TD 2004/D54 - Income tax: for the condition outlined in subsection 707-328(4) of the Income Tax (Transitional Provisions) Act 1997, are Subdivisions 170-A and 170-B of the Income Tax Assessment Act 1997 applied as if they had not been amended by Schedule 3 to Act 68 of 2002, to only provide for loss transfers involving an Australian branch of a foreign bank?

This document has been finalised by TD 2004/89.

Draft Taxation Determination

Income tax: for the condition outlined in subsection 707-328(4) of the *Income Tax (Transitional Provisions) Act 1997,* are Subdivisions 170-A and 170-B of the *Income Tax Assessment Act 1997* applied as if they had not been amended by Schedule 3 to Act 68 of 2002, to only provide for loss transfers involving an Australian branch of a foreign bank?

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. For the condition outlined in subsection 707-328(4) of *the Income Tax (Transitional Provisions) Act 1997* (IT(TP)A), Subdivisions 170-A and 170-B of the *Income Tax Assessment Act 1997* (ITAA 1997) are applied as if they had not been amended, by Schedule 3 to Act 68 of 2002, to only provide for loss transfers involving an Australian branch of a foreign bank. These amendments apply to a company, with a 30 June balance date, for an income year starting after 30 June 2003.[1] The words, 'that neither of those Subdivisions had been amended to provide only for transfers involving an Australian branch (as defined in section 160ZZV of the *Income Tax Assessment Act 1936*) of a foreign bank', in subsection 707-328(4) of the IT(TP)A operate to ensure that the Subdivisions are applied as if they had not been amended by Schedule 3 to Act 68 of 2002.

[1] For companies that first join a consolidated group before 1 July 2003;
or
for companies that first join a consolidated group (that has a head company with a substituted accounting period):
- on the day the group comes into existence; and
- the day the group comes into existence is the first day of the head company's first income year starting after 30 June 2003 (provided that day is before 1 July 2004),

the amendments made by Schedule 3 to Act 68 of 2002 to Subdivisions 170-A and 170-B of the ITAA 1997, take effect for income years or non-membership periods starting on or after the date of consolidation.

2. Chapter 13 of the Explanatory Memorandum to the New Business Tax System (Consolidation) Bill (No. 1) 2002[2] discusses the measures in the Bill dealing with the removal and modification of 'grouping' provisions such as the Division 170 loss transfer rules as a consequence of the introduction of a consolidation regime. The changes to the grouping provisions generally apply from 1 July 2003 but an exception is that loss transfers are retained for certain transfers involving an Australian branch of a foreign bank. The operation of subsection 707-328(4) of the IT(TP)A effectively disregards these amendments.

3. Therefore, for the purposes of subsections 707-325(2) and 707-327(3) of the IT(TP)A, it is not necessary for one of the companies to be an Australian branch of a foreign bank and for the other company to be the head company of a consolidated group or MEC group (or not a member of a consolidatable group), in order for the conditions in Subdivisions 170-A or 170-B to be satisfied.

Example

4. *Head Co (a company with a 30 June balance date) forms a consolidated group on 1 January 2004. Two of the subsidiary members of Head Co's group that become members of the group when it comes into existence are Loss Co and Donor Co.*

5. *Loss Co incurred a tax loss in the non-membership period 1 July 2003 to 31 December 2003*[3] *and this loss is transferred to Head Co under Subdivision 707-A of the ITAA 1997. Head Co chooses that Donor Co will be a value donor (and therefore an amount of Donor Co's modified market value*[4] *will be added to Loss Co's modified market value) in working out the available fraction*[5] *for the bundle of losses*[6] *transferred (under Subdivision 707-A of the ITAA 1997 to Head Co) by Loss Co.*

6. *In determining whether the condition in subsection 707-325(2) of the IT(TP)A is satisfied in respect of the tax loss incurred by Loss Co in the non-membership period, the period that is taken to be the income year by subsection 707-328(1) of the IT(TP)A is 1 July 2003 to just after the joining time on 1 January 2004. This is the income year which is examined to determine whether Loss Co could have transferred the loss to Donor Co under Subdivision 170-A of the ITAA 1997. Subsection 707-328(4) provides that in determining whether this transfer could have occurred, the fact that the income year commences after 30 June 2003 does not mean that one of the companies has to be an Australian branch of a foreign bank, in order to satisfy the conditions in Subdivision 170-A of the ITAA 1997.*

Date of Effect

7. 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).

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[2] Enacted as Act No. 68 of 2002.
[3] These losses are taken to be losses made for an income year by subsection 701-30(8) of the ITAA 1997, for the purposes of transfer and utilisation.
[4] As defined in section 707-325 of the ITAA 1997.
[5] As defined in subsection 707-320(1) of the ITAA 1997.
[6] See section 707-315 of the ITAA 1997.

Your comments

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

Due date:	**1 October 2004**
Contact officer:	**Carolyn Billett**
E-mail address:	**carolyn.billett@ato.gov.au**
Telephone:	**(02) 6058 7014**
Facsimile:	**(02) 6058 7148**
Address:	**Australian Taxation Office** **PO Box 9990** **ALBURY NSW 2640**

Commissioner of Taxation
1 September 2004

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/20

Subject references:

- available fraction
- bundle of losses
- consolidation – losses
- group company loss transfers
- utilise a loss
- value donor

Legislative references:

- ITAA 1936 160ZZV
- ITAA 1997 Div 170
- ITAA 1997 Subdiv 170-A
- ITAA 1997 Subdiv 170-B
- ITAA 1997 701-30(8)
- ITAA 1997 Subdiv 707-A
- ITAA 1997 707-315
- ITAA 1997 707-320(1)
- ITAA 1997 707-325
- IT(TP)A 1997 707-325(2)
- IT(TP)A 1997 707-327(3)
- IT(TP)A 1997 707-328(1)
- IT(TP)A 1997 707-328(4)
- TAA 1953 Pt IVAAA
- New Business Tax System (Consolidation) Act (No 1) 2002 Sch 3

Other references:

- Explanatory Memorandum to the New Business Tax System (Consolidation) Bill (No. 1) 2002

ATO references
NO: 2004/10556
ISSN: 1038-8982