

TD 2010/D6 - Income tax: consolidation: capital gains: does paragraph 40-880(5)(f) of the Income Tax Assessment Act 1997 prevent the deduction, under section 40-880 of that Act, of incidental costs described in subsection 110-35(2) of that Act that the head company of a consolidated group or MEC group incurs, in disposing of shares in a subsidiary member to a non-group entity, after the member leaves the group?

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This document has been finalised by [TD 2011/10](#).

 There is a Compendium for this document: [TD 2011/8EC](#); [TD 2011/9EC](#); [TD 2011/10EC](#) .



Draft Taxation Determination

Income tax: consolidation: capital gains: does paragraph 40-880(5)(f) of the *Income Tax Assessment Act 1997* prevent the deduction, under section 40-880 of that Act, of incidental costs described in subsection 110-35(2) of that Act that the head company of a consolidated group or MEC group incurs, in disposing of shares in a subsidiary member to a non-group entity, after the member leaves the group?

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Ruling

1. Yes. Paragraph 40-880(5)(f) of the *Income Tax Assessment Act 1997* (ITAA 1997)¹ does prevent the deduction, under section 40-880, of incidental costs described in subsection 110-35(2) that the head company of a consolidated group or MEC group incurs, in disposing of shares in a subsidiary member to a non-group entity, after the member leaves the group (that is, ceases to be a member of the group).

Application

2. This draft Determination does not apply to the extent (if any) that the incidental costs mentioned in paragraph 1 of this draft Determination are remuneration to a member of the group.

¹ All legislative references are to the ITAA 1997 unless otherwise indicated.

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Example

3. *H Co is the head company of a consolidated group of which another company, Sub Co, is a subsidiary member. H Co's shareholding in Sub Co consists of 2,000 shares, all of the same class.*

4. *H Co sells 500 of the Sub Co shares to a non-group entity for \$175,000 (\$350 per share). As a result, Sub Co leaves the group.*

5. *Just before the leaving time, H Co calculates the tax cost setting amount for each of the group's membership interests in Sub Co in accordance with section 711-15. The tax cost setting amount for each of H Co's shares in Sub Co is \$220 and this amount forms the cost base or reduced cost base of each of the membership interests for CGT purposes just before the leaving time.*

6. *After Sub Co leaves the group, H Co incurs a liability to pay legal fees of \$5,000 to an entity outside the group in relation to the sale of the shares.*

7. *The legal fees are incidental costs as described in subsection 110-35(2). The legal fees form part of the second element of the cost base of the shares disposed of and therefore could be taken into account in working out the amount of the capital gain from the CGT event A1 that happens on the sale of these shares. After including the incidental costs, the cost base of each share sold is \$230.*

8. *As the legal fees could be taken into account in working out the amount of the capital gain on the sale of the shares, paragraph 40-880(5)(f) prevents any deduction for the fees that would otherwise be available under section 40-880.*

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

Appendix 2 – Your comments

17. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

18. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Australian Taxation Office website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

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