


IT 2636 - Income tax: transfer of losses within a company group

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**COMPANY GROUP LOSSES
CURRENT YEAR LOSSES**

**50A-N
80G**

OTHER RULINGS ON THIS TOPIC: IT 2465

TITLE: INCOME TAX: TRANSFER OF LOSSES WITHIN A COMPANY GROUP

NOTE:

- . Income Tax Rulings do not have the force of law.
- . Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Ruling.

PREAMBLE

The purpose of this Ruling is to explain how subsection 80G(9) of the Income Tax Assessment Act 1936 (the "Act") interacts, in relation to the transfer of losses within a company group, with the current year loss provisions in Subdivision B of Division 2A of Part III of the Act.

2. Section 80G of the Act, broadly speaking, permits a resident Australian company that incurs a loss to transfer its entitlement to a tax deduction for the loss to another resident company in the same group, provided there is 100 percent common ownership of the two companies. Subsection 80G(9) is an anti-avoidance provision which provides that:

"Where subdivision B of Division 2A applies in relation to the loss company in relation to the loss year, the right to an allowable deduction in respect of any part of loss

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incurred by the loss company in the loss year shall not be transferred to the income company in the loss year."

3. The current year loss provisions in Subdivision B of Division 2A (comprising sections 50A to 50N) are designed to prevent assessable income derived by a company in one part of a year of income under the ownership of one set of shareholders from being offset by a deduction for a loss incurred by the company during another part of the income year when the company is (or was) owned by a different set of shareholders. The effect of the Subdivision is to preclude a current year loss incurred in one part of an income year from being taken into

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account in calculating the company's taxable income for the year unless the company satisfies either a continuity of ownership test or alternatively a continuity of business test. These tests are similar to those in section 80A and section 80E for the deductibility of prior year company losses.

4. Subsection 50A(1) provides that:

"This Subdivision applies in relation to a taxpayer in relation to a year of income if, and only if, the taxpayer is a company and, by reason of section 50H, a disqualifying event is deemed to have occurred"

5. The expression "Subdivision B of Division 2A applies" in subsection 80G(9) could be construed in either one of the two following ways:

- (i) If, by reason of section 50H, a disqualifying event is deemed to have occurred, then, by virtue of subsection 50A(1), Subdivision B of Division 2A applies. On this view, the Subdivision would apply whether or not the continuity of ownership test or the same business test in the current year loss provisions has been satisfied. The only requirement is that a disqualifying event be deemed to have occurred.
- (ii) If, by reason of section 50H, a disqualifying event is deemed to have occurred, Subdivision B of Division 2A only applies in the required sense where the result of its application is the disallowance of tax losses otherwise allowable as deductions. In other words, the Subdivision only applies where neither the continuity of ownership test nor the same business test is satisfied.

6. This Ruling considers which of these two constructions this Office is prepared to adopt.

7. Taxation Ruling IT 2465 deals generally with transfers of losses within company groups. Paragraph 26 of IT 2465 states in relation to subsection 80G(9):

"By subsection (9), however, section 80G does not permit the transfer of the right to a deduction for a loss in the current year loss provisions - Subdivision B of Division 2A of Part III of the Act comprising sections 50A to 50N - have applied in the determination of the amount of that loss, i.e., where, as a result of the application of those

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provisions the amount of the section 80 loss is less than it would otherwise have been." (emphasis added)

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RULING

8. The construction in subparagraph 5(ii) above is, in the view of this Office, the proper one. Subsection 80G will therefore be applied to prevent the transfer of a loss within a company group only where an application of the current year loss provisions results, or would result, in a disallowance of the amount of the loss (or a part of the loss) otherwise deductible.

9. The construction outlined in subparagraph 5(i) above, if adopted, would produce an absurd and unintended result. If, by reason of section 50H, a disqualifying event is deemed to have occurred in relation to a loss of a company in part of a particular year of income but the company satisfies either the continuity of ownership test or the same business test, there is no reason why that current year loss should not be available for transfer to another company in a group of companies. Such a current year loss should not be treated any differently, for the purposes of the company transfer of loss provisions of the law, from an available prior year company loss. Both types of losses should be able to be transferred, where the other requirements of section 80G are met, to another company within the same group. The construction in subparagraph 5(i) above would preclude all current year losses (where a disqualifying event has occurred) from being transferred within company groups. This was never intended by Parliament.

10. The approach proposed by this Office (at paragraph 8 above) gives effect to Parliament's intention in relation to subsection 80G(9). It accords with the view expressed in paragraph 26 of IT 2465. It is also supported by the following extract from the explanatory memorandum accompanying the Income Tax Assessment Amendment Bill (No. 4) 1984 (page 37, first paragraph):

"Where the current year loss provisions apply to the loss company in determining its loss for a year under section 80 that loss will not be available for transfer to another company in that year."

COMMISSIONER OF TAXATION
23 May 1991

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