

## What is the latest date for electing to tax consolidate?

### Lodge election by tax return due date – usually 15 January 2010

A recent Full Federal Court decision involving the timing of making a consolidation election has caused some uncertainty as to the correct timing of making such elections.

The Tax Office's current published view states the latest date for electing to form a tax consolidated group is the **later** of the due date and the lodgement date of the first consolidated return. However in the Federal Court decision in *M W McIntosh Pty Ltd v Commissioner of Taxation (McIntosh's case)* the Federal Court said the latest date for electing to form a consolidated group was the **earliest** of the due date and the lodgement date of the first consolidated return. The Full Federal Court did not disagree with this finding.

This case has been appealed to the High Court so this issue will not be resolved until at least late in 2010. Therefore, if the 2009 tax return is the first consolidated tax return and you have not yet lodged the election to consolidate it may be prudent to either:

- ▶ Lodge the election to consolidate by the due date for lodgement of the 2009 tax return, which is usually 15 January 2010, or
- ▶ Ask the Tax Office for an extension of time to lodge the tax return and lodge the election to consolidate by that extended due date.

### *McIntosh Case*

The pertinent parties in the *McIntosh* case involved a parent company and its wholly owned subsidiary. In October 2005 the companies lodged tax returns for the year ended 30 June 2004 with the intention to form a consolidated group but failed to lodge the election to consolidate.

Subsequently the parent company applied to the Commissioner for a deferral of the time within which it could make a choice to consolidate. The Commissioner

refused the deferral on the basis he had no discretion under the legislation. The Federal Court agreed holding that the legislation did not allow the Commissioner any discretion to extend the period of time to make an election. However in so doing, the Court also found that the latest date for lodging the election to consolidate was the **earlier** of due date for lodgement of the first consolidated tax return and the date of lodgement. This finding was contrary to the Tax Office's published view on the latest date to lodge an election to consolidate which is the **later** of those two dates.

### How to Make the Choice to Consolidate under the Consolidation Provisions

Under the relevant consolidation provision, the head company can make an irrevocable choice to consolidate the group by giving a notice to the Commissioner specifying the day from which the group is to be taken to be consolidated. The "choice" must be given to the Commissioner in the approved form and the notice of choice must be given within the period starting on the day specified in the notice and ending on the day the company lodges its income tax return for the income year in which the specified day occurs or the due date for lodgement of the first consolidated tax return. The issue of concern is whether this requires the election to be lodged by the earlier or later of these dates. The Federal Court found it to be the earlier of the dates.

If the company is not required to lodge an income tax return for that income year, the period for giving the notice ends at the last time by which the company would have been required to lodge such a return.

The consolidation provisions do not contain a power to defer the time in which a notice to consolidate can be made. This is the reason that the taxpayers in *McIntosh* tried (unsuccessfully) to invoke the Commissioner's general power to defer the time within which an approved form is required to be given to the Commissioner contained in section 388-55 of the Taxation Administration Act.

## Current ATO Position Pre *McIntosh*

In the current version of the Consolidation Reference Manual (CRM) the Tax Office states that the head company has until the lodgement of the group's first consolidatable tax return to lodge a notice to form a consolidated group, even if that return is lodged after the due date. This indicates the Tax Office's view is that the latest date for electing to form a consolidated group is the later of either the due date, or the lodgement date of the first consolidated return.

This current Tax Office view is at odds with the decision of the Federal Court in *McIntosh*. As already mentioned, in that case the Court interpreted the latest date for lodgement of the election to form a tax consolidated group as being the earliest of the due date and the lodgement date of the first consolidated return.

## ATO's view following *McIntosh* case

We understand the Tax Office is reconsidering its position following the *McIntosh* case. Until the Tax Office publishes its reconsidered position, the approach in the CRM is the official Tax Office position.

If a head company lodges its election to consolidate after the due date for lodgement but before the date of lodgement of the head company's first consolidated tax return and the High Court ultimately confirms the Federal Court's finding that it should have been lodged by the due date for the tax return, the head company would have to lodge tax returns for each of the consolidated group members on a standalone basis and therefore not obtain the benefits of being a consolidated group. However, the head company should not be charged incorrect return penalties as it was following the Tax Office's published view.

Until the High Court decision is handed down it may be advisable to ensure the consolidation election is lodged by the due date for lodgement of the head company's first consolidated tax return, which is usually 15 January unless an extension has been granted.

## Substituted Accounting Periods

If the Tax Office has granted the head company a substituted accounting period (SAP) the due date for lodgement of the tax return is usually the 15 day of the sixth month after the end of the SAP. Therefore in these cases the election to consolidate should be made by this date unless an extension has been granted.

## Multiple Entry Consolidated (MEC) Groups

The latest date for eligible tier-1 companies of a MEC group to lodge its election to form a MEC group was not considered in the *McIntosh* case, at either Federal or Full Federal Court level.

However, the wording of the provision that deals with the latest date for lodgement of the notice to form a consolidated group (section 719-50(3)) is different to the provision for a consolidated group. The eligible tier-1 companies have until the day the proposed provisional head company of the group lodges its income tax return for the year to jointly notify the Commissioner of their intent to form a MEC group, even if that is after the due date for lodgement of that return. This is except where the provisional head company of the group is not required to lodge a tax return. In which case, the election must be made by the date that it would be required to lodge a return, if it was required to do so.

Should you require assistance or additional information, please contact your PKF Tax Adviser

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