TD 2005/39 - Income tax: consolidation: membership: can an Australian resident company qualify as an eligible tier-1 company of a MEC group if a foreign resident entity is interposed between the Australian resident company and the top company of the group?

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Taxation Determination

Income tax: consolidation: membership: can an Australian resident company qualify as an eligible tier-1 company of a MEC group if a foreign resident entity is interposed between the Australian resident company and the top company of the group?

Preamble

The number, subject heading, date of effect and paragraph 1and 2 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.

1. Yes.

2. A company that satisfies the requirements of item 2 of the table in subsection 719-20(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) is a tier-1 company of the top company. To be an eligible tier-1 company, a tier-1 company must satisfy the requirements of section 719-15 of the ITAA 1997. A tier-1 company will be an eligible tier-1 company if subsection 719-15(2) of the ITAA 1997 does **not** apply to the company.

3. Subsection 719-15(2) of the ITAA 1997 will apply to prevent a tier-1 company from being an eligible tier-1 company if one or more entities are interposed between the tier-1 company and the top company and **all three** of the conditions in subsection 719-15(3) of the ITAA 1997 are satisfied in relation to at least one of those interposed entities. That is, a tier-1 company can qualify as an eligible tier-1 company if some of the conditions are satisfied in relation to an interposed entity, but not if all three are satisfied.

4. The first condition of subsection 719-15(3) of the ITAA 1997 is satisfied in relation to a tier-1 company if the interposed entity is an entity of the type mentioned in paragraph 719-15(3)(a) of the ITAA 1997, for example, a company that is a foreign resident. The second condition is satisfied if the interposed entity does not hold membership interests only as a nominee for one or more entities each of which is another tier-1 company of the top company or a wholly-owned subsidiary of such a tier-1 company (refer paragraph 719-15(3)(b) of the ITAA 1997). If, (as in the example below), the interposed company holds its membership interests beneficially (that is, not as a nominee), the second condition is satisfied.

5. The third condition of subsection 719-15(3) of the ITAA 1997 is satisfied in relation to a tier-1 company if at least one of the following entities holds a membership interest in the interposed entity (refer paragraph 719-15(3)(c) of the ITAA 1997):

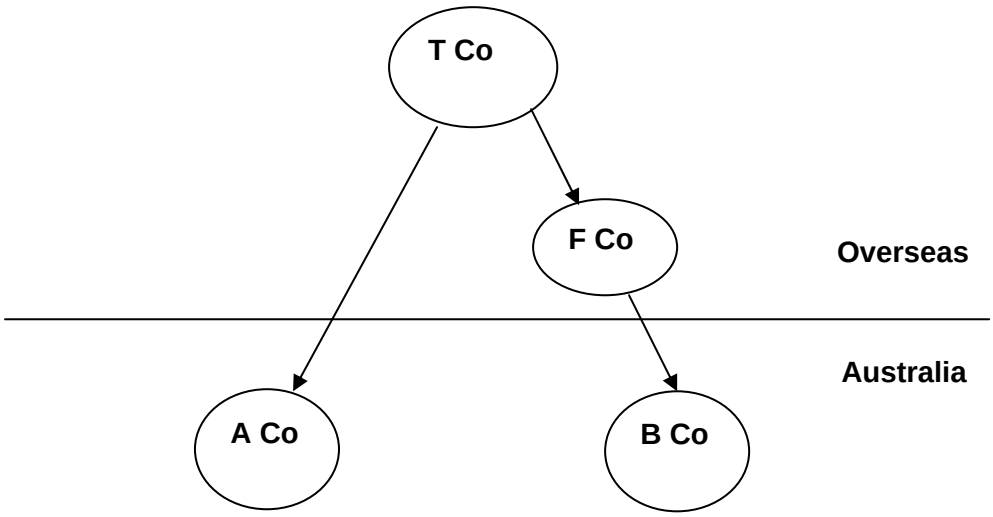
- another tier-1 company of the top company;
- a wholly-owned subsidiary of another tier-1 company of the top company; or
- an entity that holds membership interests only as a nominee for one or more other tier-1 companies and/or a nominee for one or more entities each of which is a wholly-owned subsidiary of another tier-1 company.

6. If no such entity holds membership interests in the interposed foreign resident entity, the third condition in paragraph 719-15(3)(c) of the ITAA 1997 will not be met. It follows that subsection 719-15(2) of the ITAA 1997 will not apply and consequently the tier-1 company will be an eligible tier-1 company.

Note: In the case of a transitional foreign-held subsidiary (TFHS) (as defined in section 701C-20 of the *Income Tax (Transitional Provisions) Act 1997*) that qualifies as a tier-1 company under item 2 of the table in subsection 719-20(1) of the ITAA 1997, all of the conditions in subsection 719-15(3) of the ITAA 1997 are satisfied. It follows that subsection 719-15(1) of the ITAA 1997 is not satisfied and a transitional foreign-held subsidiary cannot qualify as an eligible tier-1 company. A TFHS may also fail to qualify as an eligible tier-1 company because it is a wholly owned subsidiary of an Australian resident company and as such is not a tier-1 company (see column 4 of item 2 of the table in subsection 719-20(1) of the ITAA 1997).

Example

7. *A foreign resident company T Co holds all the membership interests in F Co, a foreign resident, and all the membership interests in A Co, an Australian resident that is not a prescribed dual resident. F Co holds all the membership interests in B Co, also an Australian resident that is not a prescribed dual resident.*



A Co and B Co are tier-1 companies under item 2 of the table in subsection 719-20(1) of *the ITAA 1997 assuming that they are subject to tax at the general company tax rate. Both companies are Australian residents and not prescribed dual residents. Further, both companies are wholly-owned subsidiaries of the top company, T Co, and are not wholly-owned subsidiaries of an Australian resident company. To be an eligible tier-1 company, a company must satisfy the requirements of section 719-15. A tier-1 company will be an eligible tier-1 company if subsection 719-15(2) does* ***not*** *apply to the tier 1 company. Subsection 719-15(2) will apply if there are one or more entities interposed between the tier-1 company and the top company and the three conditions in subsection 719-15(3) apply in relation to at least one of the interposed entities.*

8. *As no company is interposed between A Co and T Co, subsection 719-15(2) of the ITAA 1997 has no application in relation to A Co and A Co is an eligible tier-1 company of T Co.*

9. *F Co is interposed between T Co and B Co. Consequently, each of the conditions in subsection 719-15(3) of the ITAA 1997 needs to be considered in determining whether B Co is an eligible tier-1 company of T Co. The first condition is met because F Co is a foreign resident. The second condition is met because F Co holds membership interests in B Co in its own right and not as a nominee for another party. The third condition would be met if another eligible tier-1 company or a subsidiary of another eligible tier-1 company, or a nominee for either type of entity, held membership interests in F Co. As no other tier-1 company, a subsidiary of another tier-1 company, or their nominee, holds membership interests in F Co, the third condition is not met.*

10. *Subsection 719-15(2) of the ITAA 1997 consequently does not apply in relation to B Co because not all three conditions in subsection 719-15(3) are satisfied. As subsection 719-15(2) does not apply, B Co is an eligible tier-1 company of T Co pursuant to subsection 719-15(1).*

Date of effect

11. This Determination applies to years commencing both before and after its date of issue. 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).

Commissioner of Taxation
19 October 2005

Previous draft:

TD 2005/D7

Related Rulings/Determinations:

TR 92/20

Subject references:

- eligible tier-1 company
- MEC group
- tier-1 company
- top company

Legislative references:

- TAA 1953 Pt IVAAA
- ITAA 1997 719-15
- ITAA 1997 719-15(1)
- ITAA 1997 719-15(2)
- ITAA 1997 719-15(3)
- ITAA 1997 719-15(3)(a)
- ITAA 1997 719-15(3)(b)
- ITAA 1997 719-15(3)(c)
- ITAA 1997 719-20(1)
- IT(TP)A 1997 719C-20

ATO references

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