


TD 2006/74 - Income tax: consolidation: membership: where a consolidatable group comes into existence at some time during a day can the head company make a choice under section 703-50 of the Income Tax Assessment Act 1997 specifying that day as the day on and after which the consolidatable group is taken to be consolidated?

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Taxation Determination

Income tax: consolidation: membership: where a consolidatable group comes into existence at some time during a day can the head company make a choice under section 703-50 of the *Income Tax Assessment Act 1997* specifying that day as the day on and after which the consolidatable group is taken to be consolidated?

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This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*. A public ruling is an expression of the Commissioner's opinion about the way in which a relevant 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. If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

Ruling

1. Yes. Where a consolidatable group does not exist at the start of a day but comes into existence at some time during that day the head company can make a choice under section 703-50 of the *Income Tax Assessment Act 1997*¹ specifying that day as the day on and after which the consolidatable group is taken to be consolidated.
2. Accordingly, provided a valid choice to consolidate is made under section 703-50 and a consolidatable group exists on the day specified in the choice, a consolidated group will come into existence from the earliest point in time that a consolidatable group exists on that day.

¹ All references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise stated.

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Date of effect

3. 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 a settlement of a dispute agreed to before the date of the determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

29 November 2006

Appendix 1 – Explanation

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

Explanation

4. Subsection 703-50(1) states:

A company may make a choice in the approved form given to the Commissioner within the period described in subsection (3) that a consolidatable group is taken to be consolidated on and after a day that is specified in the choice and is after 30 June 2002, if the company was the head company of the group on the day specified.

5. Under section 703-10, a consolidatable group consists of a single head company and all the subsidiary members of the group, but cannot consist of a head company alone. The question has been asked whether a consolidatable group can come into existence part way through a day, for example where the potential head company only acquires membership interests in the potential subsidiary members part way through a day, and, if so, whether the head company can choose that the consolidatable group is taken to be consolidated on and after that day.

6. A consolidatable group will come into existence when there exists a single head company and at least one subsidiary member. Under subsection 703-30(1), a subsidiary member must be a wholly owned subsidiary, which means that the head company or other subsidiary members, or the head company and other subsidiary members, must beneficially own all of its membership interests.

7. In certain circumstances where the buyer and seller of shares in a company are not associates and are dealing with each other at arm's length, section 703-33 provides that the buyer and seller are taken to have respectively become, or ceased to be the beneficial owner of those shares, for the purposes of subsection 703-30(1), at the transfer time. The transfer time is the time when the seller ceases to be entitled to be registered as the holder of the shares and when the buyer becomes entitled to be registered as the holder of the shares.

8. The time at which beneficial ownership of all the membership interests commences to exist, or, where section 703-33 applies, the time at which the buyer becomes entitled to be registered as the holder of the shares, will depend on the facts and circumstances of each case. Relevant factors may include whether settlement has occurred, whether the seller and the buyer have done everything required under the contract to transfer ownership to the buyer and whether any relevant provisions in the company's constitution have been satisfied.

9. In determining the time at which an event occurs it is not always necessary to identify the hour of occurrence. As stated in *Halsbury's Laws of England*,² 'in computing a period of time ...no regard is, as a general rule, paid to fractions of a day ...'; however, '[t]he general rule ...does not apply where the object of a statute would be defeated unless the precise hour of occurrence were noted ... for then the particular hour when the events occurred may become material.' Therefore, in determining whether the relevant time for the purposes of subsection 703-30(1) may be identified as a day or should be identified as an hour of a day, it is necessary to consider the facts and circumstances of the particular case and whether the objects of Part 3-90 are met.

² 4th Edition Reissue, Butterworths, London 1994, 'Time' at paragraphs 244 and 245.

10. In this regard, the time that an entity first qualifies as a subsidiary member under paragraph 703-15(2)(b) may have a number of consequences for the purposes of Part 3-90. For example, it may be relevant for the purposes of setting the tax cost of that subsidiary member's assets under Division 705.³ Therefore, the time at which an entity is taken to become a subsidiary member needs to be determined in the light of the objects and operation of Part 3-90.

11. There may be occasions which warrant the conclusion that beneficial ownership or the entitlement to be registered as the holder of the shares is to transfer to the buyer only at a particular hour on a particular day and not simply on that day. This would be the case, for example, where transactions such as the transfer of assets or the payment of dividends occur on that day but before the time at which settlement occurs, which would otherwise result in the cost of the entity's assets not being aligned with the cost of the membership interests. In such a case, the consolidatable group which is formed will not come into existence until the particular hour of the day at which beneficial ownership transfers or the entitlement to be registered arises for the buyer.

12. Subsection 703-50(1) does not require that a consolidatable group be in existence at the start of the day. Accordingly, provided that a consolidatable group comes into existence at some point in time during a day, a choice under subsection 703-50(1) may be made by the entity which is the head company on that day. As a consolidated group cannot be in existence prior to the existence of a consolidatable group, the consolidated group will exist from the earliest point in time on the day the consolidatable group comes into existence.

13. There may be other occasions where Part 3-90 has the effect that beneficial ownership or the entitlement to be registered as the holder of the shares is to transfer to the buyer simply on a particular day rather than only at a particular hour on that day. For example, this may occur on the day the contract for the transfer of the shares is settled, even though settlement takes place at a particular hour on that day, where this does not result in any lack of alignment within the meaning of subsection 705-10(3), referred to at paragraph 11 of this Determination, between the cost of the entity's assets and the cost of the membership interests. In such a case, the consolidatable group which is formed will come into existence at the start of the day.

Example 1

14. *On 30 June 2003 H Coy meets the requirements to be a head company in paragraph 703-15(2)(a). However, it has no wholly owned subsidiaries on 30 June 2003.*

³ When an entity becomes a subsidiary member of a consolidated group, the tax cost of its assets is set at the tax cost setting amount that is worked out in accordance with Division 705 (see section 705-1). The object of that Division is to recognise the cost to the head company of such assets as an amount reflecting the group's cost of acquiring the entity (see subsection 705-10(3)).

15. On 1 July 2003 H Coy acquires all of the shares in Subco from Vendorco. At 11:00am on that day Subco declares and pays dividends to the persons who are at that time its shareholders. At 1:00pm on the same day, settlement of the contract occurs, and H Coy pays the agreed amount, which takes into account the fact that Subco's assets have been reduced by the payment of the dividends. If H Coy were taken to become entitled to be registered as the holder of shares at the start of that day, the cost of Subco's assets, which at that time have not been reduced by the payment of the dividends, would not align with the cost of the membership interests, which has been reduced by that payment, for the purposes of Subdivision 705-A. Therefore, H Coy becomes entitled to be registered as the holder of the shares in Subco at 1:00pm on that day, being the time at which the contract is completed.

16. In such a case a consolidatable group will not come into existence until 1:00pm on 1 July 2003.

17. On the basis that a consolidatable group consisting of H Coy and Subco comes into existence at 1:00pm on 1 July 2003, H Coy may make a choice under subsection 703-50(1) specifying 1 July 2003 as the day on and after which the consolidatable group is taken to be consolidated. The consolidated group will come into existence at 1:00pm on that day.

Example 2

18. On 30 June 2003 H Coy meets the requirements to be a head company in paragraph 703-15(2)(a). However, it has no wholly owned subsidiaries on 30 June 2003.

19. On 1 July 2003 H Coy acquires all of the shares in Subco from Vendorco. The objectively discerned intention of the parties is that H Coy will become entitled to be registered from the start of that day, although settlement does not happen to occur until 1:00pm on that day. Subco does not transfer any assets, or declare or pay any dividends on that day before that time. The cost of Subco's assets will align with the cost of the membership interests for the purposes of Subdivision 705-A. Accordingly, the facts and circumstances in light of the objects and operation of Part 3-90 have the effect that H Coy will become entitled to be registered as the holder of the shares in Subco on 1 July 2003 and not at any particular hour on that day.

20. In such a case a consolidatable group will come into existence at the start of 1 July 2003.

21. On the basis that a consolidatable group consisting of H Coy and Subco comes into existence at the start of 1 July 2003, H Coy may make a choice under subsection 703-50(1) specifying 1 July 2003 as the day on and after which the consolidatable group is taken to be consolidated. The consolidated group will come into existence at the start of that day.

References

Previous draft:

TD 2005/D37

Related Rulings/Determinations:

TR 2006/10

Subject references:

- consolidatable group
- head company
- subsidiary member of a consolidated group

Legislative references:

- TAA 1953
- ITAA 1997 Pt 3-90
- ITAA 1997 703-10

- ITAA 1997 703-15(2)(b)

- ITAA 1997 703-30(1)

- ITAA 1997 703-33

- ITAA 1997 703-50

- ITAA 1997 703-50(1)

- ITAA 1997 Div 705

- ITAA 1997 705-1

- ITAA 1997 Subdiv 705-A

- ITAA 1997 705-10(3)

Other references

- Halsbury's Laws of England 4th Edition
Reissue, Butterworths, London 1994

ATO references

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