PS LA 2013/5 - Collection of consolidated group liabilities

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Law Administration Practice Statement

PS LA 2013/5

This Practice Statement is an internal ATO document and an instruction to ATO staff.

Taxpayers can rely on this Practice Statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Practice Statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

SUBJECT: **Collection of consolidated group liabilities**

PURPOSE: **To outline the Commissioner's policy in relation to:**

- **the collection of group liabilities from head companies of consolidated groups, member entities and entities that have left the group**
- **tax-sharing agreements, including their form and basis of apportionment of group liabilities among members, and**
- **requirements for an entity to leave the group clear of certain liabilities.**

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BACKGROUND

1. This Practice Statement outlines our policy in relation to:
   - the collection of group liabilities from head companies of consolidated groups (which includes multiple entry consolidated (MEC) groups), member entities and entities that have left the group
   - the requirements of a tax-sharing agreement (TSA), and
   - the requirements for an entity to leave the group clear of certain group liabilities.
2. This Practice Statement should be read in conjunction with Law Administration Practice Statement PS LA 2011/14 *General debt collection powers and principles*.
3. All legislative references in this Practice Statement are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.
4. Your decisions and actions must be consistent with the commitments made by the ATO in Our Charter. You are also expected to follow the directions of Chief Executive Instruction Respecting taxpayers' rights of review (link available internally only).

TERMS USED

5. The following terms are used in this practice statement:

   Contributing member – is an entity that is a subsidiary member of a consolidated group for at least part of the period to which the group liability relates.

   Contribution amount – in respect of a particular group liability, is the amount allocated to a TSA contributing member under a TSA.

   Elimination entries – is an accounting tool or method which removes the effects of intercompany transactions such that transactions between the companies in a group are ignored for accounting purposes.

Exited entity – is an entity that was a subsidiary member of a consolidated group that has left the group – that is, it has ceased to be a member of the group.

Group liability – is one of the tax-related liabilities of the head company referred to in subsection 721-10(2).

Head company – is a head company of a consolidated group as well as a head company of an MEC group.

Head company's due time – is the time a group liability becomes due and payable by the head company.

Leaving time – is the time a member ceased to be a member of a consolidated group.

MEC group – is a multiple entry consolidated group.

TSA – is a tax-sharing agreement.

TSA contributing member – is a contributing member that is a party to a TSA.

STATEMENT

6. The legislative rules dealing with the liability of the head company and subsidiary members of consolidated groups are contained in Division 721.

7. Liabilities of the head company and its subsidiaries are tax-related liabilities and recoverable using the general collection provisions contained in Part 4-15 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

8. A reference to the head company of a consolidated group in this Practice Statement should also be taken to be a reference to a MEC group.

Professional advice

9. Certain aspects of this Practice Statement relate to events that will generate relatively complex legal obligations between subsidiary members and impact on creditors, financiers of subsidiary members, as well as prospective purchasers of group companies and other third parties. We cannot provide legal or accounting advice on these issues and it is strongly suggested that appropriate professional advice be sought on these matters.

Groups

10. From 1 July 2002, the head company of a wholly owned group of entities can elect to consolidate and thereafter be treated as a single entity for income tax purposes. Broadly, this means that the subsidiary entities lose their individual income tax identities and are treated as parts of the head company of the consolidated group for the purposes of determining income tax liability during the period in which they are members of the group.

11. From 1 July 2012 to 30 September 2014, the effect of consolidation also applied to liabilities incurred by the members of the group for minerals resource rent tax (MRRT) under the *Minerals Resource Rent Tax Act 2012* (now repealed), provided that the head company exercised the choice to consolidate for MRRT purposes. This choice was only available to a group that had already been consolidated for income tax purposes.

12. From 1 July 2012 to 1 July 2019, the effect of consolidation also applied to liabilities incurred by the members of the group for petroleum resource rent tax (PRRT) under the *Petroleum Resource Rent Tax Assessment Act 1987*,

provided that the head company exercised the choice to consolidate for PRRT purposes. This choice was only available to a group that had already been consolidated for income tax purposes.

Group liabilities – head companies and subsidiaries

13. A head company is required to pay or otherwise discharge a group liability in full by the head company's due time.

Group liabilities – joint and several liability

Joint and several liability generally

14. If the head company does not pay or otherwise discharge a group liability by the due date (head company's due time), all entities that were members of the group for a part of the liability period (contributing members) become jointly and severally liable for that group liability, unless that group liability is covered by a TSA. TSAs are examined in further detail in Part B of this Practice Statement.

15. The joint and several liability of a particular contributing member only becomes due and payable 14 days after we give written notice to that entity. We may give written notice to one or more, or all, of the contributing members, depending on the potential for recovery from those members. Notice may be given to different contributing members at different times. If, for example, we give a notice to 2 different contributing members on different days, the 2 contributing members will have different due and payable dates for the same liability. Once the full amount of the group liability and related GIC has been collected, recovery action would cease against all members in respect of that liability.

Limit on joint and several liability where group first comes into existence

16. If a group comes into existence during a period to which a group liability relates, the joint and several liability of the contributing members is limited to the proportion of the group liability that is reasonably attributable to the consolidated period.

17. In most cases, we would expect the head company to be able to determine its taxable income for the pre-consolidated period and, from this, calculate the group liability attributable to the consolidated period.

18. If the head company refuses or otherwise fails to provide when requested, a reasonable attribution of the group liability, we will use whatever information is available to make a reasonable attribution and use this figure as the basis for any recovery action against the contributing members.

19. Pay as you go (PAYG) instalments payable by the head company for quarters prior to the head company being given its initial head company instalment rate are not taken to be group liabilities. Therefore, subsidiary members cannot become liable under Division 721 for all or part of these amounts.[1] The PAYG amounts of subsidiary members are, however, a liability of the subsidiaries.

[1] See subsection 721-10(3).

Exclusion from joint and several liability

20. A contributing member is excluded from being jointly and severally liable for a group liability if at the head company's due time it was prohibited according to the effect of an Australian law from entering into any arrangement under which it could become subject to such a liability.[2]

21. If an entity is, at the head company's due time, prohibited according to the effect of an Australian law from entering into any arrangement under which the entity becomes subject to a joint and several liability, that entity is (by operation of subsection 721-15(2)) excluded from the operation of the joint and several liability provisions. However, this statutory exclusion would not prevent such an entity entering into and being liable to an amount under a TSA.

22. An example of an entity that would be considered to fall within the exclusion is one that is prevented by statute or regulation from giving a cross guarantee or was a participant in a financial market or clearing and settlement facility licensed under Parts 7.2 or 7.3 of the *Corporations Act 2001*.

23. Further, certain assets that are regulated by law may not be available to us in recovery proceedings regardless of whether the entity is excluded or not.

24. The effect of the *Life Insurance Act 1995* is that where a contributing member is a life insurance company, the assets of a statutory fund of the company are only available to meet liabilities or expenses (which includes tax liabilities) related to the business of the fund.

25. While a life insurance company may be a member of a consolidated group, the group liability of the group (being the collective tax liability of the head company and members) cannot be said to be attributable to the business of the life insurance company's statutory fund. Therefore, we may not be able to enforce the recovery of group liability against the assets of the statutory fund of the company but may enforce recovery against its other assets.

26. A contributing member's full joint and several liability does not become due and payable until 14 days after we give the entity written notice.[3]

27. When a group is created during a liability period (for example, part way through an instalment quarter) a contributing member's joint and several liability is limited to the proportion of the group liability that is reasonably attributable to the consolidation period.[4]

Possible rights of contribution between entities

28. If we decide not to sue a subsidiary member of a consolidated group, the creditors of other subsidiary members of the consolidated group could be disadvantaged relative to the creditors of the excluded entity. However, this risk would be ameliorated to the extent that the other subsidiary members of the consolidated group who have paid an amount of the group liability would have a right of contribution under section 265-45 of Schedule 1 to the TAA against the excluded entity that was not sharing the burden for which it was jointly and severally liable as a matter of law. This statutory right would operate in addition to any common law rights of contribution. The fact that the joint and several liability was not assumed voluntarily but arose from a revenue law would not preclude a right of contribution from also arising under equitable principles (*Armstrong v Commissioner of Stamp Duties* (1967) 69 SR (NSW) 38).

[2] See subsection 721-15(2).
[3] See subsection 721-15(5).
[4] See section 721-20.

29. Section 265-40 of Schedule 1 to the TAA would enable a contributing member, that could demonstrate that they have paid a joint and several liability for or on behalf of another entity in the group, to recover an appropriate amount from that other entity.

30. The risk of joint and several liability would be avoided if the group liability was covered by a valid TSA.[5]

Group liabilities – liability covered by a tax sharing agreement

31. Joint and several liability is avoided by the contributing members if, just before the head company's due time, the particular group liability was covered by a TSA that reasonably allocated the liability among the parties to that agreement, and that agreement is produced when we request it .

32. Where a group liability is covered by a TSA, a particular contributing member may have no liability or be liable for only a portion of the group debt.

33. If we have determined that a particular group liability is not covered by a valid TSA (for example, the requirements of a TSA are not met) or the TSA is not produced as required under subsection 721-25(3), all the contributing members are jointly and severally liable for that debt, and one or more of those members may be pursued for payment of that group liability.

34. A contributing member's allocated liability under a TSA does not become due and payable until 14 days after we give the entity written notice.[6]

35. An entity that leaves a consolidated group can exit clear of a group liability that has not become due and payable if, before the time it ceases to be a member of the group (leaving time), it pays to the head company the amount, or a reasonable estimate of the amount, that would otherwise be payable under the relevant TSA. An exited entity, however, remains exposed to group liabilities that are due and payable by the head company prior to the date of exit.

36. Whereas a head company has a right to object, appeal or seek any other review under Part IVC of the TAA in regard to the ascertainment of a group liability, a contributing member has no such rights under Part IVC.

37. Further information regarding the particular statutory requirements of TSA is examined in Part B of this Practice Statement.

EXPLANATION

38. The information in this section of the Practice Statement is presented as follows:

- Part A – concerns the Commissioner's general recovery policy in respect of the collection of group liabilities from the head company and subsidiary members. It also addresses the interaction between the collection of group liabilities and other collection policies.
- Part B – concerns TSAs.
- Part C – concerns exits by subsidiary members from a consolidated group.

[5] See subsection 721-15(3).
[6] See subsection 721-30(5).

PART A: COMMISSIONER'S RECOVERY POLICY FOR CONSOLIDATED GROUPS

Recovery action against a head company

39. It is expected that a head company would pay its group liabilities by the relevant due time. If, for whatever reason, the head company cannot make payment by the due time the onus will remain with the head company to initiate contact with us in order to explain its situation and seek to come to an arrangement to pay.

40. If no contact is made or an acceptable arrangement is not entered into, we will, generally, initially pursue action against the head company.

41. In all situations, the head company remains liable for the full amount of the unpaid group liability and the time at which that amount was due and payable does not change.

Recovery action against subsidiary members

42. Where it is clear that timely recovery from the head company is unlikely we may seek to recover from one or more subsidiary members immediately. Even where there is a reasonable possibility of eventually recovering from the head company, we may still seek to recover from one or more member entities in certain circumstances before exhausting all recovery avenues against the head company. These circumstances could include, but are not limited to:

    - a head company with a history of non-payment of tax debts
    - a consolidated group with a history of payment only being made after action is initiated against subsidiary member entities
    - where it is expected that action against the head company will not be successful in achieving full payment, will not be cost-effective or would result in undue delays
    - where it is known that assets are being dissipated by members of the group and this dissipation puts collection of unpaid group liabilities at risk, or
    - where we need to make a claim in an insolvency administration of a member entity.

43. If a notice is given to a member either in respect of a joint and several liability[7] or a contribution amount under a TSA[8] and that member is unable to make full payment by the due and payable date, the member should contact us to discuss alternative payment options.

44. Generally, the liability of the member would be treated as any other tax-related liability and this policy as it relates to the collection of liabilities would apply. When applying this policy, the member entity's circumstances would at first instance be considered in isolation. Submissions that other members of the group (including the head company) are in a better position to meet the liability would not be given great weight in reaching any decision regarding collection of the liability from a particular contributing member.

45. An arrangement to pay, a deferral of recovery action or any other agreement entered into with a particular contributing member does not affect our rights in respect of, nor prevent action being taken against, other members liable for all or part of the same group liability.

[7] See subsection 721-15(5).
[8] See subsection 721-30(5).

46. To simplify the negotiation process, it would be acceptable if representations were made on behalf of one or more contributing members through the head company, provided the head company is properly authorised in writing to do so. It is understood that for various reasons entities, particularly exited entities, may prefer to have separate representation. However:

- we would need to ensure that the confidentiality concerns of all entities were addressed
- the representatives would need to ensure that there was no conflict of interest, and
- the entities may need to ensure that they have a legal right of access to the relevant records (for example, the records of the head company), for the purposes of negotiation.

Recovery action against exited entities

47. Action to recover a group liability from an exited entity will depend on the circumstances in each case. Where an exited entity is liable to pay an amount under the joint and several liability provisions, recovery action would generally only commence after action against the head company and other current subsidiary members that were members of the group when the liability arose, had concluded or if we believe that action against those subsidiary members would not result in full payment of the liability.

48. Where an exited entity is liable to pay an amount under the TSA provisions, recovery action would generally only commence after action against the head company had concluded or if we believe that action against the head company would not result in full payment of the liability.

49. Where an exited entity enters into a formal insolvency administration, we will make a claim for any liability in that administration.

Interaction with other collection policies and issues

Deferring the payment time of a group liability

50. We may defer the time for payment of a group liability in accordance with the policy outlined in PS LA 2011/14. It would be rare for us to grant a deferral because the group has not made adequate arrangements to ensure that the group liabilities are met on time. A deferral would not be available solely because a group has not completed a TSA relating to that particular debt. Where a deferral has been granted, GIC on any unpaid amount will begin to accrue from the deferred date.

Arrangements to pay tax-related liabilities by instalments

51. We may grant an arrangement to pay the group liability by instalments in accordance with the policy in PS LA 2011/14. It would be unusual for us to grant such an arrangement where the group continually neglects to make adequate arrangements to ensure that the group liabilities are met on time.

52. When considering an arrangement proposal, we will look to the position of the entire group and the situation and actions of all the contributing members, as well as those of the head company.

53. Unlike a deferral of time to pay, an arrangement to pay by instalments does not alter the date from which GIC begins to accrue (that is, the head

company's due time). The GIC component of the debt should be factored into any arrangement to pay by instalments.

Disputed debts

54. Where a group liability is subject to a dispute and legal action for recovery against the head company has been deferred in accordance with an arrangement as detailed in Law Administration Practice Statement PS LA 2011/4 *Collection and recovery of disputed debts*, we will also defer commencing action against contributing members.

55. Even when a fifty-fifty arrangement has been accepted or any other agreement is in place to defer recovery action, it will be a condition that we may rescind that agreement and commence recovery action where it is considered that the associated risk requires such action (for example, dissipation of assets).[9] When considering the risk, we will look to the position of the entire group and the situation and actions of all the contributing members, as well as the head company.

Allocation of payments received by the Commissioner

56. We may receive payments from the head company or, following a demand being issued to a subsidiary member, from that member. Payments in respect of group liabilities or TSA contribution amounts by the head company or subsidiary members will be allocated as follows:

- a payment to us by a subsidiary member where an effective TSA exists will be offset against that subsidiary member's liability and the head company liability
- a payment to us by a subsidiary member where members are jointly and severally liable will be offset against all subsidiary members' liabilities and the head company liability
- a payment to us by the head company where members are jointly and severally liable will be offset against the head company liability and all the subsidiary members' liabilities, and
- a payment to us by the head company where an effective TSA exists will be offset against the head company liability and the subsidiary members' liabilities, but only to the extent that it reduces each subsidiary member's liability to an amount equalling the (reduced) head company liability (that is, in some cases there will be no reduction in the subsidiary member's liability).

57. The total amount recovered from the members of the group will be no more than the head company liability plus associated GIC.

General interest charge

58. If the head company fails to pay a group liability by the due and payable date, GIC will accrue. For example, if a PAYG instalment is not paid by the due time, the combination of section 45-80 of Schedule 1 to the TAA and Part IIA of the TAA imposes the GIC on a daily basis up until the time the group liability and the GIC is paid in full.

[9] See Law Administration Practice Statement PS LA 2011/6 *Risk management in the enforcement of lodgment obligations and debt collection activities*.

59. Requests for remission of the GIC will be considered in accordance with the policy in Law Administration Practice Statement PS LA 2011/12 *Remission of General Interest Charge*. When considering requests for remission, the circumstances of the entire group may be taken into account. It would be unusual for us to grant such a remission where the group continually neglects to make adequate arrangements to ensure that the group's taxation liabilities are met on time.

60. Any GIC payable by the head company that is relevant to another group liability is a group liability itself. It follows that GIC can be subject to a TSA. Should the head company fail to pay the GIC and that GIC liability is not covered by a TSA, each contributing member would be jointly and severally liable for the GIC amount.

61. If we give a contributing member written notice under subsection 721-15(5) of a group liability that is GIC, the joint and several liability relating to the GIC becomes due and payable at the end of the day the written notice is given. (Note: For other types of group debts a joint and several liability does not become due and payable until 14 days after the subsection 721-15(5) notice is given.)

62. In addition, section 721-17 provides that the contributing member's joint and several liability relating to any GIC that the head company may continue to incur in respect of the same unpaid group liability becomes due and payable each subsequent day without the need for a further subsection 721-15(5) notice to be given.

63. Alternatively, if the GIC group liability is covered by a TSA, the liability of the TSA contributing members would be calculated in accordance with the terms of that TSA.

64. The liability of a TSA contributing member relating to a group liability that is GIC becomes due and payable at the end of the day on which we give the member written notice under subsection 721-30(5). (Note: For other types of group debts, the liability under a TSA does not become due and payable until 14 days after the subsection 721-30(5) notice is given.)

65. Further, section 721-32 provides that liabilities arising under a TSA in respect of GIC that the head company may continue to incur in respect of the same unpaid group liability become due and payable by a TSA contributing member each subsequent day without the need for a further subsection 721-15(5) notice to be given.

66. Should a remission of the head company's GIC occur, the liability of the contributing members will be reduced accordingly.

67. Special considerations apply to the remission of GIC and tax shortfall penalties where a group seeks an amendment to its 2003–04 and prior income tax assessments as a result of one of the following circumstances:

- in respect of the 2002–03 financial year, the group has incorrectly applied law that was enacted by the time of lodgment of its original 2002–03 return
- in respect of the 2002–03 financial year, the group has relied upon announced but unenacted changes when lodging its original 2002–03 return
- the group has followed an ATO view provided in the Consolidation reference manual or similar product in its original return
- the group has followed a ruling or determination in its original return, or

- the group waited for a ruling or determination before lodging an amendment request.

68. For more information, see:

- Law Administration Practice Statement PS LA 2006/8 *Remission of shortfall interest charge and general interest charge for shortfall periods*
- Law Administration Practice Statement PS LA 2007/11 *Administrative treatment of taxpayers affected by announced but unenacted legislative measures which will apply retrospectively when enacted,* and
- Law Administration Practice Statement PS LA 2011/12 *Remission of General Interest Charge*.

Notification to liquidators and receivers

69. When a company in liquidation is, or has been, a member of a consolidated group, we will include in the notification required to be given to the liquidator under subsection 260-45(3) of Schedule 1 to the TAA any liability the company has incurred as head company or as a contributing member under the joint and several liability and TSA liability provisions.

70. This notice will not be provided until we are satisfied that all liabilities to which the company may be exposed have been established or otherwise forms the view that no other liabilities will arise.

71. This also applies to the issue of a notice to receivers under subsection 260-75(3) of Schedule 1 to the TAA and to the lodgment of proofs of debt in insolvency administrations.

PART B: TAX SHARING AGREEMENTS

72. If a particular group liability is covered by a valid TSA, the law does not operate to make the head company and contributing members jointly and severally liable for that group liability. Instead, depending on the allocation of the group liability under the TSA, a contributing member may be liable for all, part or none of the group liability. Those subsidiary members not party to the TSA would also be excluded from being jointly and severally liable for the group liability covered by the TSA.

73. However, if a copy of a TSA covering a group liability is not provided in the approved form within 14 days of being requested by us in accordance with subsection 721-25(3), then the group liability is taken never to have been covered by a TSA.

Directors' responsibilities in relation to a tax sharing agreement

74. Directors of contributing members would be aware that they need to consider their statutory and common law responsibilities as directors of that entity when becoming a party to a TSA. In particular, they would need to be aware of any obligation to the head company and us that may result from them entering into the agreement.

75. As the TSA is an agreement between the head company and subsidiary members (that is, we are not a party to the agreement), it is expected that the resolution of the content of the document and the finalisation of the

arrangements to pay the head company's group liability by the due time will be resolved by the relevant directors.

76. Given the issues that may need consideration in compiling TSAs, it may be prudent for directors to seek legal and accounting advice in relation to all aspects of Division 721.

Group liabilities covered by a tax sharing agreement

77. The table in subsection 721-10(2) outlines various group liabilities. Although the law deals with each liability of the head company as a separate group liability and for which a single TSA is required, we will also recognise a document that covers multiple group liabilities as a separate TSA for each group liability. Accordingly, even if one TSA is found to have an unreasonable allocation of the group liability to which it relates (and thus be invalid), this would not mean that other TSAs covered by the document would be invalid.

78. Similarly, we will recognise a document that covers multiple periods of group liabilities as a separate TSA for each period. For example, the document could refer to a class of group liabilities, such as all PAYG instalment group liabilities that become due and payable after 1 July 2002. The document would be considered to be a separate TSA for each group liability it purports to cover. Accordingly, even if one TSA is found to have an unreasonable allocation of the group liability for the period to which it relates (and thus be invalid), this would not mean that other TSAs covered by the document would be invalid.

79. In relation to TSAs that cover multiple periods, there is a possibility that the TSA will be 'updated' from time to time in relation to future liabilities. Considerable care will be required in drafting the TSA and amending a TSA.

80. As the TSA must make a reasonable allocation of an entire group liability, an unreasonable allocation of part of the group liability to one contributing member will invalidate the entire TSA. It is not the intended outcome of the law to have one or more members jointly and severally liable for the entire debt while others have group liabilities limited by the TSA.

81. The law imposes GIC for late payment on the head company debt and it is a distinct group liability and separate from the group liability upon which it accrues. Therefore, if it was intended that a TSA cover any potential GIC, this would need to be specified in the TSA, as well as how that GIC is to be allocated between the TSA contributing members. For example, a TSA might specify that any GIC incurred by the head company in relation to an unpaid group liability is allocated to contributing members in proportion to the allocation of the primary liability. As the rules relating to GIC vary slightly from those relating to other group liabilities, it is important to read the section on GIC commencing at paragraph 58 of this Practice Statement.

82. It is important to note that where an amended assessment is issued in respect of a group liability, both original and amended assessments relate to the same (single) liability.[10] However, where possible, we are prepared to distinguish between the debt arising under an assessment from another debt that results from an amendment of that assessment.

Amendment of a group liability

83. The possibility of future amendments to group liabilities should be a consideration of all parties entering into a TSA, as well as prospective

[10] See *Trautwein v Federal Commissioner of Taxation* [1936] HCA 77 and *Deputy Commissioner of Taxation v Faint* [1988] 2 Qd R 494.

purchasers in due diligence considerations in company acquisitions. For further discussion on amended group liabilities, refer to paragraph 182 of this Practice Statement.

Single group liability not covered by multiple agreements

84. The object of the TSA provisions is that there should be a reasonable allocation of a group liability among one or more subsidiary members in accordance with a single TSA. Where a group liability is dealt with in 2 or more TSAs, that liability cannot be considered to be covered by a TSA for the purposes of Division 721.[11]

Form of a tax sharing agreement

Background

85. If a TSA is required to be given to us pursuant to a notice under subsection 721-25(3), it must be given in the 'approved form' and within 14 days after the notice is given. Section 388-50 of Schedule 1 to the TAA allows us to specify the information to be provided in an 'approved form'. Further, paragraph 388-50(1)(c) of Schedule 1 to the TAA requires that the approved form contains not only the information we require but also 'any further information statement or document as the Commissioner requires, whether in the form or otherwise'.

86. However, in recognising that the TSA is primarily an agreement between the head company and subsidiary members of the group, we have only specified below the minimum requirements for a TSA to be produced in the 'approved form'. That is, the requirements listed in paragraph 87 of this Practice Statement must be met but the actual form of the agreement (for example, a deed) is open to the taxpayers and their advisers provided the TSA legally binds the parties concerned.

Production of a valid tax sharing agreement in the approved form – requirements to comply

87. In order to comply, each TSA must:

- be in writing
- show the date of execution
- specify the names of the head company and each TSA contributing member
- specify what group liability or liabilities it covers
- specify the method used to allocate that liability or those group liabilities which must provide for a reasonable allocation of the entire group liability or liabilities
- be properly executed by or on behalf of the head company and each contributing member that is a party to the agreement (that is, the TSA contributing members)
- either
  - specify the exact contribution amount for each TSA contributing member for the relevant liability, or

[11] See subsection 721-25(1B).

- if and when required to be produced to us, include a schedule signed by the head company
    - specifying the relevant liability or liabilities and periods as specified in our notice to produce
    - stating the name and Australian business number or Australian company number of the head company and each TSA contributing member
    - stating the contribution amount of each TSA contributing member in respect of that liability or each of the liabilities, and
    - declaring that 'the schedule includes the names of all the TSA contributing members in relation to that liability or liabilities for those periods and the contribution amount or amounts as calculated under the TSA'
- if and when required to be produced to us, include any deeds of assumption in relation to the particular liability or liabilities for the particular periods.

88. For production of a TSA by an exited entity, refer to the discussion commencing at paragraph 153 of this Practice Statement.

Production of a valid tax sharing agreement in the approved form – explanation

89. Execution of the TSA in the approved form by a person properly authorised or if appropriate, under a power of attorney, would be acceptable as per standard commercial practice provided it is legally binding. Section 127 of the *Corporations Act 2001* may be relevant in certain cases.

90. Specific amounts (which can be 'nil' amounts if appropriate) can be shown in the TSA as being the relevant contribution amounts of each TSA contributing member for the relevant group liabilities.

91. However, if these specific amounts are not shown in the TSA then (if and when the TSA is produced to us) the head company must produce the TSA, the schedule and (if deeds of assumption or similar documents are used) those documents. The working papers used to calculate the contribution amounts do not have to be produced at that time but may be requested by us if necessary. To emphasise, the non-provision of the working papers when a TSA is requested does not impact on whether or not a group liability is covered by a TSA. However, the non-provision of the working papers following any formal request under section 353-10 of Schedule 1 to the TAA at a later date would be a prosecutable offence.

92. The schedule referred to in paragraph 87 of this Practice Statement does not have to be in existence just before the due time, (but groups may find it convenient to compile the schedule at that time).

93. The figures provided in the TSA or the schedule are to be definitive – that is, any discussions between the head company and TSA contributing members as to the correctness of the liability will need to be resolved prior to the production of the TSA and schedule. A deferral of time to lodge the TSA and schedule while these matters are resolved is unlikely to be granted.

94. While all members of a group do not have to be a TSA contributing member, it is suggested that groups review their TSAs regularly in case some adjustment is required due to members exiting or new members joining the group. These exits and entries may affect the reasonableness of an allocation methodology

used in a pre-existing TSA. The question of whether all subsidiary members should enter into a TSA may also be of relevance to prospective purchasers of these group companies in their due diligence considerations.

95. Even if a subsidiary member does not trade or generate income during a particular period this may not preclude it from being a party to a TSA, nor would its participation in a TSA necessarily affect the reasonableness of the allocation of a group liability under that TSA. For example, a method based on each members contribution to the group liability that results in a 'nil' allocation to a non-trading entity would, of itself, have no bearing on whether the group liability was considered to have been reasonably allocated among the head company and all the TSA contributing members.

Timing

96. For a group liability to be covered by a TSA, the TSA must be in place just before the head company's 'due time'. We have no power to allow execution of a TSA after this date. However, if we defer the head company's due time for payment, then the TSA must be in place at that later date.[12]

97. If a TSA in respect of a particular group liability is executed after the head company's due time for that liability, it has no effect.

98. The legislation does not allow for a TSA, executed on a particular date, to have effect from an earlier date.

99. However, a valid TSA that is finalised just before the head company's due time of a particular group liability covers that group liability for the entire liability period.

100. Further, a TSA that covers multiple periods which has been executed on a particular date – but purports to have effect from an earlier date – would not be acceptable in relation to any debt that was due and payable prior to the date of execution. That in itself will not prevent it being accepted in relation to relevant debts that became due and payable after the date of execution.

Amending tax sharing agreements

101. A TSA may need to be amended for a number of reasons. Examples of situations necessitating the amendment of a TSA include:

- the introduction of a new entity to the group
- the introduction of new entities after former entities have exited
- the interposition of a new head company, and
- a change in the provisional head company of a MEC group.

102. The effect of 'amending' a document comprising various TSAs may be that a new or updated document replaces the previous document. Where a document covering multiple group liabilities (that is, multiple TSAs) is amended, taxpayers need to ensure that the 'old' document does not cease to have effect with respect to pre-existing liabilities. In other words, the TSAs covered by the 'old' document which apply to liabilities for which due times have already passed should continue to be maintained and to have operation in respect of those liabilities. Care should be taken to ensure that any amended document does not create adverse consequences with respect to

[12] See PS LA 2011/14.

pre-existing liabilities or clear exit arrangements which have already taken place.

103. Considerable care will be needed in drafting the original TSA if groups are to avoid (where possible) the necessity for all current and former TSA parties to sign all amendments and to ensure that the TSA remains valid. It will also be necessary to address (when drafting or redrafting) the impact of amended assessments on entities that were part of the group for a relevant tax period, even if not at the same time.

104. If it is intended to replace an existing TSA dealing with a particular group liability that has a future due time with a new TSA dealing with the same future liability, it should be clear that the new TSA completely voids the earlier TSA. Otherwise, it may be considered that the group liability is dealt with by 2 TSAs and so both would be void by operation of subsection 721-25(1B).

105. It is important to note that if we require a TSA to be produced in relation to a particular group liability, taxpayers will need to produce the TSA as it existed just prior to the head company's due time of that relevant liability for the relevant period. This will require careful attention to document controls.

Execution of tax sharing agreements by exited or liquidated members

106. As discussed in this Practice Statement, for a TSA to be in the approved form, it needs to be legally executed by or on behalf of each contributing member that is a party to the agreement.

107. The failure of the exited entity to be a party to the TSA may potentially mean that the allocations in the TSA are considered unreasonable. As a result, all contributing members, including itself, may be jointly and severally liable for the group liability should it remain unpaid (that is, the group liability would not be covered by a TSA).

108. A difficulty arises if a TSA needs to be signed by a member that has been liquidated and thus no longer legally exists. Clearly that former member cannot sign the TSA nor can it authorise anyone to sign on its behalf.

109. The question arises as to whether the omission of that liquidated member as a party to the TSA might affect the reasonableness of the TSA allocation. Depending on the TSA methodology used and the financial position of the entity throughout the relevant tax period, this may not be an issue. For instance, if the notional taxable incomes methodology was used in the TSA for the annual assessment group liability and the former member had a notional tax loss, notional nil taxable income or was dormant for the period, then the failure of that liquidated member to be a party to the TSA may not affect the reasonableness of the TSA allocation. Note also that not every member of the group has to be a party to a TSA.

Determination of the contribution amount – the 'reasonable allocation'

110. The contribution amounts for each of the TSA contributing members in relation to the group liability must represent a reasonable allocation of the total amount of the group liability between the head company and the TSA contributing members 'just before the head company's due time'.[13]

[13] See subsection 721-25(1).

111. This does not require the TSA to specify a 'particular amount'. It could show each TSA contributing member's contribution amount as:

- a fixed or variable percentage of the group liability
- an amount based on the 'notional' contributions to taxable income, or
- an amount based on some other formula.

112. However, if the TSA does not show each TSA contributing member's contribution amount as a specified sum, a schedule will need to be produced with a copy of the TSA, if and when required, showing the contribution amount for each TSA contributing member as determined by applying the method provided in the TSA relating to that group liability.

113. The ultimate determination of what is a 'reasonable allocation' rests with the Courts. However, without prescribing the method that a group may adopt for allocation of the group liability, examples of what we would consider as being possible bases of allocation are listed below:

- Allocations of a proportion of unquantified group liabilities by using historical information if, at the time a TSA is put in place, the group liability or liabilities which it is intended to cover have not been determined (for example, a prospective TSA). For instance, the amount allocated to a TSA contributing member could be calculated using the average contribution of that entity to the group profits over the last 12 months.
- Changes in the consolidated group's structure (for example, because of entries and exits, or changes to individual member's operations) may mean that the contribution amounts calculated under the method outlined in the first dot point of this paragraph would need to be adjusted to account for these movements. Depending on the timing and significance of these changes, a new TSA using a different methodology may need to be executed.
- Allocations on the basis of each TSA contributing member's accounting profit as a percentage of the overall group accounting profit. Note that these accounting profits could be either before or after accounting consolidation elimination entries. Note also that accounting loss companies could receive a 'nil' allocation and accounting profit companies would receive an allocation in proportion to their accounting profits.
- Allocations on the basis of each TSA contributing member's ability to pay that liability. For instance, this could be based on the shareholder equity in each contributing member. However, if at the time of allocation the directors were aware that events would occur that would severely affect one or more member's ability to pay their allocation, but the directors ignored that information, then the allocation may be viewed as unreasonable.
- If it was the case that, at the head company's due time, the entire group lacked sufficient funds to meet the group liability, an allocation may be considered reasonable despite one or more TSA contributing members being incapable of paying their contribution amount (for example, the entire group was insolvent as opposed to only one or more contributing members being insolvent).
- Allocations on the basis of each contributing member's actual or expected contribution to that group liability. Tax losses of members may be (notionally) transferred between subsidiary members so that

the loss companies receive a 'nil' allocation and the profitable companies receive an allocation of a share of the exact group liability. This approach might be summarised as follows

  - determine the notional tax liability or notional taxable income for each TSA contributing member on the basis that the group was not a consolidated group
  - apportion any notional tax losses to notional taxable companies and allocate the notional loss companies 'Nil' liability under the TSA, and
  - allocate to each TSA contributing member (that still has a notional tax liability or taxable income) a portion of the group liability on a pro rata basis.

- If the taxpayer has opted to use the PAYG instalments offset provisions in subsection 721-25(1A), the income tax liability net of PAYG instalments credits could be allocated in proportion to the notional tax payable of the contributing member after deducting its PAYG amounts allocated under the TSA in respect of the relevant income year. In situations where the contributing member has PAYG amounts allocated under the TSA greater than its notional tax payable, it would receive a nil allocation.
- For PAYG instalments liabilities, it would be reasonable to use a proportional allocation of group PAYG instalments liabilities based on one-quarter of each entity's prior year notional tax liability (adjustments would be required to address entries and exits).
- Another example of how to proportionately allocate PAYG instalments liabilities might be by using notional PAYG instalments for each entity for the quarter.
- PAYG instalments liabilities might also be allocated by using actual PAYG instalment income for each entity for the relevant quarter.

114. An allocation to a contributing member of 'nil' would be seen as 'reasonable' if the circumstances of that company warranted such an allocation – for example, 'tax loss' or 'accounting loss' companies, trustee companies of some super funds or employee share schemes.

115. These methods are not intended to be prescriptive and other methods using financial information normally available to the group may be acceptable. For example, unaudited profit figures could be used instead of notional tax liabilities.

Not a 'reasonable allocation' – example

116. If a group decides to use a methodology of allocation based on contributions to group profit and certain members were excluded from the TSA, but those members were the major contributors to the group's profit, then the TSA would be seen as invalid in that it contains an unreasonable allocation of the group debt.

Consideration for head company's contribution towards group income

117. In some cases (for example, where the head company is a contributor to the group's profits), the amount allocated to the TSA contributing members (other than the head company) may be less than 100% of the group liability because

a portion of the group liability could be notionally attributable to the head company.

Intra-group transactions

118. Generally, there is no need to adopt post-elimination entries in calculating the accounting profits on which a TSA may be based, but both pre and post-elimination entries may be used.

119. Post-elimination entries might be the better option to use in respect of dividends, but this is not mandatory. Dividend payments do not reduce the profit of the paying entity and these dividends could be streamed through a succession of companies. It may be necessary to notionally reduce profits by dividend receipts to ensure that the final liabilities match the final group liability.

The final liability (on assessment)

120. The head company's liability for assessed income tax is a group liability and therefore can be covered by a TSA.[14]

121. The quantum of income tax is determined by reference to the taxable income less tax offsets.[15] Although the entitlement to credit for PAYG instalments arises at the time of assessment of the relevant year's tax, as they are not a tax offset, they do not form part of the calculation of the assessed liability as such. That is, the credit entitlement and the assessed tax are separate and distinct sums.

122. However, when allocating an assessed liability under a TSA, a group can choose to either allocate the total amount of the assessed tax payable or that amount less the instalment credits available to the head company.[16]

123. Where it is decided to allocate the assessed tax liability without allowance for instalment credit entitlements, it is probable that the total of the TSA allocation of instalments plus the TSA allocation of the gross tax liability may exceed the net amount payable by a subsidiary.

124. However, the amount owing by the head company is the net amount of the final liability (that is, the tax payable less instalment and other credits) and we cannot recover an amount greater than that from the head company and the subsidiaries. Accordingly, we will only pursue that part of the gross tax TSA allocation to a subsidiary that is equal to or less than the net amount of the final group liability. If the TSA instalment allocations or any penalties are also unpaid, that amount will also be pursued.

125. It is also conceivable that an entity could be allocated a greater liability to instalments during a year under a TSA than its 'share' of gross tax on the final assessment under a TSA. In itself this would not constitute an unreasonable allocation, as the methodology used may be acceptable but the commercial fortunes of the company over time may have resulted in this scenario arising. For example, this could occur where the first 3 quarters of the year are extremely profitable and a sudden, severe loss occurs in the final quarter resulting in a refund on assessment to the head company because the instalment credits exceed the annual assessment. It is also conceivable that the methodology used in allocating instalments under the TSA differs from the methodology used for allocating the tax payable on assessment.

[14] See table item 3 of subsection 721-10(2).
[15] See subsection 4-10(3).
[16] See subsections 721-25(1A).

'Entire liability'

126. References in this Practice Statement to the allocation of an 'entire liability' are references to the group liabilities as listed in the table in subsection 721-10(2). It is recognised that the financial position of individual companies may change between the date on which the TSA is executed and the date (if any) on which the contribution amount is pursued by us. Accordingly, and in particular where the contribution amount is pursued some years after the head company's due time, it is conceivable that a contributing member may not be able to pay the full contribution amount.

127. We will recognise the TSA as being valid and will not be entitled to seek to recover any of the unpaid TSA contribution amount of that subsidiary from other subsidiaries provided that:

- the original allocation was in accordance with the methodology of the TSA
- the original allocation was reasonable at the head company's due time
- there are no adverse circumstances relating to the validity of the TSA (for example, the TSA was part of an arrangement to prejudice recovery), and
- all other statutory requirements of a TSA are met.

Other contractual arrangements unrelated to a tax sharing agreement

128. Groups may decide to include in the document containing a TSA various terms of an agreement that are unrelated to the TSA. Provided those do not affect the reasonableness of the allocation under the TSA or prejudice our rights to recover the group liability, this would be of no concern to us. For instance, terms governing the group's internal arrangements (set out below) are not relevant to determining whether there has been a 'reasonable allocation', but the group may choose to include them in a broader agreement containing the TSA. These terms include:

- financing ongoing tax liabilities (even if this requires different contributions from subsidiary members than would be ascertained under the 'reasonable allocation' clauses)
- the treatment of refunds received (see below), or
- the requirements for balancing adjustments between the TSA liabilities and tax liabilities as shown in entities' accounts.

129. However, while these terms may have no bearing on the determination of whether there has been a 'reasonable allocation', if they are designed to frustrate the ability of a subsidiary to pay its TSA allocation, it would be seen to 'prejudice recovery' under subsection 721-25(2). This is discussed further in this Practice Statement.

Tax sharing agreement part of an arrangement to prejudice recovery

130. As per subsection 721-25(2), a group liability is not covered by a TSA if:

- the TSA was entered into as part of an arrangement, and
- a purpose of the arrangement was to prejudice the recovery by us of some or the entire amount of the group liability or liabilities of that kind.

131. Examples of such arrangements include where the allocation to a TSA contributing member was based on:

- capacity to pay and seemed reasonable at the time the TSA was made and remained so at the head company's due time, but it was always known that by the time we may attempt to collect from that member, its circumstances would be such that it would not be in a position to meet its liability, or
- notional tax liability but the individual amounts were artificially distorted by selective allocations of losses, unwarranted administration or management fees or interest payments or other intra group transactions that appeared designed to shift the TSA liabilities to entities which are less likely to be able to pay the liability.

132. Some of the factors to be taken into account in determining whether an arrangement had a purpose of prejudicing recovery include but are not limited to:

- disposing of interests (while retaining control) in solvent or asset-rich members of the group
- allocation to members where a foreseeable event would cause it to become unable to pay (for example, litigation in progress), and
- uncommercial sale of assets.

Formal notice requesting a copy of a tax sharing agreement

133. The notice to provide the TSA is issued to the head company and it is the head company's responsibility to provide the TSA. It is highly likely that the head company would be the only entity with the current TSA because previous versions may have been superseded and if it decides not to provide the TSA to us on request, that is an issue between the head company and the subsidiaries.

134. As the existence of a TSA has liability implications only at the head company's due time or the time an entity leaves the group, we will usually not issue a notice under subsection 721-25(3) that requires the head company to provide a copy of that TSA at a time before those aforementioned dates. This is because until those times (that is, the head company's due time or the leaving time) a TSA may not exist.

135. We may defer the time for lodgment of an approved form – in this case a TSA – through the operation of section 388-55 of Schedule 1 to the TAA. (For the policy on deferring the lodgment time, refer to Law Administration Practice Statement PS LA 2011/15 *Lodgment obligations, due dates and deferrals*.) In accordance with the principles outlined in PS LA 2011/15, if the head company's due time has passed, a deferral of time to lodge the TSA would be very unlikely, particularly if delays would exacerbate the recovery position or the group was non-cooperative in attending to its obligations. Generally, the granting of a deferral would be unlikely in cases other than where compliance could not be effected due to circumstances that were beyond the control of the head company and its officers. An example may be where a liquidator has been appointed and all the records of the group are unable to be located immediately.

136. It should be noted that a deferral of the time to provide a copy of a TSA does not alter the time that a TSA needs to be in place.

137. In some circumstances, such as when negotiating a payment arrangement, we may informally request a copy of any TSA to which an entity is a signatory, or

request the TSA under section 353-10 of Schedule 1 to the TAA. These requests and the compliance or non-compliance by the requested party to provide a copy of a TSA under this provision have no impact on the liability status of the contributing members.

Commissioner's review of a tax sharing agreement

138. As liabilities determined under a TSA are only enforced once a head company defaults on its obligations, we do not expect to require the production of a significant number of TSAs. Further, while a TSA could provide a reasonable allocation of a group liability at a particular point of time, depending on the allocation methodology used the reasonableness of the allocation may change due to later events. Accordingly, it would be of questionable benefit to taxpayers for us to review TSAs as they are compiled and it would be administratively impossible to review all TSAs in a meaningful way in a reasonably brief time.

139. Accordingly, the fact that we may have received a copy of a TSA (either informally or through a request under subsection 721-25(3)) and have taken no further action does not imply that we consider that the TSA is valid or provides a reasonable allocation of the relevant group liabilities.

140. Similarly, if we took steps for recovery on the basis that there was a TSA as per section 721-25, but at some future point it is concluded that the particular group liability was not covered by a TSA (for example, because the allocation of the group liability under the TSA was not reasonable) our previous actions do not prevent the law operating as if the group liability was not covered by a TSA. As such, all contributing members will be jointly and severally liable for the group liability.

Credits and refunds

141. Credits may arise in a number of circumstances – for example, from amended assessments, variations to PAYG instalments and remission of penalties. As it is the head company which is primarily liable under the law to pay group liabilities, it follows that it is the entity entitled to receive such credits. Therefore, any excess credit not applied against other liabilities is refundable to the head company.

142. However, the original group liability may have been paid by subsidiary members, including exited subsidiary members, under the joint and several liability provisions or the TSA provisions.

143. Where, during a consolidation transitional year, a subsidiary member is directly entitled to a credit under the law (for example, under section 45-215 of Schedule 1 to the TAA as a result of a varied instalment rate) that credit can only be applied against liabilities of the subsidiary member and any excess will be refunded to that subsidiary member.

Payment by a subsidiary to head company not sufficient

144. It should be noted that a payment made by a subsidiary to the head company does not extinguish the liability of a subsidiary to us – that is, the subsidiary could still be required to make a payment to us of their TSA contribution amount or of a joint and several liability. This applies even if the amount paid to the head company equals what would be required under the TSA. (However, also refer to later commentary in Part C of this Practice Statement.)

145. For this reason, the characterisation of payments (to head companies or otherwise) may need to be considered by subsidiaries, for example, whether it is a loan or paid in escrow.

PART C: EXITING FROM THE GROUP

Clear exit

146. In accordance with section 721-35, an exiting entity is able to leave a group clear of a specific group liability if:

- the actual liability was covered by a TSA to which it was a party
- it ceased to be a member of the group on or before the head company's due time, and
- before the leaving time, it had paid to the head company an amount equal to either the contribution amount or (if that amount could not be determined) a reasonable estimate of that amount.

147. Therefore, the following liabilities cannot be subject to the clear exit rules:

- a group liability not covered by a valid TSA, or
- a group liability which has already become, or is considered to be, due and payable by the head company prior to the leaving time (for example, income tax under subsection 5-5(4)).

Summary of ATO collection action against exited entities

148. Collection action against exited entities is set out broadly below:

- An exited entity which has a joint and several liability for a group debt or amended debt that was due and payable prior to its exit will generally be pursued as a 'last resort' – that is, if it is unlikely that the debt can be recovered from other entities. The law does not allow a clear exit in relation to this debt.
- An exited entity which has a TSA liability for a group debt that was due and payable prior to its exit will probably need to be pursued to enable full collection of the group debt. The law does not allow a clear exit in relation to this debt.
- An exited entity which has a joint and several liability for a group debt that was due and payable after its exit will generally be pursued as a 'last resort' if it has not exited 'clear'.
- An exited entity which has a TSA liability for a group debt that was due and payable after its exit will need to be pursued to enable full collection of the group debt if it has not exited 'clear'.
- An exited entity which has a TSA liability for a group debt that was due and payable after its exit will not be pursued if it has exited 'clear'.
- An exited entity which has a TSA liability for a group debt arising entirely from an amendment issued and due and payable after its exit will generally not be pursued unless the circumstances are such that this affected its clear exit and:
  - its activities contributed to the need for the amendment
  - it had (notionally) used losses that were extinguished in whole or part by that amendment, or

– it had expected, or should have expected, that an amended assessment would issue.

Exit

149. A member will have exited from a group when it no longer meets the eligibility requirements to be a member of a group. Often this will occur when the member is sold to an entity outside of the group. There may, however, be other circumstances in which members are considered to have exited from the group.

150. For example, when a group deconsolidates, all members of the group will effectively have 'ceased to be a member of the group'. If the time of the deconsolidation ('leaving time', in this case) occurs before the head company's due time of a group liability of that group, it is possible for the member to achieve a clear exit in respect of that liability by complying with the requirements of section 721-35.

151. In the scenario outlined in Subdivision 705-C, which concerns the acquisition or 'takeover' of a consolidated group by another, such an acquisition results in a deconsolidation of the *acquired* group, because the head company of that group no longer qualifies as a 'head company' after the takeover.

152. In these cases, it is possible for a subsidiary member of that acquired group to achieve a clear exit in respect of a group liability incurred by that group, where the due time of the liability has not yet passed at the date of the takeover. For the purposes of section 721-35, the 'leaving time' is the time of the takeover or deconsolidation and the member must have paid its contribution amount, or reasonable estimate thereof, to the former head company of the acquired group prior to this time.

Provision of a tax sharing agreement by exited entity

153. If an exiting entity makes a payment of a reasonable estimate to the head company to cover its estimated liability under the TSA, that exiting company may still become jointly and severally liable for that group debt if the TSA is not provided by the head company as required under subsection 721-25(3).

154. However, under subsection 721-15(3A), the joint and several liability in respect of that particular contributing member is taken never to have arisen:

- if a group liability is taken never to have been covered by a TSA due to the failure of the head company to give to us a copy of the agreement as required under subsection 721-25(3)
- we give the exited entity a notice under subsection 721-15(5) in respect of the group liability (that is, a notice determining the day on which the joint and several liability of a member becomes due and payable)
- apart from the operation of subsection 721-25(3) (the failure of the head company to give a copy of the TSA to us), the exited entity would have left the group clear of the group liability in accordance with section 721-35, and
- the exited entity gives to us a copy of the relevant TSA in the approved form within 14 days of the notice under subsection 721-15(5) being given.

155. The provision by an exited entity of a copy of a TSA in the approved form in accordance with subsection 721-15(3A) does not affect the joint and several

liability of other contributing members, including other exited contributing members.

156. The provision by an exited entity of a copy of a TSA in the approved form in accordance with subsection 721-15(3A) must meet the requirements set out in paragraph 87 of this Practice Statement adjusted as follows:

- The schedule is to be signed by the *exited entity only* and must
  - specify the relevant liability or liabilities and periods as specified in our notice to pay
  - state the name and Australian business number or Australian company number of the head company and the exited entity
  - state its contribution amount or a reasonable estimate of the contribution amount in respect of that liability or each of the liabilities
  - make a declaration that 'the schedule includes the names of the head company and the exited entity in relation to that liability or liabilities for those periods and the exited entity's contribution amount or amounts as calculated under the TSA', and
  - the only deed of assumption required (if it exists) is the deed of assumption signed by or on behalf of the exited entity.

Tax sharing agreement found to be invalid

157. If the TSA in respect of the group liability to which the exited entity intended to leave clear of is found to be invalid (for example, because the allocation of the group liability was unreasonable), then the exited entity will be jointly and severally liable for the total of the group liability.

158. This joint and several liability will arise regardless of whether the allocation under the TSA to the exited entity itself was reasonable or the payment made in accordance with section 721-35 would otherwise have enabled the entity to leave clear of the group liability.

Clear exit not limited by tax sharing agreement methodology

159. A clear exit is available to a TSA contributing entity regardless of the allocation methodology used provided that the allocation is reasonable and the other requirements of the law are met – that is, a payment of the relevant contributing amount or a reasonable estimate of that amount is made by the exiting entity to the head company prior to exit.

Reasonable estimate of contribution amount

160. If an exiting entity wishes to leave the group clear of a particular group liability and, before the leaving time its contribution amount for that group liability cannot be determined, a reasonable estimate of that contribution amount must be made. The reasonableness of the estimate will be determined, and depends on the circumstances, at the time of the exit.

161. For a reasonable estimate of the contribution amount to be made, the estimate needs to relate to, and be based on, the relevant TSA.

162. Other methods could make use of actual income figures, projected cash flows or a combination of this data from group accounts or the member's own accounts.

163. Where a notional income methodology is used and there is prior knowledge of an event which may impact on the reasonableness of the amount, then this needs to be factored into the estimate calculation. Such events could include:

- adjustments for taxable extraordinary or abnormal transactions
- an audit (or notice of an intended audit) by us, the result of which would require that the subsidiary modify its treatment of certain transactions, or
- pending court cases that may impact on the subsidiary's financial or taxation position.

164. The contribution amount (or reasonable estimate of that contribution amount) required to be paid will in most cases need to be calculated in consultation with the head company. The head company will have access to group records and greater knowledge of the expected quantum of the relevant group liability as well as the exiting entity's likely allocation under a TSA.

Payment of contribution amount to head company on exit

165. Documentary evidence that the leaving member had paid to the head company the contribution amount, or a reasonable estimate of that amount, would need to be retained by the leaving entity in the event that it is later needed to prove that it had left the group clear of a particular group liability. Generally, standard commercial documentation would suffice.

166. If a payment is meant to cover 2 liabilities (for example, the fourth quarter PAYG instalment and the final income tax liability), then accounting records should disclose the amount of each component.

167. If payment of an amount is made to the head company by the leaving entity as required by paragraph 721-35(c) and the head company subsequently fails to pay this amount to us, this alone does not affect the clear exit of the entity.

168. The payment of the reasonable estimate needs to be made by the 'leaving time' which, for the purposes of this provision, will mean that the transfer of the payment must be made prior to the date that the entity can no longer be a member of the group.

169. The term 'paid' has been considered in case law[17] and may mean:

- an actual payment (that is, a sum of money or a bill of exchange) is handed over directly to a head company to extinguish a liability
- a payment by agreed set-off where cross-liabilities in money exist[18], or
- a transfer of property other than money or a bill of exchange (that is, by a transfer in kind).

170. In regard to the points in paragraph 169 of this Practice Statement, it must be remembered that paragraph 721-35(c) requires payment to be made by the leaving TSA contributing member to the head company. Therefore, where the leaving member is sold to an entity outside the group, payment made by the purchaser of that member or payment made to a vendor being an entity other than the head company would not meet the statutory requirement.

171. A 'mere' book entry is not considered a form of payment. Any such book entry must result from a clear contractual arrangement between the parties which

[17] For example, *Brookton Co-operative Society Ltd v Commissioner of Taxation* [1981] HCA 28.
[18] See 'Spargo's case' (*Re Harmony and Montague Tin and Copper Mining Co.* (1873) 8 Ch. App. 407) and *Commissioner of Taxation (Cth) v Steeves Agnew & Co (Vic.) Pty Ltd* [1951] HCA 26; (1951) 82 CLR 408 at [420–421].

establishes a debt.[19] The establishment and recording of a debt cannot be considered as payment.

Contribution amount 'nil'

172. If the contribution amount (or the reasonable estimate of that amount) that otherwise would be required to be paid to the head company under section 721-35 is determined to be 'nil', then no payment is necessary to allow the exiting entity to leave the group clear of the relevant group liability. However, documentation demonstrating the calculation of the 'nil' amount would need to be retained to support the assertion of a clear exit should that claim later need to be proved to us or a court.

Adjustment of contribution amount upon completion of sale

173. Payment of the contribution amount to the head company must occur before the leaving time. However, it may not be until after the leaving time that all accounts relating to the sale of the exiting entity are completed. Only then may it be realised that the contribution paid to the head company was too much or too little, compared to the actual contribution amount as calculated under the TSA at a later date.

174. If the estimate of the contribution amount paid to the head company was found to be too much, a repayment by the head company to the exited entity (or the purchaser) can occur without impacting on any clear exit provided the resulting net amount paid to the head company still represents a reasonable estimate of that contribution amount.

175. As the contribution amount needs to be paid to the head company before the leaving time, any extra amounts paid by the exited entity after the leaving time cannot be taken into account when determining whether the amount paid was a reasonable estimate of the contribution amount. That is not to say that if an adjustment amount is required to be paid by the exited entity to the head company under their own contractual arrangements, that the original amount paid was not a reasonable estimate of the contribution amount.

Reasonable estimate of contribution amount different to final contribution amount calculated under tax sharing agreement

176. If the 'reasonable estimate' of the contribution amount paid to the head company before the leaving time is less than the contribution amount that was later determined under the TSA just before the company's due time (for example, when all data is available for determination of the various contribution amounts), there is no need to make any compensatory adjustments to the contribution amounts of any other TSA contributing members to make up the shortfall.

177. For example, if the exiting entity leaves the group on 1 September and makes a reasonable estimate that its annual assessment contribution for the year under the TSA would be $125,000 but, upon completion of the yearly income tax return and applying the TSA the amount should have been $125,500, there is no need to reallocate the additional '$500' to other members.

178. No adjustment is necessary to the other TSA contributing members' contribution amounts as under the TSA an amount would still be allocated to

[19] See *Manzi v Smith* [1975] HCA 35; (1975) 49 ALJR 376 at [377]; 7 ALR 685 at [687–688]; *Brookton Co-operative Society Ltd v Commissioner of Taxation* [1981] HCA 28.

the exited entity. However, a reallocation of this amount in the TSA to other members would not, in itself, invalidate the TSA. If this amount, (notwithstanding that it is more than the amount paid to the head company under the clear exit rules) and the other allocations represented a reasonable allocation of the total amount of the group liability, then the requirements in paragraph 721-25(1)(c) would be met.

179. On the other hand, one element of the clear exit test is that the amount paid to the head company is a reasonable estimate of the exiting entity's contribution amount. Therefore, providing the amount paid to the head company at the time of exit can be shown to be a reasonable estimate of the final contribution amount, then a clear exit is still possible.

If leaving the group prejudices recovery

180. A TSA contributing member will not leave the group 'clear' of a group liability if the cessation of membership was part of an arrangement, a purpose of which was to prejudice the recovery by us of some or all of the amount of the group liability or liabilities.

181. An example of such an arrangement may be where an entity has been sold for less than its market value. The intent of the arrangement is the relevant consideration.

182. The sale of the business of a company for fair market value rather than a company itself is not, in itself, considered part of an arrangement designed to prejudice the recovery by us.

Amended liabilities – effect on exited entities

183. An amended assessment can affect an exited entity:

- by requiring a further payment towards a debt that is deemed due and payable before the member left the group, and
- by affecting whether there has been a 'clear exit'.

184. For discussion on amended liabilities generally and the impact on clear exit, refer to paragraph 186 of this Practice Statement.

Commissioner's review of a clear exit

185. We may at any time review claims that an entity has left the group clear of a group liability and, if necessary, take action against that entity if it is considered that it had not actually left clear of the liability. However, we are not in the position to review an exit on request of the entity or other interested parties to verify that an entity exited 'clear'.

Amendment of group liabilities

186. If a group liability previously notified or assessed is found to be incorrect, it may be necessary to amend the amount payable. A common example is where an amended income tax assessment is issued following a request by the taxpayer or an audit by us.

187. The due time for amended income tax assessments is 21 days from when the taxpayer is given notification of the amendment.[20]

[20] See subsection 5-5(7).

188. All contributing members (that is, entities who were members of the group during all or part of the period to which the liability relates which includes those entities that have since left the group) are potentially exposed to the amended liability.

Amended liability not covered by a tax sharing agreement

189. Where the amended group liability is not covered by a TSA, all contributing members would be jointly and severally liable for the entire group liability.

Amended liability covered by a tax sharing agreement

190. Despite the fact that an amended assessment has a different due time from the due time of the original assessment, both assessments relate to the same group liability. As such, there must be only one TSA dealing with the debts arising from both original and amended assessments. The TSA must be in existence before the due time of the original assessment.

191. A liability resulting from an amendment will be considered to be addressed by a TSA if the TSA refers to the underlying liability to which the amendment relates. For example, a reference to a 'group liability for income tax relating to the year ended 30 June 2003' would also encompass any amendment to that liability, provided fixed amounts were not specified elsewhere in the body of the TSA.

192. If, for example, the notional tax methodology outlined in the TSA section is used as the basis for allocation under a TSA, the effect would be to allocate the increased liability from the amendment to those entities whose transactions resulted in the amendment. This additional allocation may be an indirect allocation if losses are reduced in one company resulting in the increase in notional income of those companies that used those losses.

193. In such cases, it would not be considered unreasonable if a clause in a TSA provided that any amount of increased liability arising from an amendment is allocated to those entities whose allocations from the original assessment were understated. It is important to note 2 issues:

- this would mean that if losses are disallowed in one company, those companies that 'used' those losses would be affected as well as the loss company itself, and
- the TSA must be internally consistent – that is, this clause cannot contradict the other clauses allocating the original amount of liability.

194. It is conceivable that we may have required the production of the TSA prior to issuing the amended assessment because the original assessment was also unpaid. Accordingly, it is unlikely that any schedule showing the actual TSA liabilities derived from the application of the TSA methodology to the original group liability would include the distribution of the amended liability.

195. We may require the production of the TSA with an amended schedule within 14 days of the (new) due time of the amended assessment.[21]

[21] See subsection 721-25(3).

Amended liability and clear exit

196. The effect of an amendment on a clear exit could be as follows:

- the allocation under that TSA may no longer be considered reasonable thus invalidating the TSA (for example, if the original allocation was of a specific amount or based on the specific taxable income of the group), or
- the payment made to the head company by an exiting entity of its contribution amount may fall short of its contribution amount as calculated on the basis of the amended assessment.

197. A company which left the group between the due time of the original assessment and the due time of the amendment can achieve a clear exit in relation to the amount of the amended assessment, in certain limited circumstances:

- If the entity leaves the group before the due time of *both* the original and amended assessments, any payment it made to the head company prior to its exit *may not* be sufficient to gain a clear exit if the amount paid falls short of its contribution amount as calculated on the basis of the amended assessment.
- A clear exit can only be achieved in this case if the entity made
  - a payment of its contribution amount to the head company prior to its departure, and that amount paid is equal to the contribution amount as calculated on the basis of the amended assessment, or
  - a payment of a reasonable estimate of that contribution amount to the head company prior to its departure.
- In considering whether a 'reasonable estimate' of the amount was paid, we may have regard to whether the entity could have expected that an amended assessment would issue at a later time and whether it contributed to, and could have expected, the increased amount arising from the amendment.
- As to whether the entity could have expected an amended assessment, note paragraph 164 of this Practice Statement. Usually, the exiting entity will need to consult with the head company in calculating its contribution amount or a reasonable estimate of that amount. The head company will often be in a better position to anticipate any future amended assessments of the group liability and therefore to advise accordingly of any likely increase in the contribution amount. However, an unexpected amended assessment resulting, for example, from undisclosed activities of another subsidiary of which neither the exiting entity nor the head company were (at the time of exit) aware may not affect the 'reasonableness' of the entity's estimate of its contribution amount.
- Conversely, a clear exit would not be obtained if the entity could have expected that an amended assessment would issue at a later time and does not make any contribution on exit towards the additional liability.
- An entity that leaves the group *after* the due time of the original assessment, but *before* the amended assessment is due, may still have the benefit of the clear exit provisions in respect of amended assessments.

- This is because the due time of an amended assessment for these years is prospective, such that the leaving time of an entity in this situation can be said to be 'before the head company's due time'.
- A clear exit can be achieved in this case if the entity made a payment of its (anticipated) *post-amendment* contribution amount (that is, the contribution amount that takes into account the anticipated amended assessment) or a reasonable estimate of that amount, to the head company, prior to its departure.
- However, if payment was not made of this amount before the leaving time of the entity, then clear exit would not be achieved in respect of that debt.

198. Note the distinction drawn between 'liability' and 'debts' in paragraph 82 of this Practice Statement. Note also the discussion commencing at paragraph 146 of this Practice Statement for the other requirements to achieve a 'clear exit' and, in particular, paragraphs 159 to 182 of this Practice Statement for factors to be considered when calculating and making the payment of a reasonable estimate (of the exiting entities contribution to the amended assessment amount) on exit.

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Throughout	Content checked for technical accuracy and currency. Updated in line with current ATO style and accessibility requirements.

References

Legislative references	ITAA 1997 4-10(3) ITAA 1997 5-5(4) ITAA 1997 5-5(7) ITAA 1997 Subdiv 705-C ITAA 1997 Div 721 ITAA 1997 721-10(2) ITAA 1997 721-10(3) ITAA 1997 721-15(2) ITAA 1997 721-15(3) ITAA 1997 721-15(3A) ITAA 1997 721-15(5) ITAA 1997 721-17 ITAA 1997 721-20 ITAA 1997 721-25 ITAA 1997 721-25(1) ITAA 1997 721-25(1)(c) ITAA 1997 721-25(1A) ITAA 1997 721-25(1B) ITAA 1997 721-25(2) ITAA 1997 721-25(3) ITAA 1997 721-30(5) ITAA 1997 721-32 ITAA 1997 721-35 ITAA 1997 721-35(c) TAA 1953 Pt IIA TAA 1953 Pt IVC TAA 1953 Sch 1 45-80 TAA 1953 Sch 1 45-215 TAA 1953 Sch 1 Pt 4-15 TAA 1953 Sch 1 260-45(3) TAA 1953 Sch 1 260-75(3) TAA 1953 Sch 1 265-40 TAA 1953 Sch 1 265-45 TAA 1953 Sch 1 353-10 TAA 1953 Sch 1 388-50 TAA 1953 Sch 1 388-50(1)(c) TAA 1953 Sch 1 388-55 Corporations Act 2001 127 Corporations Act 2001 Pt 7.2

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