TD 2014/D3 - Income tax: consolidation: does the exception to the pre rules in paragraph 50(3)(a) of Part 4 of Schedule 3 to the Tax Laws Amendment (2012 Measures No.2) Act 2012 apply to an assessment (the assessment for the later income year) in the circumstance described in paragraph 1 of this Taxation Determination?

This document has been Withdrawn.
There is a Withdrawal notice for this document.

Draft Taxation Determination

Income tax: consolidation: does the exception to the pre rules in paragraph 50(3)(a) of Part 4 of Schedule 3 to the *Tax Laws Amendment (2012 Measures No.2) Act 2012* apply to an assessment (the assessment for the later income year) in the circumstance described in paragraph 1 of this Taxation Determination?

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This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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Ruling

1. No. Paragraph 50(3)(a) of Part 4 of Schedule 3 to the *Tax Laws Amendment (2012 Measures No. 2) Act 2012*[1] does not apply to an assessment (the assessment for the later income year) in the circumstance where:

- the head company applied the original 2010[2] law in respect of the joining entity in calculating the tax loss for an income year (the earlier income year); and
- a nil assessment for that earlier income year was deemed to have been served on the head company by the Commissioner on or after 12 May 2010 and on or before 30 March 2011 that satisfied the conditions in paragraph 50(3)(a); and

[1] All legislative references are to Schedule 3 to the *Tax Laws Amendment (2012 Measures No. 2) Act 2012* unless otherwise stated.
[2] The ITAA 1997 as amended by the *Tax Laws Amendment (2010 Measures No. 1) Act 2010* (the 2010 Act), but disregarding amendments made by Schedule 3: item 49.

- the Commissioner was advised by the head company that the amount of the tax loss was subsequently reduced (but not to zero) and the Commissioner, in response to this advice, subsequently issued a document headed "Notice of Amended Assessment" (the notice) after 29 June 2012; and
- the head company considers whether the tax loss can be deducted in a later income year; and
- the head company's income tax return for that later income year when lodged, is deemed to be an assessment (the assessment for the later income year), notice of which is deemed to have been served after 29 June 2012.[3]

2. Paragraph 50(3)(a) applies the interim rules[4] only to the particulars in respect of the joining entity that have been included in the head company's notice of assessment for that income year where that notice of assessment was served on the head company by the Commissioner on or after 12 May 2010 and on or before 30 March 2011. The definition of assessment in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) includes ascertaining that a taxpayer has no taxable income and no tax payable (the nil assessment). However, it does not extend to ascertaining the amount of a tax loss.[5] Rather, determining the deductibility of an amount of tax loss under the specific provisions of the ITAA 1936 and the *Income Tax Assessment Act 1997* (ITAA 1997) is part of the process of ascertaining the amount of taxable income (or that there is no taxable income) and the tax payable (or that there is no tax payable) of the later income year. If the assessment for the later income year is served after 30 March 2011, paragraph 50(3)(a) cannot apply.

3. The notice for the earlier income year served after 29 June 2012 following the reduction of the tax loss is not an assessment and therefore not an amended assessment. The nil assessment for the earlier income year deemed to be served by the Commissioner on or after 12 May 2010 and on or before 30 March 2011 under subsection 166A(3) of the ITAA 1936 remains the latest notice of assessment that satisfies the conditions of paragraph 50(3)(a).

4. Furthermore, even if the notice for the earlier income year is considered to be an assessment, the notice does not relate to the application of the original 2010 law. The original 2010 law was repealed on 29 June 2012 and therefore the notice cannot be said to have applied the original 2010 law in respect of the joining entity.[6]

5. Therefore, the interim rules apply to the calculation of the nil assessment for the earlier income year but do not extend to the calculation of the tax loss that is deductible in the later income year assessment. The pre-rules[7] will apply to the later income year assessment as subitem 50(2) is satisfied[8] and neither paragraph 50(3)(a) or subitem 50(5) apply. The amount of tax loss for the earlier income year that can be deducted in the later income year will be determined under the pre-rules.

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[3] Subsection 166A(3) of the ITAA 1936.
[4] The amendments made by Parts 1 and 2 of Schedule 3: item 49.
[5] TR 2011/5 *Income tax: objections against income tax assessments*, paragraph 60.
[6] TD 2014/D4, paragraphs 2, 37 and 38.
[7] The amendments made by Part 1 of Schedule 3: item 49.
[8] This is a necessary implication of the nil assessment satisfying the conditions in paragraph 50(3)(a), as one of those conditions is that apart from paragraph 50(3)(a) the pre rules would apply (subparagraph 50(3)(a)(i)).

6. If by applying the pre rules to the calculation of the tax loss for the earlier income year under section 36-10 of the ITAA 1997 assessable income and exempt income (if any) exceeds allowable deductions, there is no tax loss for the earlier income year that can be deducted in a later income year under section 36-17 of the ITAA 1997. However, given that the interim rules applied to the nil assessment for the earlier income year, the head company does not have a retrospective liability for income tax for the earlier income year as a result of the calculation of the tax loss under section 36-10 of the ITAA 1997 for the purposes of the later income year assessment.

7. If by applying the pre rules to the calculation of the tax loss for the earlier income year under section 36-10 of the ITAA 1997 allowable deductions exceed assessable income and exempt income (if any), the resultant tax loss amount is the amount that should be used in determining the deductibility of the tax loss in the later income year under section 36-17 of the ITAA 1997.

Examples

Note: The following examples are provided for the purposes of illustrating the Commissioner's view about the way in which subitems 50(1), (2) and paragraph 50(3)(a) apply and do not provide a view about the application of the substantive provisions of the pre rules, interim rules or original 2010 law.

Example 1

8. *On 1 July 2008 Sub Co joined the Head Co consolidated group. The assets of Sub Co at the joining time included right to future income assets. Head Co is entitled to a deduction for the right to future income assets under the original 2010 law. However, if the pre rules apply Head Co is not entitled to any deduction for the right to future income assets.*

9. *Head Co lodged its 2008-09 income tax return with the following particulars:*

- *$70,000 assessable income*
- *Less $30,000 other deductions*
- *Less $100,000 deduction under section 716-405 of the original 2010 law*

2008-09 income year: Nil assessment (tax loss of $60,000 carried forward).

10. *An assessment was deemed to have been made by the Commissioner on 15 December 2010 when the 2008-09 income tax return was lodged.*[9]

11. *As a result of a revised market valuation the deduction Head Co is entitled to under section 716-405 of the original 2010 law is $65,000. Head Co requested the carried forward tax loss amount for the 2008-09 income year be reduced to $25,000. In response to this request, on 30 June 2012, a document headed "Notice of Amended Assessment" (the notice) was issued by the Commissioner on Head Co. The notice issued did not confirm the adjusted tax loss amount but merely recited the details of the nil assessment previously made under section 166A of the ITAA 1936. The notice that issued on 30 June 2012 is not an assessment for the purposes of the ITAA 1936.*

[9] Subsection 166A(3) of the ITAA 1936.

12. *The deemed assessment made on the 15 December 2010 is Head Co's latest notice of assessment which relates to the application of the original 2010 law in respect of Sub Co. It was served on Head Co by the Commissioner on or after 12 May 2010 and on or before 30 March 2011, thus it satisfies the requirements of paragraph 50(3)(a).*

13. *However, the interim rules only apply to the calculation of the nil assessment, and not to the ascertainment of the tax loss for the 2008-09 income year. Paragraph 50(3)(a) applies only to the particulars which form part of Head Co's assessment that satisfies paragraph 50(3)(a). The tax losses do not form part of an assessment until they are recouped as deductions against assessable income in a subsequent income year.*

14. *In the 2011-12 income year Head Co has assessable income and considers whether it can deduct the carried forward tax loss from the 2008-09 income year. The assessment for the 2011-12 income year is served on 1 February 2013. The interim rules do not apply to the 2011-12 income year assessment because it does not relate to the original 2010 law and it was not served on Head Co by the Commissioner on or after 12 May 2010 and on or before 30 March 2011. Therefore, the amount of tax loss Head Co is able to deduct must be determined under the pre rules.*

15. *Under the pre rules Head Co is not entitled to deduct any amount for the right to future income assets. Therefore, the amounts Head Co can deduct for the purposes of subsection 36-10(1) of the ITAA 1997 is only the $30,000 of other deductions. The amount of deductions does not exceed the assessable income of Head Co. Therefore, there is no tax loss for the 2008-09 income year that can be deducted in the 2011-12 income year.*

16. *However, the application of the interim rules to the calculation of the nil assessment preserves the nil tax payable for the 2008-09 income year. That is, for the purposes of calculating the nil assessment the amount of deductions available is calculated under the interim rules. The application of the pre rules only affects the amount of tax loss to be deducted in the 2011-12 income year.*

Example 2

17. *Same set of facts as in Example 1 above, except that the right to future income assets in this example are different to those in Example 1 such that Head Co is entitled to a deduction of $60,000 under the pre rules in the assessment for the 2011-12 income year (the later income year).*

18. *The following particulars relate to the calculation of the tax loss under subsection 36-10(1) of the ITAA 1997 for Head Co's 2008-09 income year in the assessment for the 2011-12 income year:*

- *$70,000 assessable income*
- *Less $30,000 other deductions*
- *Less $60,000 deduction under section 716-405 of the pre rules*

2008-09 income year: $20,000 tax loss

19. *The amount of tax loss for the 2008-09 income year under section 36-10 of the ITAA 1997 is $20,000. The tax loss of $20,000 can be deducted in the 2011-12 income year subject to the satisfaction of the remaining conditions in section 36-17 of the ITAA 1997.*

Date of effect

20. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
15 January 2014

Appendix 1 – Explanation

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

Explanation

21. The application rules in Part 4 of Schedule 3 are relevant to ascertaining whether the pre-rules, interim rules or prospective rules[10] apply in relation to an assessment of the head company of a consolidated group or multiple entry consolidated group in respect of an entity (the 'joining entity') when that entity joins the group.

22. Subitem 50(1) provides that:

> The pre rules, interim rules or prospective rules apply to an assessment of the head company of a consolidated group or MEC group for an income year in respect of an entity (the ***joining entity***) that becomes a member of the group at a time (the ***joining time***), in accordance with subitems (2), (3), (4) and (5).

23. Subitem 50(2) provides that the pre rules will apply to an assessment of the head company of a consolidated group for an income year in respect of a joining entity if the entity joined the group before 12 May 2010 (or where the arrangement under which the entity joined the group commenced before 10 February 2010).

24. There are two exceptions to the pre rules, namely the interim rules as provided for in subitem 50(3) and the original 2002 law[11] as provided for in subitem 50(5).

25. Relevant to this Tax Determination, paragraph 50(3)(a) states:

> Despite subitem (2), the interim rules apply, for the income year in respect of the joining entity, if:
>
> (a) both of these conditions are satisfied:
>
> (i) apart from this subitem, the pre rules would apply, for the income year in respect of the joining entity, in accordance with subitem (2);
>
> (ii) the head company's latest notice of assessment, for the income year, that relates to the application of the original 2010 law in respect of the joining entity, was served on the head company by the Commissioner on or after 12 May 2010 and on or before 30 March 2011.

26. The meaning of 'assessment' in relation to an income tax liability is defined by subsection 6(1) of the ITAA 1936. Paragraph (a) of the definition provides that 'assessment' means the ascertainment of:

- the amount of taxable income (or that there is no taxable income); and
- the tax payable on that taxable income (or that there is no tax payable); and
- the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income).

[10] The amendments made by Parts 1, 2 and 3 of Schedule 3: item 49.
[11] The ITAA 1997 disregarding amendments to that Act made by Division 1 of Part 1 and Division 2 of Part 11 of Schedule 5 to the 2010 Act and by Schedule 3: item 49.

27. Furthermore, subsection 166A(3)[12] of the ITAA 1936 deems the Commissioner to have made an assessment on the day a head company lodges an income tax return and the income tax return itself is deemed to be a notice of assessment of the head company's taxable income (or that there is no taxable income) and the amount of tax payable thereon (or that no tax is payable).[13]

28. An assessment is made up of elements or particulars. A 'particular' is a specific or definite constituent element in the assessment of the taxable income (or that there is no taxable income) or tax payable thereon (or that there is no tax payable).[14] A claim for a deduction is an example of a particular or an element of an assessment. The tax loss is however not a particular of an assessment until the year in which it is recouped.

29. Paragraph 50(3)(a) turns on whether the *latest* notice of assessment that relates to the application of the original 2010 law in respect of the joining entity was served on the head company by the Commissioner on or after 12 May 2010 and on or before 30 March 2011. The rationale underlying this requirement is that if the taxpayer has realised tax outcomes under the original 2010 law in an assessment within the relevant period, including a nil assessment, they qualify for the interim rule exception to the pre rules to the extent of the particulars claimed in that notice of assessment.

30. Where the head company has a tax loss for an income year and the head company subsequently advises the Commissioner of an adjusted amount of tax loss and in response to the advice, the Commissioner issues a document titled “Notice of Amended Assessment” (the notice), the notice does not confirm the adjusted tax loss amount but merely recites the details of the nil assessment previously made under section 166A of the ITAA 1936.[15] The notice is not an assessment and therefore not an amended assessment for the purposes of section 173 of the ITAA 1936.

31. The meaning of 'assessment' does not extend to ascertaining or adjusting the amount of a tax loss.[16] The effect of an amended assessment is to alter the original assessment by amending it in a particular or particulars, with a view to imposing a fresh liability, or at least, by adjusting the components or elements that went to determining the taxable income or tax payable amounts previously notified.[17] Given that the ascertainment of the amount of tax loss is a separate exercise (under section 36-10 of the ITAA 1997) from the process of assessment and presupposes a nil assessment position, the Commissioner is not engaged in a process of re-allocating components or elements of the nil assessment previously made, since no ordering rules exist to determine the priority order of the application of allowable deductions against assessable income in reaching a nil assessment position. In other words, the reduction to the quantum of the tax loss does not relevantly affect the components or elements of the nil assessment previously notified. The notice subsequently issued is therefore not an amended assessment.

32. Despite the notice issuing in response to the advice of the adjustment of the tax loss, that notice is not a notice of assessment within the meaning of the statutory definition of 'assessment'.

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[12] Subsection 166A(3) of the ITAA 1936 deems an assessment when the company lodges a return that shows no taxable income or that there is no tax payable applies for the 2004-05 income year and later income years. Consequently, this Tax Determination is only relevant for income years from the 2004-05 income years and later income years.

[13] TR 2011/5, paragraphs 66 and 67.

[14] TR 2011/5, paragraphs 156 to 162.

[15] *White Industries Australia Ltd v FC of T* [2003] FCA 599; 2003 ATR 93; 2003 ATC 4558 at paragraphs 31 and 32

[16] TR 2011/5, paragraph 60. See also paragraph 2.51 of Chapter 2 of the Explanatory Memorandum to *Tax Laws Amendment (Improvements to Self Assessment) Act (No.2) 2005*.

[17] *TR* 2011/5, paragraph 62.

33. The deemed nil assessment, as a result of the lodgement of the income tax return, is the latest notice of assessment that was served by the Commissioner on or after 12 May 2010 and on or before 30 March 2011. The deemed nil assessment relates to the application of the original 2010 law if the assessment included a claim under the original 2010 law.[18]

34. Furthermore, even if the notice is considered to be an assessment, the notice does not relate to the application of the original 2010 law in respect of the joining entity for the purposes of paragraph 50(3)(a). A notice served on or after 29 June 2012 does not relate to the application of the original 2010 as it was repealed on the 29 June 2012 and therefore the notice cannot be said to apply the original 2010 law.[19]

35. Paragraph 50(3)(a) therefore only applies to the deemed nil assessment that was served by the Commissioner upon the lodgement of the income tax return that applies the original 2010 law.

36. Determining the deductibility of an amount of tax loss[20] under the specific provisions of the ITAA 1936 and ITAA 1997 is part of the process of assessment of the later income year.[21] The tax loss, if deducted, would form part of an assessment of the later income year when the income tax return is lodged. If the deemed assessment under subsection 166A(3) of the ITAA 1936 is served by the Commissioner after 30 March 2011, paragraph 50(3)(a) cannot apply. Given that paragraph 50(3)(a) does not apply, the pre rules under subitem 50(2) apply instead to the assessment of the later income year.

37. Paragraph 3.123 of the Explanatory Memorandum to the *Tax Laws Amendment (2012 Measures No.2) Act 2012* (the Explanatory Memorandum) provides support for this view:

> *3.123 Therefore, if the joining time was before 12 May 2010 or the arrangement under which the joining entity joined the group commenced before 10 February 2010 (so that the pre-rules generally apply) and the joining entity holds, for example, a right to future income that is not unbilled income, then:*
>
> - *if the Commissioner has served a notice of assessment or amended assessment for an income year on the head company between 12 May 2010 and 30 March 2011 allowing a deduction for the claim, the interim rules will apply for that income year so that the deduction is allowed; and*
> - *the pre rules will apply to the tail of the claims for deduction in subsequent income years (and therefore a deduction may not be allowed in those subsequent income years).*

38. Whilst the term 'tail of the claim' was not explained in the Explanatory Memorandum, Attachment A to the Assistant Treasurer and Minister for Financial Services and Superannuation's media release (No. 159 of 25/11/2011) at paragraphs 29 and 30 provided that the tail of a claim includes a claim that gave rise to a carry forward loss:

> *29. In some cases the benefits of a claim are realised over two or more income years (that is, the claim has a 'tail'). This could happen, for example, if:*
>
> - *the claim gives rise to a carry forward loss;*
> - *the claim is for a deduction that is spread over more than one year; or*

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[18] TD 2014/D4, paragraph 36.
[19] TD 2014/D4, paragraphs 37 and 38.
[20] Tax Loss is defined in subsection 995-1(1) of the ITAA 1997.
[21] See also Example 2.5 of the Explanatory Memorandum to *Tax Laws Amendment (Improvements to Self Assessment) Act (No.2) 2005.*

- *the claim relates to a taxing point that arises in an income year after the year in which the joining time occurs.*

30. Where the tail of a claim is covered by a private binding ruling or Advance Compliance Agreement issued before 31 March 2011, the claim will be allowed and will not be affected by the changes to the original tax cost setting rules. Otherwise, the application of the changes to the law for the pre 12 May 2010 period to the tail will depend on the time that the relevant assessment or amended assessment issues.

39. Section 36-17 of the ITAA 1997 sets out the rules on how a tax loss from an earlier income year is deducted in a later income year where the total assessable income and exempt income (if any) exceeds total deductions.

40. The method of calculating a tax loss for an income year is specified in section 36-10 of the ITAA 1997 by:

a. adding up all amounts you can deduct for an income year (except for tax losses for earlier income years);

b. subtracting the total assessable income; and

c. subtracting any net exempt income.

41. Given that the pre rules apply to the later income year assessment and the tax loss from the earlier income year is a particular that forms part of the assessment of the later income year, the pre rules are applied to the method of calculating the tax loss for the earlier income year by:

a. adding up all amounts that you can deduct in accordance to the pre rules;

b. subtracting the total assessable income in accordance to the pre rules; and

c. subtracting any net exempt income.

42. The application of the pre-rules under section 36-10 of the ITAA 1997 is only for the purposes of determining the amount of tax loss from the earlier income year that can be deducted in the assessment of a later income year. The application of the interim rules to the nil assessment preserves that assessment such that there is no further liability for income tax for the earlier income year as a result of the calculation of the tax loss under section 36-10 of the ITAA 1997 for the purposes of the assessment of the later income year.

Appendix 2 – Your comments

43. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

44. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

a. provide responses to persons providing comments; and

b. be published on the ATO website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**21 February 2014**
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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2011/5; TD 2014/D2; TD 2014/D4; TD 2014/D5; TD 2014/D6

Subject references:

- amended assessments
- amendment of assessments
- calculation of the allocable cost amount
- carry forward losses
- company losses
- consolidation
- consolidation – joining
- consolidation – losses
- current year losses
- deemed assessments
- group losses
- losses
- losses carried forward
- notices of assessment
- original assessment
- prior year losses
- service of notices of assessment
- tax assessments
- tax cost setting amount
- tax cost setting rules

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 166A
- ITAA 1936 166A(3)
- ITAA 1936 173
- ITAA 1997 36-10
- ITAA 1997 36-10(1)
- ITAA 1997 36-17
- ITAA 1997 716-405 as amended by the Tax Laws Amendment (2010 Measures No. 1) Act 2010, but disregarding amendments made by Schedule 3 to *Tax Laws Amendment (2012 Measures No. 2) Act 2012*.
- ITAA 1997 716-405 as amended by Part 1 of Schedule 3 to Tax Laws Amendment (2012 Measures No. 2) Act 2012
- Tax Laws Amendment (2010 Measures No. 1) Act 2010
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 1
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 2
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 3
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 4, Item 49
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 4 Subitem 50(1)
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 4 Subitem 50(2)
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 4 Subitem 50(3)
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 4 Paragraph 50(3)(a)
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 4 Subparagraph 50(3)(a)(i)
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 4 Subitem 50(4)
- Tax Laws Amendment (2012 Measures No. 2) Act 2012 Sch 3 Pt 4 Subitem 50(5)

Case references:

- White Industries Australia Ltd v FC of T [2003] FCA 599; (2003) 53 ATR 93; 2003 ATC 4558

Other references:

- Explanatory Memorandum to Tax Laws Amendment (Improvements to Self Assessment) Act (No.2) 2005
- Explanatory Memorandum to the Tax Laws Amendment (2012 Measures No. 2) Act 2012
- Attachment A to the Assistant Treasurer and Minister for Financial Services and Superannuation's media release (No. 159 of 25/11/2011)

ATO references

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