TD 2004/90 - Income tax: consolidation: is there any apportionment under section 707-335 of the Income Tax Assessment Act 1997 to the limits calculated under subsection 707-350(3) of the Income Tax (Transitional Provisions) Act 1997 regarding the utilisation of losses?

Taxation Determination

Income tax: consolidation: is there any apportionment under section 707-335 of the *Income Tax Assessment Act 1997* to the limits calculated under subsection 707-350(3) of the *Income Tax (Transitional Provisions) Act 1997* regarding the utilisation of losses?

Preamble

The number, subject heading, date of effect and paragraphs 1 to 7 of this document are a 'public ruling' for the purposes of Part IVAAA of the ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner.*

1. No. There is no requirement to apportion the limit for utilisation of those losses in a bundle that are subject to the alternative loss utilisation regime in section 707-350 of the *Income Tax (Transitional Provisions) Act 1997* ('IT(TP)A 1997').

2. Utilisation of losses that are transferred to the head company of a consolidated group is limited under section 707-310 in Subdivision 707-C of the *Income Tax Assessment Act 1997* ('ITAA 1997'). This is generally referred to as the ***'available fraction method'*** of loss utilisation. An alternative loss utilisation regime under section 707-350 of the IT(TP)A 1997 is available for groups that consolidate before 1 July 2004. A choice is required to be made under subsection 707-350(5) of that Act to use this alternative regime.

3. Transferred losses in a bundle that are eligible to be utilised under section 707-350 of the IT(TP)A 1997 (***concessional losses***) are those that satisfy the conditions in subsection 707-350(1) of that Act.

4. Concessional losses are losses in a bundle that *inter alia*:

(a) were actually made outside the group by a company (the ***real loss-maker***) for an income year ending on or before 21 September 1999;

(b) were transferred to the head company at the time the group consolidated before 1 July 2004;

(c) were transferred from the real loss-maker because section 165-12 of the ITAA 1997 was satisfied and the conditions in one or more of paragraphs 165-15(1)(a), (b) and (c) of the ITAA 1997 did not exist in relation to the real loss-maker;

(d) had not previously been transferred under Subdivision 707-A of the ITAA 1997; and

(e) the head company has made the choice that section 707-350 of the IT(TP)A 1997 apply to the utilisation of the losses.

5. Under subsection 707-350(4) of the IT(TP)A 1997, Subdivision 707-C of the ITAA 1997 operates as if the concessional losses had been made by the head company without being transferred under Subdivision 707-A of the ITAA 1997. Subdivision 707-C of the ITAA 1997 and the available fraction method only apply to losses that have been transferred under Subdivision 707-A of the ITAA 1997. An effect of subsection 707-350(4) of the IT(TP)A 1997 is to ensure that the available fraction method does not apply to concessional losses.

6. The rules in section 707-335 in Subdivision 707-C of the ITAA 1997 have the effect of apportioning the utilisation limit calculated for losses transferred under Subdivision 707-A of the ITAA 1997. These apportionment rules have no application to concessional losses as these losses are not treated as having been transferred under Subdivision 707-A.

7. Under subsection 707-350(3) of the IT(TP)A 1997, the limit for the amount of concessional losses in a bundle that can be utilised each year is governed by items 1 to 3 in the table in that subsection and is not affected by any of the provisions in Subdivision 707-C of the ITAA 1997.

Example

8. *A consolidated group comes into existence on 1 July 2003. The head company, Head Co Pty Ltd, has a substituted accounting period ending 31 December. Head Co Pty Ltd has a bundle of losses which were transferred from a subsidiary member. The bundle contains concessional losses totalling $900 which will be utilised under section 707-350 of the IT(TP)A 1997. The bundle also contains a loss of $500, originally made in the year ended 31 December 2001, which will be utilised under the available fraction method.*

9. *The first consolidated tax return for Head Co Pty Ltd is the year ended 31 December 2003. Under item 1 in the table in subsection 707-350(3) of the IT(TP)A 1997, the limit for utilisation of the concessional losses in the bundle for this year is $300 (being one-third of the total of the concessional losses). There is no apportionment even though the consolidated group formed six months after the start of Head Co Pty Ltd's income year.*

10. *However, the limit for utilisation of the $500 loss for the year ended 31 December 2003 is calculated initially under section 707-310 of the ITAA 1997 by reference to a proportion of Head Co Pty Ltd's income and gains for that income year. As this loss was transferred to Head Pty Ltd after the start of the income year, the limit may be further reduced by the apportionment rules in section 707-335 of the ITAA 1997.*

Date of effect

11. This Determination applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation
22 December 2004

Previous draft:
TD 2004/D59

Related Rulings/Determinations:
TR 92/20

Subject references:
- available fraction
- bundle of losses
- concessional losses
- consolidation – losses
- transferred losses
- utilise a loss

Legislative references:
- TAA 1953 Pt IVAAA
- ITAA 1997 165-12
- ITAA 1997 165-15(1)(a)
- ITAA 1997 165-15(1)(b)
- ITAA 1997 165-15(1)(c)
- ITAA 1997 Subdiv 707-A
- ITAA 1997 Subdiv 707-C
- ITAA 1997 707-310
- ITAA 1997 707-335
- IT(TP)A 1997 707-350
- IT(TP)A 1997 707-350(1)
- IT(TP)A 1997 707-350(3)
- IT(TP)A 1997 707-350(4)
- IT(TP)A 1997 707-350(5)

ATO references
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