



TD 2014/D6 - Income tax: consolidation: if the conditions in paragraph 50(3)(a) of Part 4 of Schedule 3 to the Tax Laws Amendment (2012 Measures No.2) Act 2012 are satisfied and the interim rules apply to an assessment and, on or after 29 June 2012 that assessment is amended to include a new claim which was not previously made in the assessment, do the interim rules apply to the new claim?

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This document has been finalised by TD 2014/24.

 There is a Compendium for this document: **TD 2014/24EC** .



Draft Taxation Determination

Income tax: consolidation: if the conditions in paragraph 50(3)(a) of Part 4 of Schedule 3 to the *Tax Laws Amendment (2012 Measures No.2) Act 2012* are satisfied and the interim rules apply to an assessment and, on or after 29 June 2012 that assessment is amended to include a new claim which was not previously made in the assessment, do the interim rules apply to the new claim?

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Ruling

1. No. The new claim will not attract the application of the interim rules,¹ since it was not claimed pursuant to a notice of assessment² which satisfied the conditions in paragraph 50(3)(a) of Part 4 of Schedule 3 to the *Tax Laws Amendment (2012 Measures No.2) Act 2012*.³
2. Paragraph 50(3)(a) operates to apply the interim rules to each claim in the notice of assessment that satisfies the conditions of paragraph 50(3)(a).

¹ The amendments made by Parts 1 and 2 of Schedule 3 to the *Tax Laws Amendment (2012 Measures No.2) Act 2012*.

² Note: if a tax loss was calculated for that income year and the notice of assessment that was served on the head company for that income year was for a nil assessment, then regard should be had to the effect of the Commissioner's preliminary view provided in Draft Taxation Determination TD 2014/D3. This scenario is not addressed in this Draft Taxation Determination.

³ All legislative references are to Schedule 3 to the *Tax Laws Amendment (2012 Measures No.2) Act 2012* unless otherwise indicated.

3. When a new claim is included in a notice of amended assessment served on or after 29 June 2012, the amended assessment does not relate to the application of the original 2010 law⁴ nor was it served on the head company by the Commissioner on or after 12 May 2010 and on or before 30 March 2011. Therefore the conditions of paragraph 50(3)(a) are not satisfied for that claim.

4. Paragraph 50(3)(a) does not operate to apply the interim rules to claims which could, or should have been made for that income year, but were not. If any such claims are made later in a notice of amended assessment served on or after 29 June 2012, they will be subject to the pre rules.⁵

5. The earlier notice of assessment remains the latest notice of assessment that relates to the application of the original 2010 law in respect of the joining entity and the conditions in paragraph 50(3)(a) continue to be satisfied by that notice. Thus, each claim included in that earlier notice of assessment continues to be subject to the interim rules.

Example

Note: The following example is provided for the purposes of illustrating the Commissioner's view about the way in which paragraph 50(3)(a) applies and does not provide a view about the application of any of the substantive provisions of the pre rules, interim rules or original 2010 law.

6. *Pepper Co joined the Salt Co consolidated group on 1 July 2009. At the joining time, Pepper Co's assets included asset 1 and asset 2, both reset cost base assets.*

7. *For the year ended 30 June 2010, Salt Co's notice of assessment was deemed to have been served on 27 August 2010, in accordance with the original 2010 law. It claimed a deduction for the entire tax cost setting amount of asset 1 for \$14,000 but did not claim anything regarding asset 2.*

8. *As this is Salt Co's latest notice of assessment which relates to the original 2010 law in respect of Pepper Co's asset 1 claim, and it was served on or after 12 May 2010 and on or before 30 March 2011, the conditions of paragraph 50(3)(a) are satisfied for that claim. Consequently paragraph 50(3)(a) operates to apply the interim rules to Pepper Co's asset 1 claim.*

9. *On 20 November 2012 an amended notice of assessment is served which includes a claim for part of the tax cost setting amount of asset 2.*

10. *Salt Co cannot apply the interim rules to claim a deduction for any portion of the tax cost setting amount of asset 2. No amount in relation to that asset was claimed in accordance with the original 2010 law pursuant to the notice of assessment which was served on 27 August 2010. Consequently, the requirements of paragraph 50(3)(a) are not met and the interim rules cannot apply to this claim. Instead, the pre rules apply to the new claim in relation to asset 2.*

⁴ The *Income Tax Assessment Act 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.

⁵ The amendments made by Part 1 of Schedule 3: item 49.

TD 2014/D6

Status: draft only – for comment

Page 3 of 10

11. *With regard to the asset 1 claim, Salt Co's latest notice of assessment for the 2010 income year which relates to the original 2010 law in respect of the joining entity, Pepper Co remains the one which was served on 27 August 2010. That notice of assessment included the asset 1 claim. As such the conditions of paragraph 50(3)(a) are satisfied and the interim rules continue to apply to each particular in that notice of assessment, including the asset 1 claim.*

Date of effect

12. 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 Taxation15 January 2014

Appendix 1 – Explanation

❶ *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

13. The Application rules in Part 4 of Schedule 3 are relevant to ascertaining whether the pre rules, interim rules or prospective rules⁶ 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.

14. Subitem 50(1) provides that

(1) 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).

15. 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).

16. There are two exceptions to the pre rules, namely the interim rules as provided for in subitem 50(3) and the original 2002 law⁷ as provided for in subitem 50(5).

17. Relevant to this Determination, paragraph 50(3)(a) is concerned with a specific situation, being where the joining time would otherwise fall within the pre rules, but the head company was served with notices of assessment at a time when the original 2010 law applied.

18. Paragraph 50(3)(a) states:

- (3) 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; or

19. In accordance with subitem 50(1), paragraph 50(3)(a) applies to an assessment of the head company for an income year, in respect of a joining entity.

⁶ The amendments made by Parts 1, 2 and 3 of Schedule 3: item 49.

⁷ The *Income Tax Assessment Act 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.

20. The term 'assessment' in relation to an income tax liability is defined by subsection 6(1) of the *Income Tax Assessment Act 1936* (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
- ...

21. 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 of a taxpayer (or that there is no taxable income) or tax payable thereon (or that there is no tax payable).⁸ A claim for a deduction is an example of a particular or an element of an assessment.

22. For paragraph 50(3)(a) to apply, the pre rules must otherwise apply to the joining entity for that income year.

23. The operation of paragraph 50(3)(a) must be considered in the context of subitems 50(1) and 50(2) such that paragraph 50(3)(a) only confers the application of the interim rules to particulars in respect of the joining entity that have been included in the head company's notice of assessment for that income year.

24. That is, the interim rules apply to each particular of the latest notice of assessment, for the income year that relates to the application of the original 2010 law in respect of the joining entity, that was served on the head company by the Commissioner on or after 12 May 2010 and on or before 30 March 2011. The interim rules do not apply to amounts that could or should have been claimed for that income year, but were not in fact claimed. Also, the inclusion of new particulars in an assessment cannot affect the treatment of other particulars which were included in a previous notice of assessment which satisfied the conditions of paragraph 50(3)(a).

25. 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 reason underlying this requirement is that if the taxpayer has realised tax outcomes under the original 2010 law in an assessment within the relevant period, they qualify for the interim rule exception to the pre rules to the extent of the particulars claimed in that notice of assessment.

26. The phrase 'latest notice of assessment' recognises that the Commissioner or the taxpayer may amend an assessment any number of times within the relevant statutory time limits. An amended assessment is an assessment for the purposes of the ITAA 1936.⁹ There is only one assessment for a given income year, thus an amendment of an existing assessment is not a new assessment for that year.¹⁰ An amended assessment does not cancel, revoke, extinguish or replace the original assessment. Rather, its role 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 particulars that went to determining the taxable income or tax payable amounts previously notified.¹¹ The service of a notice of amended assessment completes this assessment process. If an assessment has been amended a number of times there will be a series of notices of assessment and amended assessment for the income year.

⁸ TR 2011/5, paragraphs 156 to 162.

⁹ Section 173 of the ITAA 1936.

¹⁰ See *Stokes v. Federal Commissioner of Taxation* 96 ATC 4393; (1996) 32 ATR 500 per Davies J, citing with approval what Latham CJ said in *Cadbury-Fry-Pascall Pty Ltd v. Federal Commissioner of Taxation* (1944)

27. Therefore, to determine whether paragraph 50(3)(a) applies, each notice of assessment for the income year must be examined to determine whether it relates to the application of the original 2010 law in respect of a particular. Once the latest notice of assessment that covers the particular of the assessment that relates to the application of the original 2010 law is determined, there is then the question of whether the notice was served on the head company by the Commissioner within the relevant time period.

28. The term 'relates to' denotes a connection or relationship between the application of the original 2010 law and the notice of assessment. 'Related' is defined in the *Macquarie Dictionary* as 'to have reference (to) or to have some relation (to)'. The term 'relating to' has been considered by the courts and has been afforded a wide interpretation: *Fountain v. Alexander* (1982) 150 CLR 615 at 629; *Colakovski v. Australian Telecommunications Corp* (1991) 100 ALR 111. However, overall the term has been determined by the courts with reference to its statutory context and purpose: *Butler v. Johnston* (1984) 55 ALR 265 at 268; *Hatfield v. Health Insurance Commission* (1987) 77 ALR 103 at 106-7.

29. The purpose of paragraph 50(3)(a) can be seen as to give effect to the Government's statement in Media Release No.59 of 25 November 2011 at paragraph 30, Table 2, Item 3 which indicates that the interim rules apply if the claim is covered by an assessment or amended assessment where the notice is served between 12 May 2010 and 30 March 2011.

30. Paragraph 3.123 of the Explanatory Memorandum to Tax Laws Amendment (2012 Measures No.2) Bill 2012, also reveals this purpose and indicates the exception to the pre rules in paragraph 50(3)(a) is confined to claims made in the relevant assessment. It draws a distinction between a 'claim' being the amount relating to an asset or event which becomes a particular of the current year's assessment and the 'tail of a claim' being amounts relating to that same asset or event which might be claimable in the future. The example provided in paragraph 3.123 illustrates that in the context of paragraph 50(3)(a), only the claim made in the relevant assessment is protected and not the tail of a claim.

31. For the reasons discussed in paragraphs 35 and 36 of TD 2014/D4, in order to give effect to this purpose, 'relates to' does not have a wide meaning. A notice of assessment 'relates to the application of the original 2010 law in respect of the joining entity' if the relevant provisions of the original 2010 law were applied to a particular in respect of the joining entity in the relevant head company's notice of assessment. A notice of assessment will not possess the relevant connection to the original 2010 law to the extent that a particular could or should have been included in that assessment at a time when the original 2010 law was applicable but was not in fact included.

32. The relevant provisions of the original 2010 law were applicable until 29 June 2012, when the *Tax Laws Amendment (2012 Measures No.2) Act 2012* came into effect. As such, any notices of assessment served on or after the 29 June 2012 could not be said to relate to the application of the original 2010 law because the particulars included in that notice will not apply the original 2010 law in respect of the joining entity. Rather, the particulars included in that notice would have applied the relevant provisions of the interim rules or pre rules in accordance with *Tax Laws Amendment (2012 Measures No.2) Act 2012*.

70 CLR 362; (1944) 7 ATD 471; at CLR 381; ATD 482. The Full Federal Court in *Federal Commissioner of Taxation v. Stokes* (1996) 72 FCR 160; (1996) 97 ATC 4001; (1996) 34 ATR 478 expressed a similar view. Also see TR 2011/5, paragraph 83.

¹¹ TR 2011/5, paragraph 82.

33. Where a new particular is included in a notice of amended assessment served on or after 29 June 2012, the subsequent notice of amended assessment results from an application of the pre rules and therefore does not relate to the application of the original 2010 law in respect of the joining entity. That subsequent notice instead relates to the pre rules in respect of the new particular. The result is that paragraph 50(3)(a) will not operate to apply the interim rules to the additional particular. Rather it will be subject to the pre rules.

34. The previous notice of assessment (that was served on the head company by the Commissioner on or after 12 May 2010 and on or before 30 March 2011) remains the latest notice of assessment which can be said to relate to the application of the original 2010 law in respect of the joining entity.

35. Consequently, all of the particulars claimed in that previous notice of assessment will continue to satisfy the requirements of paragraph 50(3)(a). The result is that all of those particulars remain subject to the interim rules.

Appendix 2 – Your comments

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

37. 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:

- provide responses to persons providing comments; and
- 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.

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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/D3; TD 2014/D4; TD 2014/D5

Subject references:

- consolidation
- right to future income
- residual tax cost setting rule
- application rules
- original 2002 law
- original 2010 law
- tax cost setting
- joining entity
- joining time
- pre rules
- interim rules
- prospective rules
- assessment

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 173
- ITAA 1997
- 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 Subitem 50(5)

Case references:

- Butler v. Johnston (1984) 55 ALR 265
- Cadbury-Fry-Pascall Pty Ltd v. Federal Commissioner of Taxation (1944) 70 CLR 362; (1944) 7 ATD 471;
- Colakovski v. Australian Telecommunications Corp (1991) 100 ALR 111
- Federal Commissioner of Taxation v. Stokes (1996) 72 FCR 160; (1996) 97 ATC 4001; (1996) 34 ATR 478
- Fountain v. Alexander (1982) 150 CLR 615
- Hatfield v. Health Insurance Commission (1987) 77 ALR 103
- Stokes v. Federal Commissioner of Taxation 96 ATC 4393; (1996) 32 ATR 500

Other references:

- Explanatory Memorandum to Tax Laws Amendment (2012 Measures No.2) Bill 2012
- Assistant Treasurer's Media Release No.59 of 25 November 2011
- Macquarie Dictionary 5th Edition

ATO references

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TD 2014/D6

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