Managing obligations

Key points

The **head company** is responsible for the income tax liabilities of the entire group from the date of consolidation, and the group's PAYG instalment liabilities after a group PAYG instalment rate has been issued.

Subsidiary members could be made liable to pay all or some of the unpaid income tax related liabilities of the group.

The head company is also responsible for supply of income tax related information for the consolidated group.

In accordance with the single entity rule, the head company is responsible for a consolidated group's income tax liabilities (group liabilities) from the date of effect of consolidation.

After the head company lodges the group's first consolidated income tax return, the Tax Office issues a consolidated group pay as you go (PAYG) instalment rate. When this occurs the group will be known as a 'mature group'. From this point the head company is responsible for the group's PAYG instalment liabilities.

The head company is not responsible for the income tax related liabilities incurred by subsidiary members before they join the group. Nor is the head company responsible for unpaid PAYG instalments that are payable by subsidiaries before it receives the group's consolidated PAYG instalment rate. These liabilities remain with the subsidiary member.

The group needs to ensure that the head company is in a position to meet its obligations. This might involve:

- ensuring arrangements are in place with subsidiary members to fund the head company's payment to the Tax Office, and
- ensuring the information required from subsidiary members is available in time for the head company to lodge the group's activity statement or income tax return and calculate the amount that needs to be paid.

The Tax Office will create a separate PAYG instalment account for the group to record liabilities and head company payments of consolidated PAYG instalments.

Payment not made

It is expected that a head company will pay its group liabilities by the relevant due date. If, for whatever reason, the head company cannot make payment by the due date the onus will remain with the head company to contact the Tax Office to explain its situation and seek to come to an arrangement to pay.

The Tax Office will initially seek to recover any unpaid group liabilities from the head company. Where this is unsuccessful or is likely to be unsuccessful, the Tax Office may seek recovery from subsidiary members of the group.

A subsidiary member could be made liable for a group liability that accrued during a period it was a member of a group if the head company fails to pay, whether or not the subsidiary member has ceased to be a member of the group. Such a subsidiary member is known as a 'contributing member'.

Tax sharing agreement may limit liability

A contributing member's exposure to a group liability could be limited to an amount determined by a tax sharing agreement (TSA), providing it is a party to the agreement and the agreement:

- is in place before the head company's due time (i.e. the due date for payment of the liability)
- allows an amount to be determined for each TSA contributing member in respect of the group liability
- provides a reasonable allocation of the total amount of the group liability (or alternatively, where the liability is for income tax, the total amount less the head company's PAYG instalment credits on assessment) between the head company and the contributing members, and
- has not been entered into as part of an arrangement, a purpose of which was to prejudice recovery by the Tax Office.

Note that each group liability must be covered by no more than one TSA.

Provided it still represents a reasonable allocation, not all contributing members are required to be party to the TSA. However, it may be prudent that all contributing members elect to do so for due diligence and other commercial reasons.

For a TSA to have effect, the head company must provide a copy in the approved form to the Tax Office within 14 days of a request to the head company.

If an unpaid group liability is not covered by a TSA or if the TSA is not provided to the Tax Office when required, contributing members are jointly and severally liable for the liability.

Payment by a subsidiary to head company

A payment made by a subsidiary member to the head company does *not* extinguish the subsidiary member's liability – i.e. the subsidiary member could still be required to make a payment to the Commissioner of their TSA contribution amount or of a joint and several liability. This applies even if the amount paid to the head company equals what would be required under the TSA.

Clear exit

A contributing member that has left the group can leave the group clear of the group liability if:

- the group liability is covered by a TSA to which it is a party and which satisfies the conditions set out above
- the member had left the group before the group liability had become due and payable by the head company[1]
- the member had paid to the head company the allocated amount under the TSA (or a reasonable estimate of the amount) before it left the group, and
- the exit from the group did not take place as part of an arrangement, a purpose of which was to prejudice the recovery of some or all of the group liability.

As noted earlier, a group liability will be held not to be covered by a TSA if the head company fails to give the Commissioner a copy of the TSA within 14 days of a written request. However, a member that has left the group in such a case may avoid joint and several liability by providing the Commissioner with a copy of the TSA within 14 days of being given written notice of the group liability by the Commissioner.

Note that a further liability may arise for a leaving entity that has made a clear exit if the group liability is subsequently altered (for example, an income tax assessment is amended).

Group liabilities

Group liabilities include:

- PAYG instalments once the group is a mature group
- income tax (including any liability taken to be income tax for the purposes of section 204 of the *Income Tax Assessment Act 1936*)
- franking deficit tax
- general interest charge (GIC) in respect of the unpaid amount of any of the above liabilities, and
- certain administrative penalties incurred by the head company.

[1] Note that amended assessments relating to the 2003-04 and earlier income tax years are due and payable on the same date as the original assessment. However, for amended assessments relating to the 2004-05 and later years, the due and payable date is 21 days from when the taxpayer is given notification of the amendment.

References

More detailed technical information on TSAs is provided in part C of the manual. → 'Tax sharing agreements', C9-7-110

The law dealing with income tax related liabilities when a head company fails to pay is in Division 721 of the *Income Tax Assessment Act 1997*, as amended by *New Business Tax System (Consolidation) Act (No. 1) 2002* (No. 68 of 2002), Schedule 1, the *New Business Tax System (Consolidation and Other Measures) Act 2003* (No. 16 of 2003), Schedule 14, and *Tax Laws Amendment (2004 Measures No. 2) Act 2004* (No. 83 of 2004), Schedule 2, Part 10.

Revision history

Section B3-4 first published (excluding drafts) 2 December 2002 and updated 28 May 2003.

Further revisions are described below.

Date	Amendment	Reason
23.4.04	New paragraph under 'Tax sharing agreement may limit liability' (p. 2) clarifying that not all contributing members are required to be a party to a TSA.	For clarification.
	Section on 'Transitional year' deleted.	No longer relevant.
14.7.04	Note on recent changes to consolidation rules.	Legislative amendments.
26.10.05	Minor changes to pp. 2, 3.	Legislative amendments.

Proposed changes to consolidation

Proposed changes to consolidation announced by the Government are not incorporated into the *Consolidation reference manual* until they become law. In the interim, information about such changes can be viewed at:

- **http://assistant.treasurer.gov.au** (Assistant Treasurer's press releases)
- **www.treasury.gov.au** (Treasury papers on refinements to the consolidation regime).

Figure 1: Consolidation pathway – Managing obligations