TD 2004/76 - Income tax: consolidation: are the voting interests in a foreign company held by a subsidiary member of a consolidated group treated as being voting interests of the head company of the group when determining whether section 23AJ of the Income Tax Assessment Act 1936 applies to a dividend paid to the group?

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This document has changed over time. This is a consolidated version of the ruling which was published on *27 April 2011*

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Taxation Determination

Income tax: consolidation: are the voting interests in a foreign company held by a subsidiary member of a consolidated group treated as being voting interests of the head company of the group when determining whether section 23AJ of the *Income Tax Assessment Act 1936* applies to a dividend paid to the group?

Preamble

The number, subject heading, date of effect and paragraph 1 of this document are a 'public ruling' for the purposes of Part IVAAA of the ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner.*

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

1. Yes. The voting interests of a subsidiary member of a consolidated group are treated as being voting interests of the head company for the purposes of determining whether section 23AJ of the *Income Tax Assessment Act 1936* (ITAA 1936) is satisfied.

Explanation

2. Under section 23AJ of the ITAA 1936 non-portfolio dividends paid to an Australian resident company by a company that is not a Part X Australian resident (the foreign company) are non-assessable, non-exempt income of the Australian resident company.

3. The term 'non-portfolio dividend' is defined in section 317 of the ITAA 1936 to mean:

> a dividend (other than an eligible finance share dividend or a widely distributed finance share dividend) paid to a company where that company has a voting interest, within the meaning of section 334A, amounting to at least 10% of the voting power, within the meaning of that section, in the company paying the dividend.

4. Subsection 334A(1) of the ITAA 1936 provides that a company is taken to have a voting interest in another company if:

(a) the first-mentioned company is the beneficial owner of shares (other than eligible finance shares or widely distributed finance shares) in the other company that carry the right to exercise any of the voting power in the other company; and

(b) there is no arrangement in force at the relevant time by virtue of which any person is in a position, or may become in a position, to affect that right.

5. The extent of the voting interest is taken to be the total number of votes that, by virtue of the rights to exercise the voting power, can be cast on a poll at, or arising out of, a general meeting of the other company as regarding questions that could be submitted to such a poll. Subsection 334A(4) of the ITAA 1936 provides that, for the purposes of section 334A, the voting power is the maximum number of votes that can be cast at such a poll.

6. When determining if section 23AJ of the ITAA 1936 applies to a dividend paid to a consolidated group, the single entity rule (SER) in section 701-1 of the *Income Tax Assessment Act 1997* applies. The SER treats the subsidiary members of a consolidated group as parts of the head company (rather than separate entities) for income tax purposes during the period they are members of the consolidated group.

7. A consequence of the SER is that the actions and transactions of a subsidiary member are treated as having been undertaken by the head company and the assets a subsidiary member of the group owns are taken to be owned by the head company (excluding intra-group assets) while the subsidiary remains a member of the group.

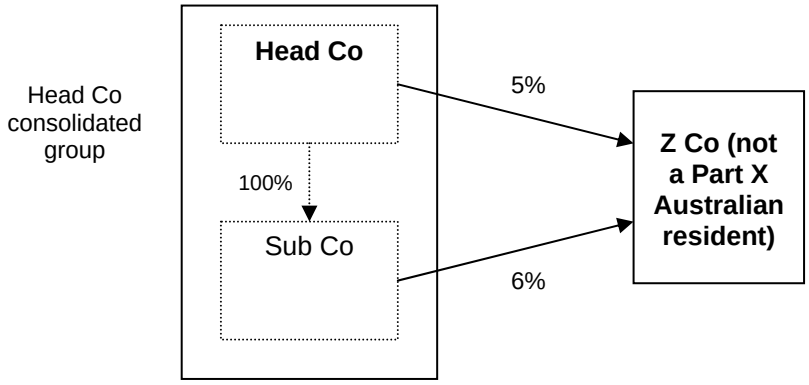
8. Accordingly, from the consolidated group's perspective, the head company is taken to hold the shares and voting rights held by a subsidiary member in the foreign company (as well as the shares and voting rights the head company holds directly in the foreign company) and to receive any dividends paid by the foreign company to the subsidiary member. If the aggregated voting interests of the members of the consolidated group amount to 10% or more of the voting power in the foreign company, any dividend received or taken to be received by the head company is a non-portfolio dividend within the meaning of section 317 of the ITAA 1936. This non-portfolio dividend is non-assessable, non-exempt income of the head company under section 23AJ of the ITAA 1936.

Example

9. *Head Co is the head company of a consolidated group. Head Co is a shareholder in Z Co, a company that is not a Part X Australian resident, and is entitled to exercise 5% of the total voting power in Z Co.*

10. *Sub Co is a subsidiary member of the consolidated group. Sub Co is also a shareholder in Z Co and is entitled to exercise 6% of the voting power in Z Co.*

11. *There is no arrangement in force under which any person is in a position, or may come to be in a position, to affect the voting rights held by Head Co and Sub Co.*



12. *From the consolidated group's perspective, the SER treats Head Co as holding the shares and voting rights held by Sub Co in Z Co and receiving the dividends paid by Z Co to Sub Co.*

13. *Accordingly, Head Co is taken to have a voting interest of 11% in Z Co. A dividend paid by Z Co to either Head Co or Sub Co is taken to be a non-portfolio dividend of Head Co and will be non-assessable, non-exempt income under section 23AJ of the ITAA 1936.*

Date of Effect

14. This Determination applies to years commencing both before and after its date of issue (subject to the note below). However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

[Note: This ruling applies to dividends paid to a consolidated group after 30 June 2004.]

Commissioner of Taxation
8 December 2004

Previous draft:
TD 2004/D48

Related Rulings/Determinations:
TR 92/20

Subject references:
- consolidation
- non-portfolio dividend
- single entity rule
- voting interest

Legislative references:
- TAA 1953 Pt IVAAA
- ITAA 1936 23AJ
- ITAA 1936 Pt X
- ITAA 1936 334A
- ITAA 1936 334A(1)
- ITAA 1936 334A(4)
- ITAA 1936 317
- ITAA 1997 701-1

ATO references
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