TD 2011/8 - Income tax: consolidation: capital gains: does paragraph 40-880(5)(f) of the Income Tax Assessment Act 1997 prevent the deduction, under section 40-880 of that Act, of incidental costs described in subsection 110-35(2) of that Act that the head company of a consolidated group or MEC group incurs, in acquiring shares in an entity that becomes a subsidiary member of the group, before the entity joins the group?

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There is a Compendium for this document: **TD 2011/8EC; TD 2011/9EC; TD 2011/10EC** .

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Taxation Determination

Income tax: consolidation: capital gains: does paragraph 40-880(5)(f) of the *Income Tax Assessment Act 1997* prevent the deduction, under section 40-880 of that Act, of incidental costs described in subsection 110-35(2) of that Act that the head company of a consolidated group or MEC group incurs, in acquiring shares in an entity that becomes a subsidiary member of the group, before the entity joins the group?

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Ruling

1. Yes. Paragraph 40-880(5)(f) of the *Income Tax Assessment Act 1997* (ITAA 1997)[1] prevents the deduction, under section 40-880, of incidental costs described in subsection 110-35(2) that the head company of a consolidated group or multiple entry consolidated (MEC) group incurs, in acquiring shares in an entity that becomes a subsidiary member of the group, before the entity joins the group.

[1] All legislative references are to the ITAA 1997 unless otherwise indicated.

Application

2. This Determination does not apply to the extent (if any) that the incidental costs mentioned in paragraph 1 of this Determination are remuneration to a member of the group.

Example

3. Head Co is the head company of a consolidated group (the group).

4. On 1 February 2008 Head Co incurred a liability to pay legal and accounting fees of $100,000 in negotiating and drawing up a contract for the acquisition of all of the shares in A Co.

5. On 1 May 2008 Head Co acquired all of the shares in A Co. At that time (the joining time) A Co became a subsidiary member of the group.

6. The legal and accounting fees are incidental costs as described in subsection 110-35(2). At the joining time, the second element of the cost bases of the shares in A Co included the $100,000 legal and accounting fees Head Co incurred in negotiating and drawing up the contract for the acquisition of the shares.

7. The cost base of each of the shares in A Co was taken into account in working out the step 1 amount of the allocable cost amount calculation for A Co under section 705-65 when it joined the group.

8. As the legal and accounting fees form part of the cost bases of CGT assets (the shares in A Co) they could be taken into account in working out the amount of a capital gain or capital loss from a CGT event for the purposes of paragraph 40-880(5)(f).

9. *Paragraph 40-880(5)(f) therefore prevents any deduction for the legal and accounting fees that would otherwise be available under section 40-880.*

Date of effect

10. This Determination applies to years of income commencing both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
4 May 2011

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Explanation

11. Section 40-880 allows certain business capital expenditure to be deducted in equal proportions over five income years. However, paragraph 40-880(5)(f) prevents an amount of expenditure from being deductible under section 40-880 to the extent that 'it could, apart from this section, be taken into account in working out the amount of a capital gain or capital loss from a CGT event'.

12. In most cases, capital proceeds and cost base (or reduced cost base) are taken into account in working out the amount of a capital gain or capital loss from a CGT event. Therefore, capital expenditure which reduces capital proceeds from a CGT event or forms part of the cost base (or reduced cost base) of a CGT asset could be taken into account in working out the amount of a capital gain or capital loss from a CGT event for the purposes of paragraph 40-880(5)(f).

13. Where incidental costs defined in subsections 110-35(1) and 110-35(2) are incurred by the head company of a consolidated group to acquire a share in an entity which becomes a subsidiary member of the group, the expenditure is included in the second element of the cost base (or reduced cost base) of the share under subsections 110-25(3) and 110-55(2) respectively. As they form part of a cost base (or reduced cost base) paragraph 40-880(5)(f) prevents any deduction for the incidental costs under section 40-880.

14. It is the inclusion of the incidental costs in the cost base (or reduced cost base) of the share in the joining entity that brings the expenditure within the scope of paragraph 40-880(5)(f). Paragraph 40-880(5)(f) has no regard to whether the capital expenditure is actually taken into account in working out a capital gain or capital loss from a later CGT event.

15. Incidental costs as described in subsection 110-35(2) that the head company of a consolidated group or MEC group incurs in acquiring shares in an entity which joins the group are included in the cost base (or reduced cost base) of each share. Those incidental costs could therefore be taken into account in working out the amount of a capital gain or capital loss from a CGT event, and paragraph 40-880(5)(f) prevents any deduction for those costs that would otherwise be available under section 40-880.

References

Previous draft:

TD 2010/D4

Related Rulings/Determinations:

TR 2006/10; TD 2010/1; TD 2011/9; TD 2011/10

Subject references:

- blackhole expenditure
- capital expenditure
- capital gains tax
- CGT cost base
- consolidation
- cost setting rules
- joining entity
- membership interest in an entity
- tax cost setting rules

Legislative references:

- ITAA 1997
- ITAA 1997 40-880
- ITAA 1997 40-880(5)(f)
- ITAA 1997 110-25(3)
- ITAA 1997 110-35(1)
- ITAA 1997 110-35(2)
- ITAA 1997 110-55(2)
- ITAA 1997 705-65
- TAA 1953

ATO references

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