


TD 2005/50 - Income tax: consolidation: can the transferee make a choice under subsection 707-327(4) of the Income Tax (Transitional Provisions) Act 1997 to treat part of a loss transferred, under Subdivision 707-A of the Income Tax Assessment Act 1997, from a value donor as being included in another bundle of losses?

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Taxation Determination

Income tax: consolidation: can the transferee make a choice under subsection 707-327(4) of the *Income Tax (Transitional Provisions) Act 1997* to treat part of a loss transferred, under Subdivision 707-A of the *Income Tax Assessment Act 1997*, from a value donor as being included in another bundle of losses?

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.

1. No. A choice made by the transferee¹ under subsection 707-327(4) of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997) applies to treat a loss transferred from a value donor as if it is included in a bundle of losses transferred from a real loss-maker. The choice cannot be made in respect of part of that loss.
2. Subdivision 707-C of the IT(TP)A 1997 contains the value and loss donor rules. The value donor rules allow the available fraction² for a bundle of losses³ transferred from an entity ('the real loss-maker') under Subdivision 707-A of the *Income Tax Assessment Act 1997* (ITAA 1997) to be worked out as if an amount of the modified market value⁴ of another entity ('the value donor') were added to the modified market value of the real loss-maker. The loss donor rules allow a loss of the value donor to be treated as if it is included in the bundle of losses transferred from the real loss-maker, for the purposes of utilising the loss.
3. Subsections 707-327(1) to (3) of the IT(TP)A 1997 state the conditions that need to be satisfied in order for a choice to be made to treat a loss transferred from the value donor as being included in the bundle of losses transferred from the real loss-maker. The loss must be a sort of loss as identified in paragraphs 701-1(4)(a) to (c) of the ITAA 1997, namely a tax loss, a film loss or a net capital loss. Paragraph 707-327(1)(b) of the IT(TP)A 1997 requires that the loss (under consideration) was transferred, under Subdivision 707-A of the ITAA 1997, at the initial transfer time from the value donor.

¹ The transferee will generally be the head company of a consolidated group or MEC (multiple entry consolidated) group.

² Within the meaning of section 707-320 of the ITAA 1997.

³ Within the meaning of section 707-315 of the ITAA 1997.

⁴ Within the meaning of section 707-325 of the ITAA 1997.

4. Subsection 707-327(4) of the IT(TP)A 1997 applies so that, where a transferee chooses, the rate of utilisation of the loss is determined by reference to the available fraction for the bundle of losses transferred from the real loss-maker.⁵
5. The loss donor rules in section 707-327 of the IT(TP)A 1997 are drafted so that they apply on a loss by loss basis, with each loss being referable to the loss that was transferred under Subdivision 707-A of the ITAA 1997 from the value donor. If the amount of a loss that was transferred under Subdivision 707-A of the ITAA 1997 subsequently changes (because of a change in circumstances in respect of a period before the initial transfer time) then this changed amount will be the relevant loss that was transferred at the initial transfer time for the purposes of the loss donor rules. The fact that the amount of the loss that was transferred has been altered does not affect the choice (to treat the loss as if it was included in the real loss-maker's bundle for the purposes of utilisation) that was made in respect of the loss.
6. There is no specific provision which allows a part of a loss to be subject to the loss donor rules. This means that it is not possible to split up a loss and have multiple applications of the loss donor rules in respect of the loss. Therefore, the transferee is not able to choose to treat one part of the loss as being included in the bundle of losses transferred from one real loss-maker and another part of the loss as being included in the bundle of losses transferred from a different real loss-maker.
7. The requirement in subsection 707-327(3) of the IT(TP)A 1997, that it must have been possible for the value donor to transfer an amount (greater than a nil amount) of the loss to each company covered by subsection 707-327(2) of the IT(TP)A 1997, is not authority to permit the multiple application of the choice in respect of the same loss. Instead, that precondition to the exercising of the loss donor choice relates only to the ability of the value donor to transfer the loss, under Division 170 of the ITAA 1997, to each of those companies (the real loss-maker and other value donors to that real loss-maker) had the conditions in section 707-328 of the IT(TP)A 1997 existed.

Example 1

8. *Head Co forms a consolidated group on 1 July 2003. Donor Co, Loss 1 Co and Loss 2 Co are subsidiary members at the time the consolidated group is formed. Tax losses are transferred, under Subdivision 707-A of the ITAA 1997, from Donor Co, Loss 1 Co and Loss 2 Co to Head Co at the time the group forms. The bundle of losses transferred from Donor Co contains a \$100 tax loss originally incurred in the income year ended 30 June 2003.*
9. *Under separate applications of the value donor rules, modified market value is added from Donor Co to both Loss 1 Co and Loss 2 Co. Head Co, as transferee, seeks to split up the \$100 tax loss in the bundle of losses transferred from Donor Co and 'donate' \$60 of the loss to the Loss 1 Co bundle of losses and 'donate' \$40 of the loss to the Loss 2 Co bundle of losses.*

⁵ Section 707-327 of the IT(TP)A 1997 does not prescribe how the choice is to be made. There is no approved form in which to record the choice. However, specifying details such as the sort of loss, the amount, the original loss year and the value donor's loss bundle when documenting the choice will make it explicit which particular loss is the subject of the choice.

10. Under the loss donor rules, providing the conditions in subsections 707-327(1) to (3) of the IT(TP)A 1997 are satisfied, Head Co can choose to either treat the \$100 loss as being included in the bundle of losses transferred from Loss 1 Co or the bundle of losses transferred from Loss 2 Co. Head Co cannot choose to have parts of the loss treated as being included in both of those two bundles of losses.

Example 2

11. Head Co forms a consolidated group on 1 July 2003. Donor Co and Loss Co are subsidiary members at the time the consolidated group is formed (the initial transfer time). Tax losses are transferred, under Subdivision 707-A of the ITAA 1997 to Head Co from Donor Co and Loss Co at the time the group forms. Details of the losses that are transferred are as follows:

<i>Entity that originally incurred the loss</i>	<i>Income year loss originally incurred</i>	<i>Amount of the loss that is transferred to Head Co at the initial transfer time</i>
<i>Donor Co</i>	<i>y/e 30/6/2002</i>	<i>\$3,000</i>
<i>Loss Co</i>	<i>y/e 30/6/2002</i>	<i>\$6,500</i>

12. Under an application of the value donor rules, modified market value is added from Donor Co to Loss Co. Head Co, as transferee, chooses to treat the \$3,000 tax loss originally incurred by Donor Co as being included in the bundle of losses transferred from Loss Co.

13. Subsequent to this choice being made, there is an adjustment to the amount of the tax loss (to increase the amount to \$4,500) that was transferred from Donor Co to Head Co under Subdivision 707-A of the ITAA 1997. The choice to include this loss in Loss Co's bundle is not affected by the increase in the amount of the loss (that is, the choice merely applies to the higher amount of the loss).

Date of effect

14. 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

30 November 2005

TD 2005/50

Previous draft:

TD 2005/D15

Related Rulings/Determinations:

TR 92/20

Subject references:

- available fraction
- bundle of losses
- consolidation - formation
- consolidation - losses
- head company
- head company of a MEC group
- real loss-maker
- transferred losses
- utilise a loss
- value donor

Legislative references:

- ITAA 1997 Div 170
- ITAA 1997 701-1(4)(a)
- ITAA 1997 701-1(4)(b)
- ITAA 1997 701-1(4)(c)
- ITAA 1997 Subdiv 707-A
- ITAA 1997 707-315
- ITAA 1997 707-320
- ITAA 1997 707-325
- IT(TP)A 1997 Subdiv 707-C
- IT(TP)A 1997 707-327
- IT(TP)A 1997 707-327(1)
- IT(TP)A 1997 707-327(1)(b)
- IT(TP)A 1997 707-327(2)
- IT(TP)A 1997 707-327(3)
- IT(TP)A 1997 707-327(4)
- IT(TP)A 1997 707-328
- TAA 1953 Pt IVA

ATO references

NO: 2005/7894

ISSN: 1038-8982

ATOlaw topic: Income Tax ~~ Consolidation ~~ losses
Income Tax ~~ Consolidation ~~ choices