


TD 2005/51 - Income tax: consolidation: can the transferee make more than one choice, under subsection 707-327(4) of the Income Tax (Transitional Provisions) Act 1997, to treat a value donor's loss as being included in another bundle of losses?

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Taxation Determination

Income tax: consolidation: can the transferee make more than one choice, under subsection 707-327(4) of the *Income Tax (Transitional Provisions) Act 1997*, to treat a value donor's loss 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 IVA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner.*

1. No. Only one choice can be made by the transferee¹ under subsection 707-327(4) of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997), to treat a loss of the value donor as if it is included in a bundle of losses transferred from a real loss-maker.
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 of the value donor as being included in the bundle of losses of the real loss-maker.

¹ The transferee mentioned in subsection 707-325(1) of the IT(TP)A 1997, will generally be the head company of a consolidated group or the head company of a MEC 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 states:

If the transferee mentioned in subsection 707-325(1) chooses, sections 707-310, 707-335 (except paragraph 707-335(2)(a)) and 707-340 of the *Income Tax Assessment Act 1997* (and subsections 707-315(3) and (4) of that Act, so far as they relate to those sections) operate as if, at the initial transfer time:

- (a) the bundle of losses included the loss; and
- (b) the loss was not included in any other bundle of losses.

Note: This section has the effect that the utilisation of the loss will be affected by the available fraction for the bundle of losses.

5. Subsection 707-327(5) of the IT(TP)A 1997 specifies the time period within which the choice has to be made and can be revoked.

6. Where the choice has been made by the transferee to treat the loss as if it is included in a bundle of losses transferred from a real loss-maker, and the time in which to revoke that choice has passed, an alternative choice cannot be made to include the loss in another bundle transferred from a different real loss-maker. The key effect of making a choice under subsection 707-327(4) of the IT(TP)A 1997 is to treat the loss as being included in the bundle of losses transferred from the real loss-maker to the exclusion of all other bundles of losses including that of the value donor itself (see paragraphs 707-327(4)(a) and (b) of the IT(TP)A 1997). The choice can therefore be only exercised once in respect of each loss of the value donor and only in favour of the particular real loss-maker's bundle of losses that is chosen.

7. If the transferee purports to make two loss donor choices in respect of the one loss and the conditions in section 707-327 of the IT(TP)A 1997 are only satisfied for one of those choices, then that choice will be effective in 'donating' the loss from the value donor to the real loss-maker and the other choice will be taken as not being made. However, if each of those purported choices in isolation would meet the conditions in section 707-327, then both of those choices will be taken as not being made resulting in the loss being utilised using the available fraction for the value donor's bundle of losses. There is no provision in section 707-327 which would enable one of those purported choices in that situation to be valid to the exclusion of the other.⁵

8. The loss donor rules in section 707-327 of the IT(TP)A 1997 were drafted to 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. Subdivision 707-A of the ITAA 1997 applies to losses of the sort described in paragraphs 701-1(4)(a) to (c) of the ITAA 1997 subject to the conditions in section 707-115 of that Act. 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. A new choice is not taken to have been made merely because of a change in the amount of the loss to which the choice applies.

⁵ In contrast, under the value donor rules in section 707-325 of the IT(TP)A 1997, multiple donation choices can be made in respect of a value donor.

Example

9. *Head Co forms a consolidated group on 1 July 2003. Donor Co and Loss Co are subsidiary members at the time that the consolidated group is formed.*

10. *Tax losses are transferred, under Subdivision 707-A of the ITAA 1997, from Head Co and Loss Co to Head Co (as the head company of the consolidated group) at the time the group forms (the initial transfer time). Also, a net capital loss is transferred, under Subdivision 707-A, from Donor Co to Head Co at the time the group forms.*

11. *Head Co chooses (as the remaining conditions in subsections 707-325(1) and 707-325(2) of the IT(TP)A 1997 are satisfied) for Donor Co to be a value donor in respect of working out the available fractions for the two bundles of losses, transferred from Head Co and Loss Co respectively.*

12. *Head Co, as the transferee, also chooses under subsection 707-327(4) of the IT(TP)A 1997, for the net capital loss transferred from Donor Co to be treated as if it is included in the Head Co bundle for the purposes of utilising that loss. The choice to treat this loss as if it is included in the Head Co bundle is unaffected if the amount of the loss changes (because of a change in circumstances in respect of a period before the initial transfer time). The choice will merely be taken to apply to the adjusted amount of the net capital loss transferred from Donor Co under Subdivision 707-A of the ITAA 1997.*

13. *On 15 December 2004, Head Co lodges an income tax return for the 2003-04 income year and transferred losses are utilised in the return in accordance with the choices outlined above.*

14. *If it is later decided to utilise the net capital loss as if it was in the Loss Co bundle (and not the Head Co bundle), then Head Co would need to revoke the previous choice and make this different choice by the end of the final revocation and choice date.⁶ After this time, the choice to utilise the net capital loss as if it was included in the Head Co bundle, cannot be revoked and therefore no other effective choice, under subsection 707-327(4) of the IT(TP)A 1997, can be made by Head Co in respect of the loss.*

Date of effect

15. 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 Taxation30 November 2005

⁶ For this taxpayer, this is the same date which is specified in paragraph 707-327(5)(b) and subparagraph 707-327(5)(a)(ii) of the IT(TP)A 1997 respectively.

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Previous draft:

TD 2005/D16

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 701-1(4)(a)
- ITAA 1997 701-1(4)(b)
- ITAA 1997 701-1(4)(c)
- ITAA 1997 Subdiv 707-A
- ITAA 1997 707-115

- ITAA 1997 707-310
- ITAA 1997 707-315
- ITAA 1997 707-315(3)
- ITAA 1997 707-315(4)
- ITAA 1997 707-320
- ITAA 1997 707-325
- ITAA 1997 707-335
- ITAA 1997 707-335(2)(a)
- ITAA 1997 707-340
- IT(TP)A 1997 Subdiv 707-C
- IT(TP)A 1997 707-325
- IT(TP)A 1997 707-325(1)
- IT(TP)A 1997 707-325(2)
- IT(TP)A 1997 707-327
- IT(TP)A 1997 707-327(1)
- 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 707-327(4)(a)
- IT(TP)A 1997 707-327(4)(b)
- IT(TP)A 1997 707-327(5)
- IT(TP)A 1997 707-327(5)(a)(ii)
- IT(TP)A 1997 707-327(5)(b)
- TAA 1953 Pt IVAAA

ATO references

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