



TD 2008/D10 - Income tax: consolidation: capital gains: for the purposes of Part 3-90 of the Income Tax Assessment Act 1997, is the CGT asset that an entity has contracted to buy from another taxpayer an asset of the entity at a time it joins or leaves a consolidated group, if the contract is not completed at that time?

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This document has been finalised by TD 2008/30.

 There is a Compendium for this document: **TD 2008/30EC** .



Draft Taxation Determination

Income tax: consolidation: capital gains: for the purposes of Part 3-90 of the *Income Tax Assessment Act 1997*, is the CGT asset that an entity has contracted to buy from another taxpayer an asset of the entity at a time it joins or leaves a consolidated group, if the contract is not completed at that time?

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This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes. You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

Ruling

1. No. The CGT asset, the subject of the contract, is not an asset of the entity at the time it joins or leaves a consolidated group for the purposes of the consolidated group rules in Part 3-90 of the *Income Tax Assessment Act 1997* (ITAA 1997).
2. Whether another asset in relation to the contractual arrangements is recognised for consolidation purposes must be determined in accordance with the views expressed in Taxation Ruling TR 2004/13¹. That is, such an asset must, in the particular circumstances, be something recognised in commerce and business as having economic value to the joining entity at the joining time for which a purchaser of its membership interests would be willing to pay. The same criteria apply in identifying an asset a leaving entity takes with it on exiting the group.

¹ Taxation Ruling TR 2004/13 Income Tax: the meaning of an asset for the purposes of Part 3-90 of the *Income Tax Assessment Act 1997*.

Application

3. This draft Determination does not apply if the CGT asset the subject of the contract is a CGT asset of the same consolidated group at both the contract time and the time just after the contract is completed.

Example 1: Entry-buy

4. On 16 June 2004, X Co entered into a contract to purchase shares (60%) in B Co.

5. On 1 July 2004, all of the shares in X Co were purchased by the head company of a consolidated group and, as a result, X Co joined the group. No other member in the group held shares in B Co. At X Co's joining time, the value of B Co's shares had increased.

6. The head company must allocate the group's allocable cost amount (ACA) for X Co's shares to the assets of X Co when it becomes a subsidiary member. In accordance with the views in TR 2004/13, an asset of X Co arising out of the contractual arrangement to purchase the shares in B Co would be recognised for tax cost setting purposes because the value of the B Co shares had increased between the time the contract was entered into and the time X Co became a member of the consolidated group.

Example 2: Exit-buy

7. On 12 May 2006, M Co, a subsidiary member of a consolidated group, entered into a contract to purchase land from Y Co who is not a member of the group. A deposit of \$20,000 was paid, with the balance of the purchase price to be paid on the settlement date.

8. On 20 June 2006, the head company of the group sold all of the shares in M Co. As a result, M Co leaves the group. There has been no change in the market value of the land.

9. At the leaving time, the head company must identify the assets M Co takes out of the group in calculating the tax cost of the group's membership interests in M Co. In accordance with the views in TR 2004/13, an asset of M Co arising out of the contractual arrangement would be recognised as an asset that the head company holds at the leaving time (because M Co is taken to be a part of the head company under the single entity rule).

Date of effect

10. 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 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

25 June 2008

Appendix 1 – Explanation

① *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

Background

11. When an entity joins a consolidated group it is necessary to identify each asset that it brings with it into the group. This is because the rules in section 701-10 and Division 705 of the ITAA 1997 seek to align the assets' cost for income tax purposes with the group's cost of acquiring the entity (referred to as the allocable cost amount or ACA).

12. Similarly, when an entity ceases to be a subsidiary member of a consolidated group, it is necessary to identify the assets taken from the group when it leaves. This is because the assets' cost is used in working out the cost base of the group's membership interests in the leaving entity under Division 711 of the ITAA 1997.

Meaning of 'asset'

13. The meaning of an 'asset' for the purposes of applying of the tax cost setting rules in Divisions 705 and 711 is not defined in the ITAA 1997.

14. The Commissioner takes the view in TR 2004/13 that an asset, for the purposes of the tax cost setting rules in Part 3-90 of the ITAA 1997, is 'anything recognised in commerce and business as having economic value to the joining entity at the joining time for which a purchaser of its membership interests would be willing to pay'. The same criteria would apply in identifying an asset a leaving entity takes with it on exiting the group.

15. As explained in paragraph 26 of TR 2004/13, the extent and degree to which the assets of the entity should be separately identified or treated as composite items will depend on the nature of the asset, the business being carried on by the entity and the circumstances of the particular case.

Identifying the relevant asset in a straddle contract

16. When an entity enters into a contract to buy a CGT asset, it will acquire legal rights under the contract and assume contingent obligations. Depending on the nature of the CGT asset, it may also acquire equitable rights by which any equitable interest in the asset is measured (for example, a right to specific performance).

17. If the transfer of ownership of the asset has yet to be completed when the purchasing entity joins or leaves a consolidated group then, in the Commissioner's view, it is only any asset of the entity that arises out of the contractual arrangement that may be recognised as an asset for tax cost setting purposes in terms of TR 2004/13 (as outlined in paragraph 14 of this draft Determination).

18. The Commissioner does not consider the CGT asset the subject of the contract to be an asset of the purchasing entity for tax cost setting purposes. This is because there is no change in the ownership of this CGT asset at the time when an asset's identification is relevant to the tax cost setting process – that is, at the entity's joining or leaving time.

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19. The Commissioner does not consider this approach to be inconsistent with paragraph 26 of TR 2004/13 where it refers to CGT assets being identified consistently with the approach in TR 95/35.² That taxation ruling deals with compensation receipts and identifying the relevant asset for the purposes of the CGT provisions. However, these rulings must be read in the context of the tax cost setting provisions in Divisions 705 and 711 of the ITAA 1997 which require the identification of each asset of the entity at the time it joins or leaves the group. At that time, the only asset that may be capable of being recognised in relation to the uncompleted contract relates to something arising out of the contractual arrangement.

20. Importantly, it is for the purposes of applying the tax cost setting rules that an asset must be identified by the head company of the group at the entity's joining or leaving time. The vendor under the straddle contract does not need to identify any asset for tax purposes at this time (unless it also joins or leaves a consolidated group before the contract is completed (see Draft Taxation Determination TD 2008/D11)).

² Taxation Ruling TR 95/35 Income tax: capital gains: treatment of compensation receipts.

Appendix 2 – Your comments

21. This draft Determination is part of a suite of draft Determinations that deal with issues related to straddle contracts. The complete suite of draft Determinations are:

- Draft Taxation Determination TD 2008/D9;
- Draft Taxation Determination TD 2008/D10; and
- Draft Taxation Determination TD 2008/D11.

22. We invite you to comment on this draft Determination individually, or on the suite of draft Determinations as a whole. Please forward your comments to the contact officer by the due date.

23. We are developing our views on the way the tax cost setting provisions apply where the CGT asset the subject of the contract is a CGT asset of the same consolidated group at both the contract time and the time just after the contract is completed. Any comments and submissions on this and other intra-group related issues are also welcome. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2008/D9; TD 2008/D11; TR 95/35;
TR 2004/13; TR 2006/10

Subject references:

- assets
- consolidation
- consolidation – assets
- consolidation – capital gains tax
- consolidation – exiting
- consolidation – joining

- cost of membership interests
- cost setting rules
- head company
- joining entity
- joining time
- leaving entity
- leaving time
- tax cost setting rules

Legislative references:

- ITAA 1997 Pt 3-90
- ITAA 1997 701-10
- ITAA 1997 Div 705
- ITAA 1997 Div 711

ATO references

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Income Tax ~ Consolidation ~ tax cost setting amount