TR 98/12 - Income tax: transfer of losses: section 80G (Subdivision 170-A)

Taxation Ruling
Income tax: transfer of losses: section 80G (*Subdivision 170-A*)

other Rulings on this topic

IT 2465; IT 2624; TD 22; TD 93/120

Preamble

*The number, subject heading, and the **Date of effect** and **Ruling** parts of this document are a 'public ruling' in terms 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.*

What this Ruling is about

Class of person/arrangement

1. This Ruling is concerned with the transfer of losses, incurred in 1984-85 or subsequent years of income, within a wholly owned company group pursuant to section 80G of the *Income Tax Assessment Act 1936* (the Act) or *Subdivision 170-A* of the *Income Tax Assessment Act 1997* (the 1997 Act). The 1997 Act takes effect from 1 July 1997. In this Ruling references to the 1997 Act appear in italics within brackets and follow references to section 80G of the Act, where applicable. The Ruling does not consider the definition of 'group company' in subsections 80G(1) to 80G(5B) (*Subdivision 975-A*). To the extent that the principles in section 80G (*Subdivision 170-A*) and section 160ZP (in respect of capital losses) are the same, the discussion of the elements of section 80G (*Subdivision 170-A*) apply equally to section 160ZP (*Subdivision 170-B* of the 1997 Act).

Date of effect

2. This Ruling applies to income years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling 92/20). The Ruling also does not disturb revocations of loss transfers which have occurred prior to the date of this Ruling.

3. In addition, in the event that a 'formula document' has been used to transfer a loss deduction, this Ruling does not preclude its effectiveness to the extent that it has resulted in an amount of loss claimed as a deduction in the income tax return of the relevant income company. In these circumstances the Commissioner accepts the formula document as valid to transfer that amount only. No adjustment of that amount in accordance with the formula document will be accepted subsequent to the date of this Ruling. The Ruling does not disturb adjustments in accordance with a formula document which have occurred prior to the date of this Ruling. Formula documents entered into after the date of this Ruling will not be acceptable to transfer a loss deduction.

Previous Rulings

4. This Ruling supplements the Commissioner's earlier opinion on section 80G expressed in Taxation Ruling IT 2465. This Ruling does not withdraw IT 2465 except to the extent of any inconsistency.

Definitions

5. In this Ruling the following definitions have been used:

divisional company: a single company operating along divisional lines;

formula document: a document that expresses a loss deduction transfer in terms of a percentage or formula which purports to:

(a) vary the amount of loss deduction transferred as circumstances of the loss company or income company change;

or

(b) transfer one amount of loss deduction which is calculated on the basis of the final determination of the loss of the loss company or the net assessable income of the income company for the relevant income year;

group company: refer to paragraphs 27 and 28 below;

income company: a resident company transferee of losses;

loss: a loss calculated in accordance with a loss provision (sections 79E, 79F, 80, 80AAA or 80AA (*Divisions 36, 165, 175, 375*));

loss company: a resident company transferor of losses;

loss deduction: a right to an allowable deduction in respect of a loss;

net assessable income: the sum of assessable income and net exempt income less allowable deductions in a year of income;

subvention payment: a payment made in respect of the transfer of a loss deduction;

taxable income: assessable income less allowable deductions calculated in accordance with section 48 (*section 4-15*);

transfer document: a notice or an agreement in writing pursuant to section 80G (*Subdivision 170-A*).

Ruling

6. The interpretation of section 80G of the Act expressed below applies to the equivalent provisions in Division 170 of the 1997 Act. Section 80G (*Subdivision 170-A*) operates to enable resident companies with losses to transfer the right to an allowable deduction in respect of those losses to other resident companies within the same group. This transfer is effected by a transfer document entered into by the loss company and the income company. The provisions of subsections 80G(6) to 80G(19) (*Subdivision 170-A*) govern the process by which loss deductions are transferred.

Nature of agreements

7. An agreement to transfer a loss deduction under section 80G (*Subdivision 170-A*) is effective when the conditions laid down in the section have been satisfied. These conditions include:

(i) the ascertainment, at the time of making the agreement, of a loss of the loss company and taxable income of the income company;

(ii) the existence of a group relationship between the companies;

(iii) an agreement between the relevant companies that a loss deduction is to be transferred; and

(iv) the formal requirements of writing and signing by the public officers of each company.

8. The validity of transfer documents does not depend upon compliance with principles of contract law. Accordingly, these

principles are not relevant to affect the validity of an agreement where there has been compliance with the statutory requirements. It is compliance with these requirements which triggers the deeming provisions in subsections 80G(6) and (12) (s*ection 170-15* and *subsection 170-20(2)*) to transfer the loss deduction from the loss company to the income company.

Further transfers

9. The provisions of section 80G (*Subdivision 170-A*) indicate that there is a degree of flexibility in the loss transfer process. The section is only invoked with the agreement of the relevant loss company and income company, which means that the loss company would otherwise have the option to carry forward the loss itself for future recoupment. The section also provides that parts of a loss may be transferred and these parts may be transferred to a number of income companies within the group to the extent of the total amount of loss available for transfer. This is the effect of subsection 80G(13). Although this provision has been omitted from the 1997 Act, the Commissioner considers the position remains unchanged under the 1997 Act.

10. 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. Further transfer documents must be effected before the date of lodgment of the relevant return of the income company or within such further time as the Commissioner allows. Although this provision has been omitted from the 1997 Act, the Commissioner considers that the position remains unchanged.

Revocation

11. Although section 80G (*Subdivision 170-A*) provides a degree of flexibility in the treatment of losses, a transfer document that satisfies the requirements of section 80G (*Subdivision 170-A*) cannot be revoked. There is no provision within section 80G (*Subdivision 170-A*) that permits the revocation of a valid transfer document, nor is there any provision that enables a loss to be transferred back from an income company to a loss company. Furthermore, subsections 80G(6) and (12) (s*ection 170-15* and *subsection 170-20(2)*) operate to deem an agreed amount of loss to have been incurred by the income company and not to have been incurred by the loss company at the time a valid transfer document is executed. This means that the

relevant amount of loss is no longer available to be dealt with by the loss company.

12. The agreement under section 80G (*Subdivision 170-A*) requires a meeting of the minds in respect of the fact that a loss deduction is to be transferred. This agreement can remain effective where there are subsequent changes to the amount of the loss incurred by the loss company or the taxable income of the income company. The adjusting provisions of subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*) operate to maintain the validity of a transfer document by varying the amount of loss transferred in accordance with the changed circumstances of either the loss company or the income company. The maintenance of the loss transfer by operation of the adjusting provisions is inconsistent with the view that such a change in circumstances means that there is no agreement at all between the parties for the purposes of section 80G (*Subdivision 170-A*). It is also inconsistent with a general right of revocation.

13. The principles of contract law cannot be invoked to override the provisions of section 80G (*Subdivision 170-A*). The validity of the transfer document is dependent upon compliance with the statutory requirements of section 80G (*Subdivision 170-A*) and the statute provides for adjustments where the facts upon which the transfer is made have changed. Contract law remedies cannot apply to invalidate a transfer document in a manner which is inconsistent with these statutory provisions.

Specificity of transfer documents

14. The Commissioner considers that section 80G (*Subdivision 170-A*) only contemplates transfer documents which specify a fixed amount of loss. The section provides for a transaction between two entities which affects the taxation position of those two entities in an income year. The transaction involves the identification, at the time the transfer document is made, of a loss of the loss company, the taxable income of the income company, and the amount of loss to be transferred.

15. It has been suggested that the operative provisions of section 80G (*Subdivision 170-A*) are expressed broadly enough to enable the use of 'formula documents'. The Commissioner's view is the proper construction of section 80G (*Subdivision 170-A*) does not envisage the use of formula documents. The inference that a fixed amount of loss is to be specified in a transfer document is drawn from the words, operation and interaction of the various subsections of section 80G (*Subdivision 170-A*). These subsections also indicate the fixed amount

of loss is determined on the basis of the loss of the loss company and the taxable income of the income company at the time of execution of the transfer document. The relevant considerations are:

(i) The wording in section 80G suggests there must be a fixed loss amount in the transfer document. The deeming provision in subsection 80G(6) provides that where a valid agreement has been made to transfer a loss deduction, '**the amount** of the loss ... shall ... be deemed to be a loss incurred by the income company'. (Similar wording is used in *section 170-15*.) Furthermore, the provisions within section 80G that refer to the content of a transfer document use the words 'the amount specified in the agreement' in reference to the loss deduction transferred under the document (see subsections 80G(7), (8), (13) and (16)). These provisions indicate that section 80G requires a transfer document specifying one fixed amount that is deemed to be the loss of the income company at the time of the transfer transaction.

(ii) It has been suggested that a formula document may give an 'amount [of loss] specified' in the future when the tax position of the respective companies is finally determined. However, this interpretation is arguably inconsistent with the operation of the adjusting provisions in subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*). These provisions operate to alter the amount specified in a transfer document as circumstances of the relevant companies change. This indicates that the 'amount [of loss] specified' in a transfer document is the amount determined on the basis of the tax position of the respective companies at the time of executing the transfer document.

(iii) Subsection 80G(15) (*section 170-70*) indicates an agreement under subsection 80G(6) (*Subdivision 170-A*) is made in respect of a fixed amount of loss that is ascertained on the basis of a determination of the 'loss' of the loss company at the time of making the agreement. Subsection 80G(15) (*section 170-70*) removes the section 170 time limits for amendment of assessments in circumstances where a purportedly transferred loss was 'not deemed to have been incurred by the loss company'. This subsection would have no operation if the 'loss' of the loss company (as referred to in paragraphs 80G(6)(a), (6)(c) and (15)(a)) was the loss as finally determined, rather than the initial determination by the loss company at

the time of making the loss transfer agreement. That is, the subsection presupposes that companies agree to transfer an amount of loss deduction on the basis of the loss of the loss company as calculated at the time of making the agreement. If this is not the amount of loss as finally determined under the relevant loss provision, then subsection 80G(15) (*section 170-70*) provides for the appropriate amendment.

(iv) A self-adjusting formula document could effect a *de facto* revocation of later transfer documents that would be inconsistent with the view that section 80G (*Subdivision 170-A*) does not authorise the revocation of transfer documents. If a formula document operated to increase the original amount of loss transferred, this could require the invalidation of subsequent loss transfers that have complied with the requirements of section 80G (*Subdivision 170-A*).

(v) The use of a formula document impedes the ascertainment, under subsection 80G(13), of the balance of loss remaining when part of a loss deduction is transferred. Where a loss company has agreed to transfer part of a loss, subsection 80G(13) provides that the loss company can only enter into further transfer documents in respect of the balance of loss remaining, after subtracting from its total loss the sum of the amounts specified in any previous loss transfer documents. This process is inconsistent with the use of formula agreements that are capable of multiple applications or purport to transfer one amount of loss that is to be clarified in the future.

(vi) The use of formula agreements would limit the operation of the deeming provisions in subsections 80G(6) and (12) (s*ection 170-15* and *subsection 170-20(2)*). These subsections deem an amount of loss to have been incurred by the income company and not to have been incurred by the loss company when a valid transfer document has been executed. Deeming operates on the amount of loss the parties have agreed to transfer. Where a fixed dollar amount of loss is used, deeming operates immediately as it is this amount the parties have agreed to transfer. If the formula document purports to transfer an amount of loss based on the ultimate determinations of loss and taxable income of the respective companies, it would follow that deeming could not take place until this amount is known. Therefore, it is arguable that section 80G (*Subdivision 170-A*) could not take effect to transfer a loss deduction

until the later time and tax would be payable by the income company in respect of the income year. This interpretation is not supported because it is contrary to the policy behind section 80G (*Subdivision 170-A*) to provide tax relief to the income company in the income year.

16. The provisions of section 80G (*Subdivision 170-A*) described in the subparagraphs of paragraph 15 are inconsistent with the use of formula documents that purport to have, in effect, a retrospective operation as the circumstances of the relevant companies change. Section 80G (*Subdivision 170-A*) contains a code (subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65)*) that covers changes in circumstances that impact upon the effectiveness of loss deduction transfers. This indicates the agreement contemplated by section 80G (*Subdivision 170-A*) is made on the basis of circumstances existing at the time of the transfer transaction, and the deeming provisions operate in respect of a fixed amount of loss determined at the time.

Exercise of the discretion under subsection 80G(6A) (*paragraph 170-50(2)(d)*)

17. Under subsection 80G(6A) (*paragraph 170-50(2)(d)*), a loss transfer agreement is required to be made before the date of lodgment of the return of the income company **or within such further time as the Commissioner allows**.

18. In exercising the discretion under subsection 80G(6A) (*paragraph 170-50(2)(d)*), the Commissioner is guided by administrative law principles. These include an obligation to identify and consider all factors that may be relevant to the exercise of the discretion and to give them an appropriate weighting. In determining the relevant factors and their weighting, the Commissioner has regard to the policy of section 80G (*Subdivision 170-A*) and its context within the Act. Although each case must be decided on its merits, this Ruling provides a guide to taxpayers and ATO officers as to what factors may be relevant in the exercise of the discretion.

19. In cases where there has been delay on the part of the relevant companies in effecting an agreement, the principles outlined in *Hunter Valley Developments Pty Ltd & Ors v. Minister for Home Affairs and Environment* (1984) 58 ALR 305; (1984) 7 ALD 315; (1984) 3 FCR 344 (*Hunter Valley Developments*) and subsequent supporting authorities in respect of statutory discretions to extend time, is relevant to the subsection 80G(6A) (*paragraph 170-50(2)(d)*) discretion. Following *Hunter Valley Developments*, the statutory time limit is not to be ignored and, *prima facie*, agreements must be made within time.

Therefore, the onus is on the taxpayer to demonstrate to the Commissioner that the case is an appropriate one for the favourable exercise of the discretion. This generally requires the taxpayer to provide an adequate explanation for the delay.

20. In cases where an agreement is sought to be made out of time as a result of an adjustment to the tax position of the company group by the Commissioner, a relevant factor is the conduct giving rise to the adjustment. For example, where there is fraud or evasion, or a scheme to which Part IVA of the Act applies, this factor weighs heavily against a favourable exercise of the discretion. Conversely, where an adjustment stems from conduct which could not be regarded as culpable, this factor would be weighted in favour of the extension of time being granted.

Explanations

A. General outline of the operation of section 80G (*Subdivision 170-A*)

21. Broadly, section 80G (*Subdivision 170-A*) allows a transfer of the right to an allowable deduction in respect of a loss from a resident company with losses (the loss company) to another resident company (the income company) where the following conditions are satisfied:

(i) the loss company has incurred a loss;

(ii) the income company has net assessable income, or, but for the operation of section 80G (*Subdivision 170-A*), would have net assessable income;

(iii) the loss company and income company agree in writing that the right to an allowable deduction in respect of the loss is to be transferred; and

(iv) the loss company is a group company in relation to the income company.

Losses

22. The loss company must have incurred a loss (paragraph 80G(6)(a)). The loss company must offset any prior year losses against its own net assessable income in an income year before a loss can be transferred to an income company in respect of the income year (subsection 80G(10) (*subsections 170-5(3)* and *170-45(1)*). Losses must also be transferred in the order they were incurred (subsection 80G(11) (*section 170-55)*).

Taxable income

23. The income company must have, or would have but for the operation of section 80G (*Subdivision 170-A*), a taxable income in the year of income in which the loss that has been transferred will be deducted. Therefore, the income company needs to ascertain whether or not it has a taxable income in terms of the calculation under section 48 (*section 4-15*) (paragraph 80G(6)(b).

Residence

24. The loss company must be a resident in the year of income in which the loss is incurred whilst the income company must be a resident in the year of income in respect of which the loss is transferred (subsection 80G(6) (*subsections 170-35(1)* and *170-40(1)*).

Agreement

25. The loss company and the income company must agree the loss deduction is to be transferred. The loss in respect of which the agreement is made cannot have been the subject of a deduction to the loss company or another group company in the year of income in which the deduction is to be allowed or an earlier year.

26. The agreement must be in writing and made before the date of lodgment of the return of income of the income company. The Commissioner has a discretion to allow further time for the making of the agreement (subsection 80G(6A) (*subsection 170-50(1)* and *paragraphs 170-50(2)(c)* and *(d)*).

Group company

27. The transfer only applies where the loss company is a group company in relation to the income company during the whole of the:

(i) loss year;

(ii) income year; and

(iii) any intervening year.

28. One company must be a wholly owned subsidiary (directly or indirectly) of the other, or both must be wholly owned subsidiaries of the same company (subsection 80G(1) (*sections 170-30* and *975-500)*).

Varying the amount specified in the agreement

29. Although subsection 80G(6) (*subsection 170-20(1)*) operates to transfer the loss deduction to the income company, section 80G (*Subdivision 170-A*) also operates to vary the amount specified in an agreement in the circumstances outlined below - see also the **Examples** at paragraphs 95 to 101 below.

30. An agreement does not have effect to the extent that the amount specified in the transfer document exceeds the net assessable income of the income company (subsection 80G(7) (*subsections 170-5(3)* and *170-45(2)*). Therefore, where it is found that a deduction is not allowable to the income company in respect of the whole amount of the loss specified in the transfer document, subsection 80G(16) (*section 170-65*) applies as if the amount that is allowable as a deduction had been specified in the transfer document.

31. Where, subsequent to the loss transfer, it is found the whole or part of the transferred loss was not incurred by the loss company, the Commissioner is not restrained by section 170 time limits for amendment to disallow the whole or part of the deduction to the income company (subsection 80G(15) (*section 170-70)*).

Further agreements

32. Once an agreement to transfer part of a loss is made, the loss company is precluded from making further agreements that purport to transfer a loss deduction for an amount greater than the balance of the loss. The balance of the loss is calculated as the total loss incurred by the loss company reduced by the sum of the amount(s) specified in any earlier transfer document(s) (subsection 80G(13)).

B. Notices and agreements

33. Prior to 1 July 1992, the transfer of a loss deduction was effected by a **notice** pursuant to the former paragraph 80G(6)(c) as follows:

> '... the loss company and the income company give to the Commissioner, on or before the date of lodgment of the return of income of the income company for the income year or within such further time as the Commissioner allows, a notice in writing signed by the public officer of each of those companies ...'.

34. With the introduction of self-assessment for companies, the legislation was amended, effective from 1 July 1992, and provided that **agreements** between the loss company and the income company would replace the requirement of the provision of a **notice** to the

Commissioner. The amendment is expressed in subsection 80G(6A) as follows:

> 'An agreement under paragraph (6)(c) must be:
>
> (a) in writing and signed by the public officer of each of the loss company and the income company; and
>
> (b) made before the date of lodgment of the return of income of the income company for the income year or within such further time as the Commissioner allows.'

(Similar wording is used in *subsection 170-50(2)*.)

35. Agreements are not required to be lodged with the Commissioner. However, notices were previously required to be lodged **on or before** the date of lodgment of the return of the income company. Agreements must be made **before** the date of lodgment of the income company's return. The 1997 Act requires that agreements must be made **on or before** the date of lodgement of the income company's return (*paragraph 170-50(2)(d)*). Section 80G (*Subdivision 170-A*) vests the Commissioner with a discretion to allow further time for the making of an agreement.

36. All transfer documents must be:

(i) in writing; and

(ii) signed by the public officer of each of the loss company and the income company.

On this basis, where a loss is transferred in respect of an income year subsequent to 30 June 1992, it must be effected by an **agreement**.

Nature of 'agreements' under subsection 80G(6)

37. The validity of an agreement pursuant to subsection 80G(6) (*Subdivision 170-A*) is not governed by the principles of contract law. The word 'agree' in paragraph 80G(6)(c) appears in the context of ordinary language and the legislature has avoided the use of technical phrases which may otherwise connote a legal contract. The relevant words used in paragraph 80G(6)(c) are:

> 'the loss company and the income company agree that the right to an allowable deduction ... should be transferred to the income company in the income year'.

(Similar wording is used in *subsection 170-5(5)* of the 1997 Act.)

38. Subsection 80G(6A) (*section 170-50*) provides that an **agreement** under paragraph 80G(6)(c) (*Subdivision 170-A*) must be both in writing and signed by the public officer of each company. It is

considered that 'agree' in this provision is not used in the sense of requiring a binding contract. In accordance with the ordinary meaning of the term, a 'meeting of the minds' is required between the loss company and the income company in respect of the fact that an amount of loss deduction is to be transferred. The written form of the agreement generally reflects this common understanding.

39. If the conditions of section 80G (*Subdivision 170-A*) are not satisfied, a valid agreement cannot be said to exist and no loss deduction can be transferred. However, in circumstances where the written document contains a minor error (e.g., an incorrect date) so that it does not completely or accurately reflect the agreement between the parties, the minor error does not necessarily destroy the effect of the agreement (see the legal maxim of '*falsa demonstratio non nocet*' or 'false description does not vitiate', referred to in *Attorney General (NT) v. Maurice and Ors* (1986) 72 ALR 231).

40. The fact that the word 'agreement' was not part of section 80G, prior to 1992, further indicates that the transfer document need not be contractual in nature. The explanatory memorandum to the introduction of subsection 80G(6A) confirms agreements were only introduced to replace 'notifications of transfer' for the purpose of facilitating full self-assessment principles. The requirement of a written and signed agreement simply serves as evidence of the decision to transfer losses, should the Commissioner subsequently require verification of the transfer.

41. Section 80G (*Subdivision 170-A*) is not predicated upon the existence of consideration as a prerequisite to the making of an effective loss transfer agreement. Subsections 80G(17) and (18) (*subsections 170-25(1)* and *(2)*) merely provide for those circumstances where subvention payments are, in fact, made in respect of a transfer of a loss deduction. This is in contrast with the requirements for an agreement in subsections 80G(6) (*Subdivision 170-A*) and (6A) (*section 170-50*). It is not denied that a legally enforceable contract may arise in the guise of the agreement referred to in subsections 80G(6) (*Subdivision 170-A*) and (6A) (*section 170-50*), e.g., because the agreement is supported by valuable consideration in the form of a subvention payment. However, the **validity** of the transfer document does not depend upon the agreement being legally enforceable. It is compliance with the requirements of subsections 80G(6) (*Subdivision 170-A*) and (6A) (*section 170-50*) that creates an effective agreement, and the force of statute that **deems** the loss to be incurred by the income company when the requirements have been fulfilled.

C. Revocation

42. An agreement that is effective in transferring the right to an allowable deduction in respect of a loss cannot subsequently be revoked. There is no provision in section 80G (*Subdivision 170-A*) that specifically permits revocation, nor is there any provision for a loss deduction to be transferred back from an income company to a loss company. The conclusion that transfer documents cannot be revoked is also to be drawn from the nature of section 80G (*Subdivision 170-A*) and in particular:

(i) the deeming provisions (subsections 80G(6) and (12) (*section 170-15* and *subsection 170-20(2)*);

(ii) the nature of the section 80G (*Subdivision 170-A*) 'agreement' and the adjusting provisions (subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65)*); and

(iii) the fact that the principles of contract law are inapplicable to determine the validity of an agreement under section 80G (*Subdivision 170-A*).

Subsections 80G(6) and 80G(12)

43. The Commissioner believes revocation is not permitted because it would deny the proper operation of the deeming provisions. Pursuant to subsection 80G(6) (*section 170-15*), the amount of the loss, or part of the loss, transferred is deemed to be the loss of the income company for the purposes of the provisions of the Act (other than section 80G (*Subdivision 170-A)*). Conversely, the loss is deemed not to have been incurred by the loss company (subsection 80G(12) (*subsection 170-20(2)*).

44. The deeming, in respect of both the income company and the loss company, is effective at the time the provisions of subsections 80G(6) (*Subdivision 170-A*) and (6A) (*section 170-50*) have been satisfied (i.e., at the time the income company and the loss company agree in writing, signed by the public officers, that the right to the loss deduction is to be transferred). Therefore, as from that date, the loss can no longer be dealt with by the loss company.

The section 80G 'agreement' and the adjusting provisions (subsections 80G(7), (15) and (16))

45. The Commissioner considers the agreement under section 80G (*Subdivision 170-A*) involves a determination by the two parties of an amount of loss deduction to be transferred at the time the transfer

document is made. Where subsequent adjustments to the loss company or income company affect the operation of the agreement, the provisions in subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*) provide for the appropriate adjustment to the loss deduction transfer.

Alternative view

46. It has been argued that, where the loss of the loss company or the net assessable income of the income company is subsequently varied, the companies cannot be said to have reached an agreement in respect of the loss deduction transfer. This is because the purported agreement has been made on the basis of an incorrect assumption of fact.

Commissioner's response

47. As previously mentioned in paragraph 38, where there is no 'meeting of the minds' there cannot be an agreement pursuant to section 80G *(Subdivision 170-A*). However, the Commissioner no longer accepts the view that a variation in the amount of loss or income of the respective companies invalidates an agreement. This is because the adjusting provisions in subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*) indicate that a valid agreement can be made on the basis of an amount of loss or net assessable income that is subsequently varied.

48. These provisions have the effect of altering the amount of loss deduction that is effectively transferred under an agreement where the circumstances of the loss company or the income company change. Accordingly, the provisions operate on the basis that there is no general authority to revoke the transfer document. They are inconsistent with the view that there is no agreement at all when the amounts of loss or net assessable income have varied.

49. Subsection 80G(15) (*section 170-70*) operates on the premise that the transfer document is valid only to the extent of the loss incurred by the loss company. Where there is a purported transfer of a loss deduction, and the whole or part of the loss was not deemed to have been incurred by the loss company, the Commissioner is not restrained by section 170 time limits for amendment to disallow the deduction for the part of the loss not deemed to have been incurred - see also the decision in *Woolcombers (WA) Pty Ltd v. FC of T* 95 ATC 4393; (1995) 31 ATR 39.

50. Pursuant to subsection 80G(7) (*subsections 170-5(3)* and *170-45(2)*), where a loss company purports to transfer a loss

deduction, the transfer document has no effect to the extent that the amount specified in the transfer document exceeds the net assessable income of the income company. Where other loss deduction amounts have been previously transferred to the income company, the sum of these transfers also must be taken into account in determining this excess. Furthermore, subsection 80G(16) (*section 170-65*) supports the restriction in subsection 80G(7) (*subsections 170-5(3)* and *170-45(2)*) by treating the transfer document as if it had only specified the part of the loss that is deductible to the income company. The loss company would therefore retain the loss deduction for the excess amount.

Principles of contract law inapplicable

51. As previously mentioned in paragraph 37, the validity of an agreement made pursuant to subsection 80G(6) (*Subdivision 170-A*) is not governed by the principles of contract law.

Alternative view

52. The alternative view is that contractual principles may be relevant to determine the validity of loss deduction transfers where the agreement creates a contract. If so, the agreement could be void or voidable in some cases, including, for example, agreements which have been affected by:

(i) mistake;

(ii) misrepresentation; or

(iii) conditions precedent as to the amount of loss in the loss company or the amount of income in the income company.

Commissioner's response

53. The Commissioner does not accept this view because a common law contract could not operate to transfer a loss deduction in the absence of section 80G (*Subdivision 170-A*). The Act creates and governs the use of tax losses. Section 80G (*Subdivision 170-A*) provides for the transfer of these losses, specifies the conditions for a valid transfer, and provides for remedies in cases of changed circumstances. Therefore, contractual principles cannot override the provisions of section 80G (*Subdivision 170-A*) to invalidate an agreement where the agreement has been made in compliance with the section and where the section provides for the appropriate adjustment under changed circumstances.

D. Specificity

54. The Commissioner accepts that there is a level of flexibility inherent in the phrase 'whole or part of the loss' as it appears in paragraph 80G(6)(c). (Similar wording is used in *subsection 170-10(2)*). However, the words, operation, and interaction of the various subsections of section 80G (*Subdivision 170-A*) provide the inference that the section only envisages transfer documents which specify a fixed amount of loss transfer at the time the agreement is made. As such, it is considered the section does not envisage the use of formula documents.

55. In examining transfer documents, at least three formats have been identified:

(i) sum specific, e.g., Company A transfers $100 to Company B;

(ii) sum expressed as percentage of loss in the loss company, e.g., Company A transfers to Company B 20% of the loss incurred in year X; and

(iii) sum expressed as a formula, e.g., Company A transfers to Company B an amount sufficient to cover the net assessable income less the sum of amounts which give rise to rebates/credits (e.g., dividends and foreign income).

56. Most transfer documents are in the form of (i) or (iii). Both percentage and formula modes (those in the form of (ii) or (iii)) come within the term 'formula document' as defined in paragraph 5 of this Ruling.

Alternative views

57. The alternative views are:

(i) section 80G (*Subdivision 170-A*) can be interpreted to permit the use of formula documents that have multiple applications as circumstances of the loss company or income company change; or

(ii) the references in section 80G to the 'loss' of the loss company and the 'taxable income' of the income company (upon which a formula operates to purportedly transfer one loss deduction) are references to the final determination of those amounts.

Commissioner's response

58. The Commissioner considers, overall, section 80G (*Subdivision 170-A*) requires transfer documents that specify a fixed amount of loss. Furthermore, the determination of the amount to be transferred is based upon the ascertainment of the loss of the loss company and the net assessable income of the income company at the time of executing the transfer document. The relevant considerations outlined in the following paragraphs are:

(i) the wording of section 80G;

(ii) the adjusting provisions of subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*);

(iii) the operation of subsection 80G(15) (*section 170-70*);

(iv) revocation;

(v) the operation of subsection 80G(13); and

(vi) the deeming provisions.

The wording of section 80G

59. The wording of a number of provisions in section 80G indicates that a transfer document must specify one fixed amount of loss. An agreement in the form of a formula which purports to have multiple applications is inconsistent with a fixed amount of loss.

60. This view is supported, first, by the wording in subsection 80G(6). Where an agreement to transfer the right to an allowable deduction in respect of a loss is made in accordance with paragraph 80G(6)(c), the deeming provision provides that '**the amount** of the loss ... shall ... be deemed to be a loss incurred by the income company' (emphasis added).

61. The Commissioner acknowledges the flexibility of paragraph 80G(6)(c) (*subsection 170-10(2)*) that provides for the agreement to transfer a loss deduction. It enables the whole or a fraction of a loss to be transferred. However, those provisions of section 80G (*Subdivision 170-A*) that refer to the **content** of transfer documents (that embody the agreement between the parties) use the phrase '**the amount specified** in the agreement ... made under paragraph (6)(c)' (emphasis added). In particular, subsections 80G(7), (8), (13), and (16) all operate on the premise of **the amount specified** in the agreement made pursuant to paragraph 80G(6)(c).

62. The definitions of the words 'amount specified' support the view that section 80G (*Subdivision 170-A*) requires a transfer of a fixed

amount of loss deduction. In the *Macquarie Dictionary* (3rd ed) the term 'amount' refers to quantity, and 'specified' means to mention or name specifically or definitely, to state in detail, to give a specific character to, or to make specific mention or statement. 'Amount specified' may, therefore, be said to be a fixed or definite quantity. In the context of section 80G (*Subdivision 170-A*), the 'amount specified' refers to the fixed or definite quantity of the **loss** transferred pursuant to the transfer document.

The adjusting provisions

63. The Commissioner considers that section 80G *(Subdivision 170-A)* is predicated upon the application of the law to the facts as they are understood at a point in time. It depends upon a determination of the 'loss' and the 'taxable income' at the time of the transfer transaction.

64. It is recognised that the loss of the loss company and net assessable income of the income company may change in circumstances where the facts or law are clarified. In this regard, section 170 specifically provides for amendments to assessments within four years. Section 80G (*Subdivision 170-A*) also recognises that circumstances may change in subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*).

65. It has been suggested that a formula document may give an 'amount [of loss] specified' in the future when the tax position of the respective companies is finally determined. However, this interpretation would be inconsistent with the operation of the adjusting provisions in subsections 80G(7), (15) and (16) *(subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*). These provisions operate to alter the amount specified in a transfer document as circumstances of the relevant companies change. This indicates that the 'amount [of loss] specified' in a transfer document is the amount determined on the basis of the tax position of the respective companies at the time of executing the transfer document.

66. As mentioned in paragraph 49, subsection 80G(15) (*section 170-70*) removes time limits for amendments where the loss, or a part of the loss, purportedly transferred was not deemed to have been incurred by the loss company. Also, as mentioned in paragraph 50, subsection 80G(7) (*subsections 170-5(3)* and *170-45(2)*) and subsection 80G(16) (*section 170-65*) provide for the appropriate amendment to the loss transfer in circumstances where there has been an adjustment to the net assessable income of the income company, which renders it incapable of absorbing the whole of the amount specified in the transfer document. These amending provisions indicate that a section

80G (*Subdivision 170-A*) agreement transfers a fixed amount of loss deduction which is determined on the basis of the loss of the loss company and income of the income company at the time of the agreement.

The operation of subsection 80G(15)

67. The Commissioner considers that subsection 80G(15) (*section 170-70*) indicates an agreement under subsection 80G(6) (*Subdivision 170-A*) is made in respect of a loss that is identified at the time of execution of the transfer document.

Alternative view

68. It has been suggested an agreement that transfers, for example, 'half of the loss of the loss company' only transfers one amount of loss deduction. This amount is half of the loss when finally determined, as only one loss is ever incurred by a company in an income year.

Commissioner's response

69. If this agreement is considered to have specified one amount of loss deduction, the amount could only be, consistently with section 80G (*Subdivision 170-A*), half of the loss as determined at the time of making the agreement. This would be the amount claimed in the return lodged by the income company.

70. The Commissioner's view is supported by the operation of subsection 80G(15) (*section 170-70*) that removes the section 170 time limits for amendment of assessments in circumstances where a purportedly transferred loss was 'not deemed to have been incurred by the loss company'. Paragraph 80G(15)(a) refers to an agreement made in accordance with subsection 80G(6) to transfer the right to an allowable deduction in respect of a loss or part of a loss. Paragraph 80G(15)(b) then refers to the circumstance where that loss or a part of that loss was not deemed to have been incurred by the loss company.

71. The loss referred to in paragraph 80G(15)(a) (and subsection 80G(6)) must be the initial determination of the loss of the loss company. Otherwise, paragraph 80G(15)(b) would have no application. If paragraph 80G(15)(a) refers to the loss as is finally determined, there would never be a circumstance under which the loss would be 'not deemed to have been incurred' by the loss company. As a matter of logic, the final determination of the loss would always be deemed to be incurred by the loss company.

72. In other words, subsection 80G(15*)* presupposes that companies agree to transfer an amount of loss deduction on the basis of the loss of the loss company as calculated at the time of making the agreement. (Similar words are used in *section 170-70*.) If this is not the amount of loss as finally determined under the relevant loss provision, then the subsection provides for the appropriate amendment.

Revocation

73. The inference that formula documents are not envisaged by section 80G (*Subdivision 170-A*) is strengthened by the fact that their operation into the future could permit, in effect, a revocation of subsequent agreements. If there was an increase in the income of an income company, and the relevant formula expressed that the amount of loss transferred would be sufficient to reduce income to nil, then the document would purport to have the effect of increasing the amount of loss transferred into the income company. If the loss company had used up all its losses (e.g., by self-recoupment or transferring out to other entities), the formula document could only work if losses were clawed back from other years or other entities.

74. This may require a *de facto* revocation of subsequent agreements which had complied with all the requirements of section 80G (*Subdivision 170-A*). This is inconsistent with the Commissioner's view that section 80G (*Subdivision 170-A*) does not authorise the revocation of effective loss transfers (see paragraph 42 above). There is nothing in section 80G (*Subdivision 170-A*) to indicate agreements that have been executed in accordance with the requirements of the section can be made provisional or subject to the subsequent effect of a previous agreement. In fact, the deeming provisions in subsections 80G(6) and 80G(12) (s*ection 170-15* and *subsection 170-20(2)*) indicate that agreements take effect upon execution to deem the transferred loss to be incurred by the income company and not to be incurred by the loss company. This deeming is subject only to the statutory adjustments provided for in subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*).

Complying with subsection 80G(13)

75. Pursuant to subsection 80G(13) a further complexity would arise with the use of a formula document. Subsection 80G(13) provides that a loss company can only enter into further transfer documents in respect of the balance of loss remaining after subtracting from its total loss the sum of the amounts specified in any previous loss transfer documents. It recognises that parts of a loss can be transferred over

many years and to a variety of group companies. As a consequence, transfers of fractions of the total loss are acceptable so long as the sum of the amounts transferred does not exceed the total amount of the loss.

76. The process of identifying the amount of loss remaining for transfer, after taking into account the amounts specified in previous transfer documents, is inconsistent with the use of formula agreements that are capable of multiple applications or purport to transfer one amount of loss to be clarified in the future. If a formula document is used to transfer **part** of a loss, the balance of the loss available for transfer remains unclear. Again, the inference to be drawn from the operation of subsection 80G(13) is that section 80G (*Subdivision 170-A*) only envisages the use of agreements which transfer a specific, fixed amount of loss deduction that is ascertainable at the time of making the agreement.

The deeming provisions

77. The use of a formula agreement would limit the operation of the deeming provisions in section 80G (*Subdivision 170-A*). The deeming sections are necessary to transfer an entitlement to a loss deduction from the loss company to the income company. The deeming process operates on the amount of loss the parties have agreed to transfer. A formula agreement may purport to transfer an amount of loss based upon the ultimate loss or taxable income of the respective companies. If the amount of income and loss is not finally ascertained until some later time (say, the making of a High Court decision), then it would follow that no deeming could take place until that time. It is arguable, therefore, that section 80G (*Subdivision 170-A*) could not take effect to transfer a loss deduction until that later time and tax would be payable by the income company in respect of the income year. Delaying the relief could adversely affect cash flows of the company group. Furthermore, the delay could result in the income company having an assessment for the income year that it would not otherwise have had.

78. In circumstances where the estimated loss deduction is not determined to be a specified amount for some years, section 170 may preclude an amended assessment to allow a deduction for the amount of loss. Interpreting section 80G (*Subdivision 170-A*) so as to provide tax relief to the income company in the income year requires a transfer document to specify an agreed dollar amount of loss deduction. This specified amount of loss deduction is then the amount of deduction allowable to the income company under subsection 80G(6) (*section 170-15*), subject to the variations provided for in subsections 80G(7),

(15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*).

Alternative view

79. If a formula document was used to transfer a loss deduction, it could be argued that the deeming provisions would operate from the date of the agreement in respect of an amount of loss to be determined in the future. That is, when the tax position of the relevant companies has been finally settled and the amount of loss deduction to be transferred is ascertained, the deeming would be considered to have taken effect from the date of agreement. Viewed in this way, a formula document could be said to have a 'retrospective effect'.

Commissioner's response

80. The Commissioner considers that section 80G (*Subdivision 170-A*) contains a code (subsections 80G(7), (15) and (16) (*subsections 170-5(3)* and *170-45(2)*; *section 170-70*; *section 170-65*)) for dealing with the changes in circumstances that may affect the validity of transfer documents (refer to paragraphs 63 to 66 above). This code operates whenever it is found, subsequent to the making of an agreement, that the loss company does not have sufficient losses or the income company does not have sufficient income to support the agreement. This indicates that the section 80G (*Subdivision 170-A*) agreement is made on the basis of the circumstances prevailing at the time of agreement and that the deeming provisions operate in respect of an amount of loss determined at that time.

E. Exercise of the discretion under subsection 80G(6A)

81. Paragraph 80G(6A)(b) provides that an agreement under paragraph 80G(6)(c) must be:

> 'made before the date of lodgment of the return of income of the income company for the income year **or within such further time as the Commissioner allows**' (emphasis added).

(Similar words are used in *paragraph 170-50(2)(d)*).

82. This part of the Ruling provides a general guide for taxpayers and officers of the ATO when considering the exercise of the discretion. This is desirable in the interests of consistent, efficient administration and equity among taxpayers in similar circumstances. However, the decision-maker must exercise the discretion according to the merits of each case and should not fetter the discretion by inflexibly applying, or acting in blind obedience to a policy or rule

(see *R v. Moore; Ex parte Australian Telephone and Phonogram Officers' Association* (1982) 148 CLR 600; (1982) 39 ALR 1).

Factors relevant to the exercise of the discretion

83. The exercise of the discretion under subsection 80G(6A) (*paragraph 170-50(2)(d)*) includes a two-step process of identifying relevant factors and applying a weighting to each of those factors, having regard to the circumstances of the case. Further, it is for the decision-maker to determine the appropriate weighting to be applied to these factors - see *Minister for Aboriginal Affairs and Anor v. Peko-Wallsend Ltd and Ors* (1986) 162 CLR 24.

84. Applications for the exercise of the discretion usually fall into one of two broad categories. The first is where it can be said that there has been delay on the part of the taxpayer that results in non-compliance with the subsection 80G(6A) (*paragraph 170-50(2)(d)*) time limit. The second is where the request for an extension of time to make an agreement arises out of an adjustment to the tax position of the company group by the Commissioner. The following paragraphs outline the factors the Commissioner considers to be relevant to the exercise of the discretion under subsection 80G(6A) (*paragraph 170-50(2)(d)*) in both categories, although they are by no means exhaustive.

Non-compliance with time limit caused by delay of the taxpayer

85. This category encompasses cases where no agreement has been made prior to the date of lodgment of the income company's return or, where an agreement has been made, the group subsequently discovers, for example:

(i) there are further losses within the group available for transfer to the income company; or

(ii) the income company has additional income against which unused losses within the group can be offset.

86. In these cases, the Commissioner considers that the principles outlined by Wilcox J in *Hunter Valley Developments* in respect of statutory discretions to extend time are relevant to the subsection 80G(6A) (*paragraph 170-50(2)(d)*) discretion, although the case was decided in the context of a different statutory provision.

87. The Commissioner also considers these general principles need to be balanced with a consideration of the underlying policy of section 80G (*Subdivision 170-A*) (to broadly align the treatment of company

groups with divisional companies) and the wider consideration of the proper administration of the Act.

88. In *Hunter Valley Developments*, Wilcox J stated that statutory time limits are not to be ignored and the onus is on the applicant to convince the decision-maker that the case is an appropriate one for a favourable exercise of the discretion. This would generally require the taxpayer to provide an acceptable explanation of the delay.

89. The length of the delay in making an agreement after the prescribed time is relevant to the exercise of the discretion. Generally, the longer the delay, the greater the onus is upon the applicant to demonstrate an acceptable explanation for the delay (see *Stergis and Ors v. Boucher and Anor* (1989) 86 ALR 174; (1989) 20 ATR 591). Also, it should not be assumed that the Commissioner will automatically exercise this discretion in circumstances where the request is lodged within the objection period relating to assessments.

90. The Commissioner will weigh the explanation of delay with the other relevant factors referred to in *Hunter Valley Developments* (for example, public interest considerations and the question of prejudice to either party arising from the exercise or non-exercise of the discretion).

Extension of time requests arising from ATO adjustments

91. In this category, there is generally compliance with the requirement to enter into loss transfer agreements within the time stipulated in subsection 80G(6A) (*paragraph 170-50(2)(d)*). However, as a result of an adjustment to the taxation position of the group by the Commissioner, there is a request for an extension of time to enter into a further agreement or further agreements.

92. In *Bond Corporation Holdings Ltd and Ors v. Australian Broadcasting Tribunal* (1988) 84 ALR 669, Gummow J stated the range of factors that can be considered in the exercise of an unfettered discretion (such as that contained in subsection 80G(6A) (*paragraph 170-50(2)(d)*) is unconfined, subject to any implied limitation within the relevant legislation. It is considered there is nothing within the subject matter, scope and purpose of section 80G (*Subdivision 170-A*) (or the rest of the taxation legislation) that would imply any limitation upon the Commissioner to consider the conduct of a company group giving rise to an adjustment as being a relevant factor to the exercise of the discretion.

93. Accordingly, where an adjustment is made, for example, as a result of fraud or evasion, or a scheme to which Part IVA applies, then this factor generally weighs heavily against a favourable exercise of the discretion. In a sense, it could be said in these circumstances the

delay is directly attributable to the actions of the taxpayer. Conversely, in cases where it cannot be said the conduct of the group is culpable in respect of its failure to comply with its obligations under the law, this is a factor which weighs in favour of an extension of time being granted (e.g., where a company was unclear as to the appropriate tax treatment for bill discounts prior to the High Court decision in *Coles Myer Finance Ltd v. FC of T* (1993) 176 CLR 640).

Taxation Ruling IT 2624

94. It has been suggested that paragraphs 20 to 22 of Taxation Ruling IT 2624 require in every case the discretion should be exercised in the taxpayer's favour. However, the purpose behind IT 2624 was to facilitate the introduction of self-assessment and to reduce the amount of information taxpayers had to supply in their returns. From 1 July 1992, the law was changed such that taxpayers no longer are required to lodge notices, but must enter into agreements. As such, IT 2624 has no application to agreements entered into under subsection 80G(6A) (*paragraph 170-50(2)(d)*).

Examples

Effect of changed circumstances on subsection 80G(6) agreements

95. It is possible to outline five broad examples under which changed circumstances of group companies may affect the validity of transfer documents and/or cause group companies to seek to enter into transfer documents out of time. This provides a guideline as to the operation of the law in each case. The five examples are:

(i) insufficient loss example;

(ii) insufficient income example;

(iii) increased loss example;

(iv) increased income example; and

(v) no original transfer document example.

(i) Insufficient loss example

96. This occurs where, for any reason, the loss of the loss company is less than originally determined (e.g., through an error in the return or audit action) so there are consequently insufficient losses for transfer to the income company.

(a) The simplest case is where there is one transfer document between a loss company and an income company, e.g., a loss company transfers a loss of $20 to an income company with a net assessable income of $100. As a result of an audit, the losses of the loss company available for transfer are reduced to $10. The operation of subsection 80G(15) (*section 170-70*) means the Commissioner is not restrained by section 170 time limits to amend the assessment of the income company accordingly. Therefore, the transfer document remains valid to the extent of the $10 that was capable of being transferred.

(b) The more complex example is where the loss company has made multiple transfer documents with different companies, e.g., available losses of $20, and transfer documents entered into with four companies to transfer $5 to each. As a result of an audit, available losses are reduced to $16. The Commissioner's view is the first three transfer documents in time are still valid. In some cases, this is easy to ascertain, particularly where the transfer documents are made on different days. In other cases, the Commissioner may be guided by the taxpayer as to which transfer documents were made first. The last transfer document in time is valid to the extent of $1.

(ii) Insufficient income example

97. In this case, an amendment to the income company's return reduces its net assessable income to a level so it is unable to absorb the amount of loss specified in the transfer document, e.g., a loss company transfers $20 to an income company with a net assessable income of $20. An audit amendment to the income company's return reduces its taxable income to $10. Subsection 80G(7) (*subsections 170-5(3)* and *170-45(2)*) operates and provides an agreement has no effect to the extent it purports to transfer a loss amount from a loss company that exceeds the net assessable income of the income company.

98. In these circumstances, subsection 80G(16) (*section 170-65*) operates to treat the transfer document as if it had specified the amount the income company is capable of absorbing ($10) and enables the loss company to retain the remaining $10. The loss company may then seek a favourable exercise of the Commissioner's discretion under subsection 80G(6A) (*paragraph 170-50(2)(d)*) to make a further agreement to transfer the excess loss ($10) to another company. The same principles in respect of validity and transfer documents made first in time, as outlined in scenario (b) of **Example (i)**, apply where

there are multiple loss companies transferring losses to the income company with the reduced net assessable income.

(iii) Increased loss example

99. In this instance, the loss company has made transfer documents and, subsequently, it is discovered the amount of loss available for transfer is greater than initially determined (e.g., through an error in preparing a return). This includes an example where the loss company wishes to transfer further losses to a company with which it has already made a loss transfer agreement. Subsection 80G(13) anticipates that a loss company can make more than one transfer document under subsection 80G(6), by providing the sum of the losses that have been transferred by the loss company under multiple transfers must not exceed the total amount of the loss incurred by the company. There is nothing within this subsection or the other provisions of section 80G (*Subdivision 170-A*) to indicate the making of further transfer documents to transfer losses should be limited to companies with which the loss company has not made any previous agreement. In this case, it may be a matter for the Commissioner's discretion as to whether further time should be allowed to make the additional agreement(s).

(iv) Increased income example

100. In this example, a transfer document has been entered into and, subsequently, the net assessable income of the income company is increased. As a result, the income company wishes to make a further agreement or further agreements to transfer losses from either the loss company or another company with losses within the group. The loss deduction transfer may only take place where the loss company has losses available in respect of the year in which the income company has increased net assessable income. The loss company **cannot revoke** any subsequent loss deduction transfers it has made with other group companies and transfer those losses to the income company. Where the loss company has losses available, the question of whether the losses can be transferred to the income company is subject to the exercise of the Commissioner's discretion under subsection 80G(6A) (*paragraph 170-50(2)(d)*).

(v) No original transfer document example

101. This is the case where there has been no loss transfer document entered into by the date of lodgment of the income company return and there is simply a request for the Commissioner to exercise the

discretion under subsection 80G(6A) (*paragraph 170-50(2)(d)*) to allow the making of the agreement out of time (see discussion at paragraphs 81 to 90 above on the exercise of the Commissioner's discretion). In circumstances of the appropriate lodgment of returns, the Commissioner would generally exercise his discretion if the transfer document is made on the date the return of the income company is lodged.

Detailed contents list

102. Below is the detailed contents list for this Ruling:

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- Hunter Valley Developments Pty Ltd and Ors v. Minister for Home Affairs and Environment (1984) 58 ALR 305; (1984) 7 ALD 315; (1984) 3 FCR 344
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