TD 2004/D24 - Income tax: consolidation: capital gains: does section 104-40 (CGT event D2) of the Income Tax Assessment Act 1997 apply to the head company of a consolidated group where an option is granted within the consolidated group and subsequently transferred to a third party?

This cover sheet is provided for information only. It does not form part of *TD 2004/D24 - Income tax: consolidation: capital gains: does section 104-40 (CGT event D2) of the Income Tax Assessment Act 1997 apply to the head company of a consolidated group where an option is granted within the consolidated group and subsequently transferred to a third party?*

This document has been finalised by TD 2004/34.

Draft Taxation Determination

Income tax: consolidation: capital gains: does section 104-40 (CGT event D2) of the *Income Tax Assessment Act 1997* apply to the head company of a consolidated group where an option is granted within the consolidated group and subsequently transferred to a third party?

Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the ***Taxation Administration Act 1953****. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. Yes.

2. An intra-group option is one where both the grantor and grantee are members of the same consolidated group. From the head company's perspective, the granting of an option between two members of the same group has no tax consequences for the head company of the consolidated group as intra-group dealings and transactions are taken to be internal arrangements between parts of the head company. This is by virtue of the single entity rule (SER) in section 701-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) which treats the consolidated group as a single entity for income tax purposes. The head company is that entity. For those purposes the subsidiary members of the group are treated as parts of the head company of the group rather than separate income tax entities.

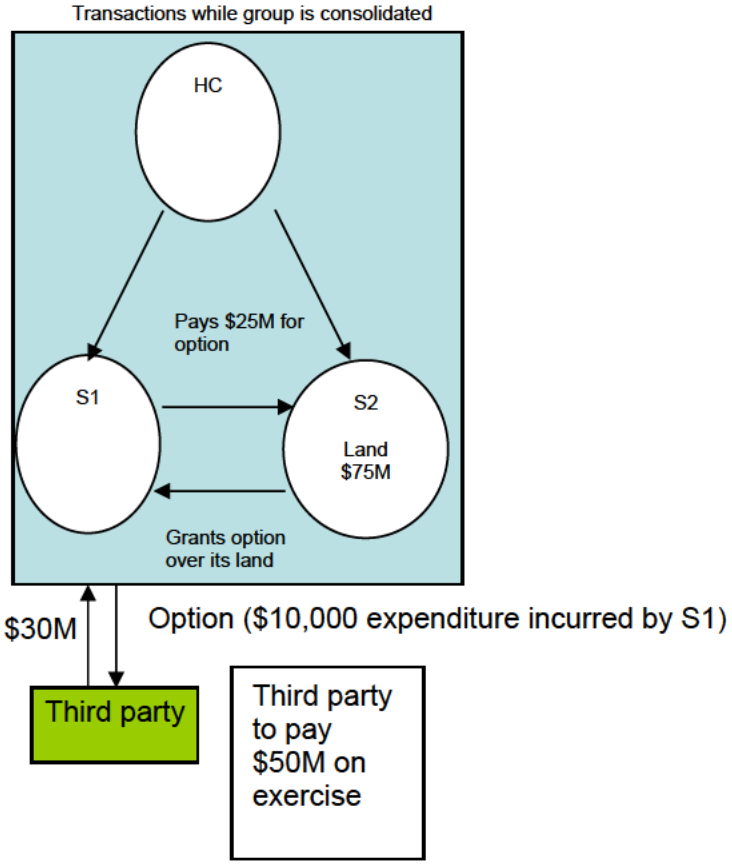
3. From the head company's perspective, when such an option is transferred to a third party the income tax laws recognise the conferring of rights and obligations under the option to the third party.

4. Subsection 104-40(1) of the ITAA 1997 applies to the head company as this conferring of rights and obligations is treated as the granting of an option to the third party by the head company.

5. For the purpose of subsection 104-40(3) of the ITAA 1997, any expenditure incurred by the head company in respect of conferring the rights and obligations in the third party is taken to be the expenditure incurred for that grant.

6. Example: HC is the head company of a consolidated group with S1 and S2 being subsidiary members of the consolidated group. While consolidated, S2 grants an option over land it owns to S1 for $25M consideration. S2 does not incur any expenditure in respect of the granting. Subsequently S1 assigns the option to a third party for $30M consideration, incurring $10,000 legal fees.

7. The diagram below shows the above transactions.



8. In the example there are no income tax consequences from S2 granting an option to S1. The SER, on S1 assigning the option to the third party, has the effect of treating HC as conferring rights and obligations on the third party which is treated as the granting of an option to the third party. HC is treated as having received capital proceeds of $30M for the granting of an option and incurring $10,000 expenditure in respect of that granting for the purpose of applying CGT event D2 (about the granting of an option) to HC. HC makes a D2 capital gain of $29,990,000.

Date of Effect

9. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).]

Your comments

10. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

Due date: **6 August 2004**

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Commissioner of Taxation
7 July 2004

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
TR 92/20

Legislative references:
- TAA 1953 Part IVAAA
- Section 701-1
- Section 104-40
- Subsection 104-40(1)
- Subsection 104-40(3)

ATO references
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