The SER provides the foundation for the income tax laws to be applied to the head company of a consolidated group (representing the consolidated group) broadly on the same basis as it does for a non-consolidated company. Once the SER applies to a consolidated group the provisions of the income tax law apply to the group as if it is a single entity with the head company as that entity. Where a provision of the income tax law expressly provides for part of a company to be given specific tax treatment (for example, a life insurance company), this would also be true for the head company of a consolidated group where the head company meets the necessary requirements for that specific treatment.

Modification of the SER in certain circumstances

41. The SER may be modified in certain circumstances. Section 701-85 of the ITAA 1997 provides that '[t]he operation of each provision of this Division is subject to any provision of this Act that so requires, either expressly or impliedly.' As such, the operation of the SER may be modified by a provision in Part 3-90 of the ITAA 1997 or any other provision of the Income Tax Assessment Acts (and certain related Acts) that so requires it, expressly or impliedly.

42. This subjects the SER to the purposes of the other provisions of the Act where this is explicit or implied. Whilst the intention is for consolidated groups to be treated as single entities and comparably to the way non-consolidated companies are treated, if achieving the purposes of another provision runs contrary to this broad intent, the SER should yield to those purposes. Whether section 701-85 will apply in any given situation will depend on the particular provisions being considered.

Commissioner of Taxation
22 September 2004

Appendix 1 – Channel Pastoral

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

42A. In *Channel Pastoral Holdings Pty Ltd v. Federal Commissioner of Taxation* (2015) FCR 162; [2015] FCAFC 57; 2015 ATC 20-503 the Full Court of the Federal Court of Australia heard a special case stated pursuant to Part 38 of the Federal Court Rules 2011. The special case concerned three questions reserved for the consideration of the Court regarding the interaction of Part IVA of the ITAA 1936 and the provisions relating to consolidated groups in Part 3-90 of the ITAA 1997. Resolving the questions required the Court to reconsider the principles governing the interaction of Part IVA and Part 3-90 as previously determined in *Federal Commissioner of Taxation v. Macquarie Bank Ltd* (2013) 2010 FCR 164; [2013] FCAFC 13; 88 ATR 708; 2013 ATC 20-373 (the *Mongoose* case).

42B. The reserved questions considered by the Court can be stated as follows:

> **Question 1:** Whether the Commissioner was not authorised to make a determination under section 177F of the ITAA 1936 to Channel Cattle Co Pty Ltd (CCC) and to give effect to that determination by including an amount in the assessable income of Channel Pastoral Holdings Pty Ltd (CPH)
>
> **Question 2:** Whether the Commissioner was not authorised to make a determination under section 177F of the ITAA 1936 to CPH and to give effect to that determination by including an amount in the assessable income of CPH
>
> **Question 3:** Whether the Commissioner was not authorised to make a determination under section 177F to CCC and to give effect to that determination by including an amount in the assessable income of CCC

42C. A majority of the Court (Allsop CJ and Edmonds and Gordon JJ) ultimately answered reserved questions 1 and 2 'yes', with the consequence that the Commissioner was not authorised, and reserved question 3 'no', with the consequence that the Commissioner was authorised.

ATO view of decision

The administration of Part IVA

42D. The subject matter of the three questions reserved for the consideration of the Court concerned the narrow issue of the interaction of the provisions in Part IVA of the ITAA 1936 and Part 3-90 of the ITAA 1997. Specifically, the issues to be resolved by

the Court, having regard to the facts agreed between the parties, were:

(i) to which entity could a determination under paragraph 177F(1)(a) of the ITAA 1936 be made, and

(ii) the action required by the Commissioner to 'give effect' to the determination.

42E. The Commissioner will administer the relevant provisions of Part IVA in accordance with the answer given to the third reserved question by the majority. This means that where a tax benefit within the meaning of paragraph 177C(1)(a) of the ITAA 1936 is obtained by an entity in connection with a scheme that includes, as a step, an entity, not being a subsidiary member of a consolidated group, becoming a subsidiary member of a consolidated group, the Commissioner will make a determination for that entity and give effect to that determination by including an amount in its assessable income.

42F. The reasoning of the majority in the *Mongoose* case will not be followed.

The interpretation of the SER

42G. In answering the reserved questions, the primary focus of the joint judgment of Edmonds and Gordon JJ was the interaction of Part IVA of the ITAA 1936 and Part 3-90 of the ITAA 1997 in the particular circumstances under consideration. However, in relation to the ordinary operation of the SER, Edmonds and Gordon JJ stated at paragraph 80 of the joint judgment that:

> In the normal course, where a subsidiary member of a consolidated group enters into a scheme to which s 177D applies, the Commissioner is authorised to make a determination under s 177F(1), but the authorised determination will be (in a para (a) case) one to include an amount in the assessable income of the head company, to which for tax assessment purposes the activities of the subsidiary member are, by s 701-1, attributed and subsumed. Effect is then given to that determination by the issue of an assessment including the amount in the assessable income of the head company.

42H. This understanding of the SER informed their Honour's approach to addressing the controversy embedded in the first clause of each of the three reserved questions concerning the identification of the 'relevant taxpayer', and ultimately informed their Honour's answers to those questions (with which Allsop CJ agreed).

42I. The Commissioner considers that the description of the ordinary operation of the SER given in paragraph 80 of the joint judgment is consistent with the view expressed in this Ruling (for example, see paragraph 31).

42J. The Commissioner will continue to administer the SER in accordance with the view expressed in this Ruling. In particular, when

determining the interaction of the SER and the other provisions of the Income Tax Assessments Acts, the Commissioner will adhere to the view expressed in paragraphs 26 to 29 and 40 to 42 of this Ruling that, broadly:

(i) the relevant hierarchy of the provisions in each case is to be resolved through the application of the ordinary principles of statutory interpretation, and

(ii) the SER may be modified in certain circumstances as section 701-85 of the ITAA 1997 causes it to be subject to the other provisions of the Act, as expressly or impliedly required.

The minority 'statutory direction' approach

42K. The interpretation and consequences of the SER as described at paragraphs 119 to 121 of the judgment of Pagone J are not consistent with the Commissioner's view of the SER as expressed in this Ruling.

42L. The answers given to the reserved questions by the majority of the Court are based on an understanding that the SER operates in a way consistent with the description given at paragraph 80 of the joint judgment of Edmonds and Gordon JJ. Conversely, Pagone J's 'statutory direction' interpretation of the SER informed His Honour's answers to the reserved questions (that is, 'no' to each) and, as a result, his reasoning in reaching those answers does not form part of the *ratio decidendi* of the majority that is binding authority on the interpretation and application of the SER.

42M. Consequently, the Commissioner will continue to apply the SER, including addressing the interrelationship between Part 3-90 of the ITAA 1997 and the other provisions of the Income Tax Assessment Acts, in accordance with the view expressed in this Ruling.

Appendix 2 – Detailed contents list

43. Below is a detailed contents list for this Taxation Ruling:

References

Previous draft:

TR 2004/D2

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 97/16
TD 2004/33; TD 2004/34;
TD 2004/35

Legislative references:

- TAA 1953
- TAA 1953 Pt IVAAA
- ITAA 1936
- ITAA 1936 Pt IVA
- ITAA 1936 262A
- ITAA 1997
- ITAA 1997 177C(1)
- ITAA 1997 177D
- ITAA 1997 177F
- ITAA 1997 177F(1)
- ITAA 1997 177F(1)(a)
- ITAA 1997 4-15
- ITAA 1997 104-10
- ITAA 1997 Pt 3-90
- ITAA 1997 700-1
- ITAA 1997 701-1
- ITAA 1997 701-1(1)
- ITAA 1997 701-1(2)
- ITAA 1997 701-1(3)
- ITAA 1997 701-85
- ITAA 1997 715-215
- ITAA 1997 715-410
- ITAA 1997 Div 721
- ITAA 1997 Pt 3-95
- Acts Interpretation Act 1901

Case references:

- Channel Pastoral Holdings Pty Ltd v. Federal Commissioner of Taxation (2015) 232 FCR 162; [2015] FCAFC 57; 2015 ATC 20-503
- Federal Commissioner of Taxation v. Macquarie Bank Ltd (2013) 210 FCR 164; [2013] FCAFC 13; (2013) 2013 ATC 20-373
- Marshall (Inspector of Taxes) v. Kerr [1993] STC 360
- Cooper Brookes (Wollongong) Pty Ltd v. Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26; (1981) 35 ALR 151; 81 ATC 4292; (1981) 11 ATR 949

Other references:

- Explanatory Memorandum to the New Business Tax System (Consolidation) Bill (No. 1) 2002

ATO references
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