FEDERAL COURT OF AUSTRALIA

Evolution Mining Limited v Commissioner of Taxation [2026] FCA 935

File number(s):	NSD 104 of 2025
Judgment of:	**JACKMAN J**
Date of judgment:	17 July 2026
Catchwords:	**TAXATION** – determination of separate question – whether choice made to cancel transfer of losses was effective for the purposes of s 707-145 of the Income Tax Assessment Act 1997 (Cth) – where choice was made in 2014 tax return – where the income year in which the joining entity became a member of the consolidated group (the **joining year**) was 2012 – where no choice made to cancel in 2012 tax return – construction of s 707-145 considered – whether choice to cancel transfer must be made in relation to joining year – whether choice to cancel in 2014 tax return could be construed as applying in relation to the joining year – purported choice made in 2014 tax return ineffective – separate question answered "No"
Legislation:	*Income Tax Assessment Act 1936* (Cth) *Income Tax Assessment Act 1997* (Cth) *Income Tax Assessment Amendment Act (No 4) 1984* (Cth) *New Business Tax System (Consolidation) Act (No 1) 2002* (Cth) *Tax Laws Amendment (2010 Measures No 1) Act 2010* (Cth) *Taxation Administration Act 1953* (Cth) *Federal Court Rules 2011* (Cth)
Cases cited:	*Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 *Collector of Customs v Cliffs Robe River Iron Associates* (1985) 7 FCR 271 *Eichmann v Federal Commissioner of Taxation* [2020] FCAFC 155; (2020) 280 FCR 10 *HFM043 v Republic of Nauru* [2018] HCA 37; (2018) 359 ALR 176 *Marshall v Watson* [1972] HCA 27 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; (2016) 260 CLR 232

Sterling Guardian Pty Ltd v Commissioner of Taxation [2006] FCAFC 12; (2006) 149 FCR 255

Taylor v The Owners - Strata Plan No 11564 [2014] HCA 9; (2014) 253 CLR 531

Thompson v Goold [1910] AC 409

Vickers, Sons & Maxim Ltd v Evans [1910] AC 444

Wills v Bowley [1983] 1 AC 57

Ziegler v Federal Commissioner of Taxation [2025] FCAFC 168; (2025) 313 FCR 574

Division:	General Division
Registry:	New South Wales
National Practice Area:	Taxation
Number of paragraphs:	98
Date of hearing:	2 July 2026
Counsel for the Applicant:	Ms K J Deards SC with Mr R J May
Solicitor for the Applicant:	Corrs Chambers Westgarth
Counsel for the Respondent:	Ms E Kovacs with Mr J Nixon
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 104 of 2025

BETWEEN:	**EVOLUTION MINING LIMITED** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent
ORDER MADE BY:	**JACKMAN J**
DATE OF ORDER:	**17 JULY 2026**

THE COURT ORDERS THAT:

1. The separate question be answered as follows:

   Question: Was the choice made in Part B of the losses schedule to the 2014 income tax return of Evolution Mining Ltd lodged on or about 13 March 2015 effective for the purposes of s 707-145 of the *Income Tax Assessment Act 1997* (Cth) to cancel any transfer of the Updated Conquest Tax Losses?

   Answer: No

2. The costs in relation to the hearing of the separate question and of the proceedings to date be reserved.
3. The proceedings be listed for case management at 9.30 am on 14 August 2026.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKMAN J:

Introduction

1 On 31 March 2026, I ordered pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) that the following question be heard separately:

> Whether the choice made in Part B of the losses schedule to the 2014 income tax return of Evolution Mining Limited (**Evolution**) lodged on or about 13 March 2015 is effective for the purposes of s 707-145 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) to cancel any transfer of the Updated Conquest Tax Losses notwithstanding that the choice was made after:
>
> (a) 2 November 2011 (being the time that Conquest Mining Limited (**Conquest**) joined the Evolution Tax Consolidated Group); and
>
> (b) 25 June 2014 (being the time that Evolution lodged its 2012 income tax return).

2 The "Updated Conquest Tax Losses" are certain losses reported by Conquest in its tax returns for the income years ending 30 June 2007 to 30 June 2010 in the total amount of $31,292,880. Evolution, as the head company of the joined group, seeks to utilise some of those losses in the income year ending 30 June 2017, which the respondent (the **Commissioner**) opposes.

3 The salient facts are as follows. On 2 November 2011, Evolution acquired all of the shares in Conquest, and Conquest became a subsidiary member of the consolidated group that has Evolution as its head company. On 25 June 2014, Evolution lodged its 2012 tax return, in which it did not exercise any choice under s 707-145 of the ITAA 1997 to cancel the transfer of the Updated Conquest Tax Losses in its 2012 tax return. Evolution took the same approach in its 2013 tax return, which it lodged on 22 August 2014. On 13 March 2015, Evolution lodged its 2014 tax return, in which it recorded the cancellation of the transfer of losses which included the Updated Conquest Tax Losses.

4 Evolution contends that the choice purportedly made in its 2014 tax return to cancel the transfer of the Updated Conquest Tax Losses, which occurred at the joining time on 2 November 2011 in the income year ending 30 June 2012, was too late and of no effect. That follows from Evolution's contention that the choice must be made in relation to the income year in which the joining entity became a member of the consolidated group (the **joining year**). The Commissioner contends that the choice was effective.

5 During the hearing, it became apparent that the question which I ordered on 31 March 2026 to be heard separately was infelicitous, in that it conveyed the erroneous impression that Evolution's argument was based on the timing of the head company's choice to cancel the transfer of losses, rather than being based on the identification of the income year to which the choice was referable (see T36.29–37.34, 46.23–47.12, 52.1–38, 60.42–61.43, 85.12–18). Accordingly, with the agreement of the parties, the separate question was reframed as follows:

> Was the choice made in Part B of the losses schedule to the 2014 income tax return of Evolution Mining Ltd lodged on or about 13 March 2015 effective for the purposes of s 707-145 of the *Income Tax Assessment Act 1997* (Cth) to cancel any transfer of the Updated Conquest Tax Losses?

Legislative Provisions

6 The separate question concerns the proper construction of s 707-145(1) of the ITAA 1997, although that provision must be construed in its broader context.

Subdivision 707-A

7 Part 3-90 relevantly contains Subdivision 707-A, which is headed "Transfer of losses to head company". Subdivision 707-A relevantly contains ss 707-100, 707-105, 707-110, 707-115, 707-120, 707-140, 707-145 and 707-150. Part 3-90 was introduced into the ITAA 1997 by the *New Business Tax System (Consolidation) Act (No 1) 2002* (Cth). Part 3-90 is headed "Consolidated groups" and allows certain groups of entities to be treated as single entities for income tax purposes.

8 Section 707-100 provides:

> **What this Subdivision is about**
>
> A loss made by an entity before the time it becomes a member of a consolidated group is transferred to the head company of the group at that time if the entity could have utilised the loss had the entity not become a member of the group.

9 Section 707-105 is in the following terms:

> **Who can utilise the loss?**
>
> (1) If the loss is transferred, the head company is treated for income years ending after the transfer as having made the loss, so the head company can utilise the loss for those income years to the extent permitted by:
>
> (a) the general rules (outside this Part) about an entity utilising a loss it has made; and
>
> (b) the special rules about transferred losses in the other Subdivisions of this Division that supplement and modify those general rules.
>
> Note: If the entity from which the loss was transferred became a subsidiary member of the

consolidated group, the entity cannot utilise the loss for those income years because of section 701-1 (single entity rule) and section 707-140.

(2) If the loss is *not* transferred, then, for an income year ending after the time the entity became a member of the consolidated group, the loss cannot be utilised by any entity.

Note: The loss will not be transferred if the entity would not have been able to utilise it or if the transfer is cancelled under section 707-145.

10 The word "utilise" is defined in s 995-1(1) by reference to s 960-20(2), which relevantly provides:

Utilisation of losses

(2) A *tax loss is utilised to the extent that:
(a) it is deducted from an amount of assessable income or *net exempt income…

11 Section 707-110 provides:

Objects of this Subdivision

The main objects of this Subdivision are:
(a) to provide for the transfer of a loss from an entity (the joining entity) becoming a *member of a *consolidated group to the *head company of the group (so the head company may be able to *utilise it), if the joining entity could have utilised the loss if it had not become a member of the group; and
(b) to prevent the utilisation by any entity of a loss made by the joining entity, if the joining entity could not have utilised the loss if it had not become a member of the group.

12 Section 707-115 states:

What losses this Subdivision applies to

This Subdivision applies to a loss of any *sort if:
(a) an entity (the joining entity) becomes a *member of a *consolidated group (the joined group) at a time (the joining time) in an income year (the joining year); and
(b) the loss was made by the joining entity for an income year ending before the joining time.

Note 1: If the joining entity had a loss transferred to it by a previous operation of this Subdivision (when the entity was the head company of a consolidated group), this Subdivision operates later as if the joining entity had made the loss. See section 707-140.

Note 2: Section 707-405 may affect the income year for which the joining entity is treated as having made the loss, if the joining entity made the loss and the loss is referable to part of an income year.

13 Section 707-120(1) and (1A) provide for the transfer for loss from a joining entity to a head company:

(1) Subject to subsection (1A), the loss is transferred at the joining time from the

joining entity to the *head company of the joined group (even if they are the same entity).

(1A) The loss is transferred under subsection (1) only to the extent (if any) that the loss could have been *utilised by the joining entity for an income year consisting of the *trial year if:

(a) at the joining time, the joining entity had not become a *member of the joined group (but had been a *wholly-owned subsidiary of the *head company if the joining entity is not the head company); and

(b) the amount of the loss that could be utilised for the trial year were not limited by the joining entity's income or gains for the trial year.

14 Section 707-140(1) provides for the effect of the transfer of loss:

> To the extent that the loss is transferred under section 707-120 from the joining entity to the *head company of the joined group, this Act operates (except so far as the contrary intention appears) for the purposes of income years ending after the transfer as if:
>
> (a) the head company had made the loss for the income year in which the transfer occurs; and
>
> (b) the joining entity had not made the loss for the income year for which the joining entity actually made the loss.

15 Section 707-145 provides for cancelling the transfer of the loss as follows:

> **Cancelling the transfer of the loss**
>
> (1) The *head company of the joined group may choose to cancel the transfer of the loss.
>
> (2) If the *head company of the joined group does so, this Act (except this section) operates for all income years ending after the transfer as if it had not occurred under section 707-120.
>
> (3) The choice cannot be revoked.

16 As to the role of s 707-145 in Part 3-90, cancelling the transfer of a loss under s 707-145 has the effect of:

(a) increasing the "allocable cost amount" for a joining entity when that entity becomes a subsidiary member of the group; and

(b) preserving the existing "available fractions" for bundles of losses previously transferred to the head company by other entities.

Allocable cost amount

17 The "single entity rule" in s 701-1 provides that while an entity is a subsidiary member of a consolidated group, that entity and any other subsidiary member of the group are taken to be part of the head company for "head company core purposes"; that is, for the purposes of working out a head company's tax liability and losses. Under the single entity rule, the assets

of a subsidiary member of a consolidated group are treated as assets of the head company. Part 3-90 contains rules which set the cost for income tax purposes of assets that a subsidiary member brings into the group.

18 The object of s 701-10 (and Division 705 to which it relates) is to recognise the cost to the head company of the subsidiary member's assets as an amount that reflects the group's cost of acquiring the subsidiary member: s 701-10(3). Section 701-10 provides that at the time an entity becomes a subsidiary member of a consolidated group, the "tax cost is set" for each asset of the entity that would be an asset of the entity at the time if the single entity rule did not apply. The asset's tax cost is set as its "tax cost setting amount" for the purposes of working out the head company's tax liability and losses: s 701-10(1), (2), (4).

19 The tax cost setting amount for an asset that is brought into the group when an entity becomes a subsidiary member is worked out in accordance with Division 705: s 701-60. Subdivision 705-A contains the rules for working out an asset's tax cost setting amount in the "basic case" of a single entity joining an existing consolidated group. Subdivisions 705-B, 705-C and 705-D apply to other situations in which an entity can become a subsidiary member (e.g. where the entity is a member of the group at the time it comes into existence as a consolidated group) and modifies the rules contained within Subdivision 705-A. Subdivision 705-E allows for errors in calculating the tax cost setting amount to be reversed by means of an immediate capital gain or loss if it would be unreasonable to require the calculations to be re-done.

20 Taking the "basic case" in Subdivision 705-A by way of illustration, that subdivision has effect "…if an entity (the ***joining entity***) becomes a *subsidiary member of a *consolidated group (the ***joined group***) at a particular time (the ***joining time***)": s 705-10(1).

21 Subsections 705-10(2) and (3) identify the object of Subdivision 705-A:

> (2) The object of this Subdivision is to recognise the *head company's cost of becoming the holder of the joining entity's assets as an amount reflecting the group's cost of acquiring the entity. That amount consists of the cost of the group's *membership interests in the joining entity, increased by the joining entity's liabilities and adjusted to take account of the joining entity's retained profits, distributions of profits, deductions and losses.
>
> (3) The reason for recognising the *head company's cost in this way is to align the costs of assets with the costs of *membership interests, and to allow for the preservation of this alignment until the entity ceases to be a *subsidiary member, in order to:
>
> (a) prevent double taxation of gains and duplication of losses; and
>
> (b) remove the need to adjust costs of membership interests in response to transactions that shift value between them, as the required adjustments

occur automatically.

22 Section 705-35 provides for the calculation of a "reset cost base asset" (being any asset of the joining entity that is not a "retained cost base asset", such as Australian currency, a debt, or a prepaid right to services: s 705-25). The tax cost setting amount for "reset cost base assets" is worked out by:

(a) first working out the joined group's "allocable cost amount" for the joining entity in accordance with s 705-60;

(b) then reducing that amount by the total of the tax cost setting amounts for each retained cost base asset (but not below zero); and

(c) finally, allocating the result to each of the joining entity's reset cost base assets in proportion to their market values.

23 Section 705-60 is headed "What is the joined group's *allocable cost amount* for the joining entity?" and sets out the steps for working out the "allocable cost amount" and the purpose of each step. In step 6, the losses of the joining entity that are transferred to the head company under Subdivision 705-A are subtracted in calculating the allocable cost amount: ss 705-60 and 705-110.

24 Step 6 in the table to s 705-60 relevantly provides (emphasis added):

> Work out the joined group's ***allocable cost amount*** for the joining entity in this way:
>
> …

Working out the joined group's allocable cost amount for the joining entity		
Step	**What the step requires**	**Purpose of the step**
6	Subtract from the result of step 5 the step 6 amount worked out under section 705-110, which is about losses that the joining entity transferred to the *head company under Subdivision 707-A	**To stop the joined group getting benefits both through higher *tax cost setting amounts for the joining entity's assets and through losses transferred to the head company**

> …

25 The Explanatory Memorandum to the *New Business Tax System (Consolidation) Bill (No 1) 2002* (Cth) (**Consolidation EM**) provides the following guidance on the purpose of the adjustment at step 6:

Step 6: Subtract an amount for certain losses transferred to the head company

5.93 The sixth step in determining a joined group's allocable cost amount for a joining entity is to subtract an amount for the group's "acquired" losses of the joining entity that are transferred to the head company and not cancelled. The amount subtracted for these losses is the amount of the losses multiplied by the company tax rate. [Schedule 1, item 2, section 705-110]

5.94 The group's acquired losses of the joining entity are those tax losses, net capital losses and overall foreign losses of the joining entity at the joining time that did *not* accrue to membership interests that were continuously held by members of the joined group from when the loss accrued until the joining time.

5.95 Consistent with the treatment of "acquired" deductions of a joining entity (see paragraph 5.96), this adjustment reflects the amount by which the loss would reduce the head company's tax liability when the loss is deducted if the company tax rate is unchanged from its rate at the joining time.

26 Section 705-110 of the ITAA 1997 is headed "If joining entity transfers a loss to the head company – step 6 in working out allocable cost amount" and provides that (emphasis added):

(1) For the purposes of step 6 in the table in section 705-60, the step 6 amount is worked out by multiplying the sum of the losses mentioned in subsection (2) by the *corporate tax rate.

(2) **The losses are the joining entity's losses of any *sort that:**
(a) were not *utilised by the joining entity for the income year in which the joining time occurred or any earlier income year; and
(b) did not accrue to the joined group before the joining time (see subsection 705-90(8)); and
(c) are transferred to the *head company under Subdivision 707-A; and
(d) **are not cancelled under section 707-145**.

27 Accordingly, if a loss is automatically transferred and *not* cancelled under s 707-145, then the allocable cost amount is *reduced* by the tax effect of the transferred loss. For example, if a loss of $1,000,000 is transferred to the head company at the joining time and not cancelled under s 707-145, then the allocable cost amount is reduced by $300,000 (being the amount of the transferred loss multiplied by the corporate tax rate): ss 705-60 and 705-110. The purpose of this reduction is to prevent the head company from obtaining the benefit of both:

(a) deductions for the transferred loss; and

(b) a higher allocable cost amount for the joining entity (which will result in higher tax cost setting amounts for the assets of the joining entity which are taken to be held by the head company as a result of the operation of the single entity rule in s 701-1).

28 The benefits of a higher allocable cost amount include the following:

(a) the cost base of each reset cost base asset is higher, and therefore the capital gains realised on the happening of CGT events from the joining time will be lower (and any capital losses will be greater): ss 701-10 and 701-55(5);

(b) depreciating assets to which any of Subdivisions 40-A to 40-D, ss 40-425 and 40-445 and Subdivisions 328-D and 355-E of the ITAA 1997 apply, for example, are taken to be acquired at the joining time for a payment that is higher, and therefore any capital allowance deductions under Division 40 since the joining time will be correspondingly greater: s 701-55(2); and

(c) revenue assets and trading stock may also be taken to be acquired at a higher value subject to certain limits, and therefore the profit produced on their sale or write off may be lower (and losses may be greater): ss 701-10, 701-55, 705-30 and 705-40.

29 There can be a capital gains tax event for the head company at the joining time if:

(a) the sum of the tax cost setting amounts for all retained cost base assets exceeds the group's allocable cost amount for the entity, with the difference being a capital gain: s 104-510;

(b) there are no reset cost base assets against which to apply the excess of net allocable cost amount on joining, with that amount being a capital loss: s 104-515; and

(c) there is a reduction in the tax cost setting amount for certain reset cost base assets under s 705-40 and some or all of that reduction cannot be allocated as mentioned in s 705-40(2), with that amount being a capital loss: s 104-535.

30 Part 3-90 contains equivalent rules for calculating the tax cost setting amount when a member leaves a consolidated group. For the leaving entity, the "exit history rule" in s 701-40 provides that when the entity ceases to be a subsidiary member it inherits the consolidation history of any asset, liability or business that becomes that of the entity because the single entity rule in s 701-1 ceases to apply to that entity. For the consolidated group, Division 711 contains rules for working out the tax cost setting amount for each membership interest held by a member of the consolidated group in an entity that ceases to be a subsidiary member. In broad terms, the tax cost setting amounts for membership interests in a leaving entity are calculated by:

(a) working out the group's allocable cost amount for the leaving entity which in general terms is the cost to the group of the assets the leaving entity takes with it less the liabilities that the leaving entity takes with it (ss 711-20 to 711-45); and

(b) allocating the allocable cost amount to each class of membership interest in the leaving entity in proportion to the market value of all of the membership interests in the class.

The object of Division 711 (in conjunction with s 701-15) is to "preserve the alignment of the *head company's costs for *membership interests in entities and their assets that is established when entities become subsidiary members" when an entity ceases to be a subsidiary member: s 711-5(2); see also s 701-15(2).

Available fraction

31 Subdivision 707-C limits the rate at which a head company can utilise losses that have been transferred to it under Subdivision 707-A. The first limitation is that the head company can only utilise transferred losses for an income year after it has utilised losses that were not transferred to the head company under Subdivision 707-A, even if the non-transferred losses were made after the transferred losses. The second limitation, which is more relevant for present purposes, is that the transferred losses can be utilised only against a fraction (the "available fraction") of the company's income or gains for the income year remaining after the reduction by the company's deductions and non-transferred losses. The object of this limitation is to ensure that transferred losses are used broadly at the same rate that they would have been used if the transferor entity had not become a member of the group and the fraction assumes that the relative market values of the transferor and transferee reflect their capacity to generate income or gains in the future: s 707-305.

32 A "bundle of losses" comes into existence each time losses are transferred under Subdivision 707-A (the "initial transfer time") from an entity (the "real loss-maker") to the head company of the joined group (the "transferee"): s 707-315(1). Section 707-320 provides the method for working out the available fraction for a bundle of losses. The available fraction for a bundle of losses at the initial transfer time is calculated as follows (s 707-320(1)):

$$\frac{\text{*Modified market value of the real loss-maker at the initial transfer time}}{\text{Transferee's adjusted market value at the initial transfer time}}$$

33 The denominator in the formula is the market value of the transferee worked out on the basis that all members of the consolidated group, including the real loss-maker, are part of the transferee but the amount is adjusted as if the transferee had no prior year losses and a nil franking account balance: s 707-320(1). In the numerator, the modified market value for the real loss-maker correspondingly disregards the real loss-maker's prior year losses and franking account balance, among other matters: s 707-325(1).

34 The available fraction worked out in accordance with the formula in s 707-320(1) remains the available fraction for a bundle of losses unless and until any of the adjustment events listed in the table in s 707-320(2) occurs in relation to the bundle.

Evolution's Submissions

35 Evolution accepted that s 707-145 does not expressly prescribe the time by which a choice to cancel the transfer of a loss under s 707-120(1) is to be made, and submitted that the limitation (if any) for cancelling the transfer of a loss falls to be determined by reference to the statutory terms, their context and purpose. Evolution insisted that it is not seeking to read words into s 707-145 but merely to identify the meaning that is implicit in the statutory language when read in context.

36 Evolution submitted in its written submissions that the terms of s 707-145 suggest that any choice to cancel the transfer must be made in the head company's tax return for the year in which the joined entity became a member of the consolidated group. However, in its oral submissions, Evolution submitted that, while the tax return was the regular means of communicating the choice, it could be made by other means, such as a deed poll or letter (T7.1–30). The Commissioner agreed with that position, and even accepted that the choice could be communicated orally to the Commissioner in a conversation (T53.18–54.6).

37 As Evolution submitted, s 707-120(1) provides for when losses are transferred from a joining entity to the head company. If the requirements for the transfer are satisfied, the loss is automatically transferred from the joining entity to the head company at the joining time; that is, when the entity became a subsidiary member of the consolidated group. Under s 707-145, the head company can choose to "cancel the transfer" of the loss that otherwise happens automatically at the joining time. That is, as Evolution submitted, the subject matter of the cancellation is the transfer, not the loss. Evolution submitted that the provision does not facilitate a choice to subsequently "cancel the loss".

38 Evolution submitted that the terms of s 707-145 can be contrasted with s 719-325, which was inserted by a later Act but as part of the same suite of legislation enacted in 2002 to implement the consolidation regime for corporate groups. Section 719-325 speaks in terms of "cancelling all the losses" in a bundle, as opposed to cancelling the "transfer of the loss", and does not contain any element of retrospectivity:

719-325 Cancellation of all losses in a bundle

(1) The ongoing head company:

(a) may choose to cancel all the losses in the *bundle of prior group losses; and

(b) may choose to cancel all the losses in a *bundle of losses to which section 719-310 applies.

(2) If the ongoing head company chooses to cancel all the losses in a *bundle, subsections (3), (4), (5), (6) and (7) operate.

(3) The ongoing head company cannot *utilise for the income year in which the application event happened more of the losses than it would have been able to utilise under Subdivision 707-C assuming:

(a) if the losses are prior group losses:

(i) the losses were in a *bundle for the income year; and

(ii) the *available fraction for the bundle were 1 for the period from the start of the income year until the event happened; and

(b) in any case–the available fraction for the bundle including the losses were 0 from the time of the event until the end of the income year.

Note: Section 707-335 is relevant to working out how much of the losses could be utilised, because the value of the available fraction for the bundle changes during the period described in that section.

(4) The ongoing head company cannot:

(a) transfer the losses to another company under Division 170 for an income year ending after the application event; or

(b) transfer the losses to another company under Subdivision 707-A after the application event.

This subsection has effect despite subsection (3).

(5) Disregard the existence of the *bundle at and after the time of the application event for the purposes of working out the *available fraction for another *bundle of losses.

(6) The losses cannot be *utilised by any entity for an income year starting after the application event.

(7) The choice cannot be revoked.

39 The note to s 707-315(5), which incorrectly refers to s 707-140 instead of s 707-145, contrasts the effect of s 707-145, which cancels the "transfer of the loss", with s 719-325, which cancels "the loss":

> Note: Section 707-140 [sic: s 707-145] provides for a choice to cancel a transfer under Subdivision 707-A. Section 719-325 provides for a choice to cancel all losses in certain bundles of losses. A choice under one of those sections may result in a bundle not coming into existence [which is a reference to a choice under s 707-145], or not being in existence after a certain time [which is a reference to a choice under s 719-325].

40 Evolution submitted that the specific reference in s 707-145 to the choice to "cancel the transfer of the loss" (as opposed to a choice to "cancel the loss"), where such transfer otherwise occurs automatically at the joining time, indicates that the election to cancel the transfer must be made

in relation to the joining year, typically in the tax return for that year. Evolution submitted that, as the transfer will likely have already occurred by the time the head company lodges its tax return for the joining year (and potentially subsequent income years), s 707-145 operates "as if" the transfer had not occurred under s 707-120 for the joining year and any subsequent income years.

41 Evolution further submitted as follows that the broader statutory context and purpose tell strongly against a construction of s 707-145 which permits the head company to cancel the transfer of a loss in a tax return filed for an income year after the income year in which the entity joined the consolidated group.

42 As set out above, cancelling the transfer of a loss under s 707-145 has the effect of increasing the "allocable cost amount" for a joining entity when that entity becomes a subsidiary member of the group. The "allocable cost amount" is used in turn to determine the "tax cost setting amount" for "reset cost base assets" at the joining time as well as whether there has been a capital gain or loss at the joining time. Evolution submitted that there is no statutory mechanism in Part 3-90 by which these consequences can be "unscrambled" if a decision is later made in a tax return two, three or more income years later to cancel the transfer of the loss that occurred at the joining time.

43 Evolution noted that Subdivision 705-E allows for errors in calculating the tax cost setting amount to be reversed by means of an immediate capital gain or loss if it would be unreasonable to require the calculations to be re-done. Evolution submitted, and I accept, that the word "errors" bears its usual meaning of mistakes (as the Consolidation EM confirms at [5.10]), which would not apply to the re-calculation (of what were originally correct calculations) which would be required if the choice to cancel the transfer of losses under s 707-145 could be made in relation to an income year after the joining year. Evolution submitted that the absence of an equivalent statutory regime for a later choice to cancel the transfer of the loss tells against a construction that would permit that election to be made in relation to later income years. Evolution submitted that, if it were the legislature's intention that losses could be cancelled in relation to income years after the joining year, it would be expected that a similar regime to the "shortcut" under Subdivision 705-E would have been included to facilitate the making of those adjustments to reflect that later cancellation.

44 Similarly, Evolution submitted that, as set out above, the available fraction is calculated at the time that the losses are transferred under Subdivision 707-A, being the time that the entity

became a subsidiary member: s 707-120(1). Evolution submitted that the available fraction calculated as at that time remains the available fraction for a bundle of losses unless and until any of the adjustment events listed in the table in s 707-320(2) occurs, and the events listed in the table in s 707-320(2) do not include a subsequent choice under s 707-145 by the head company in relation to a later income year to cancel the transfer of the loss. Evolution submitted that this context again tells against a construction of s 707-145 that permits a head company to cancel the transfer of a loss in a tax return for an income year after the year in which the entity became a subsidiary member.

45 Evolution's submissions concerning the lack of a mechanism to deal with the situation where the choice under s 707-145(1) is sought to be made after the tax return for the joining year is lodged were expanded as follows, by way of reply to the Commissioner's submissions.

46 Evolution referred to s 170 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**), which prescribes the time within which the Commissioner may amend an assessment (relevantly four years after the notice of assessment), and s 14ZW of the *Taxation Administration Act 1953* (Cth) (**TAA**), which prescribes the time within which a taxpayer may object to an assessment (relevantly four years, subject to the Commissioner's discretion to extend that time under s 14ZX). As Evolution submitted, subs 170(10AA) of the ITAA 1936 contains a long list of provisions in the ITAA 1997 which, if they apply, allow the Commissioner to amend an assessment out of time, but s 707-145 is not among them.

47 Every person must, if required by the Commissioner by legislative instrument, give the Commissioner a return for a year of income within the period specified in the instrument: ITAA 1936, s 161(1). A return lodged by a company is deemed to be a notice of assessment: ITAA 1936, s 166A.

48 At the time that Part 3-90 was introduced in 2002, s 170 of the ITAA 1936 provided that if a taxpayer is a company, the Commissioner may amend an assessment within four years after the date on which he gave the taxpayer notice of the assessment. That remains the case today unless the company is a small or medium business entity in which case the period is two years instead of four. Section 170 of the ITAA 1936 contains a long list of exceptions to the operation of the four-year period in which the Commissioner may amend an assessment. An election by a head company to cancel the transfer of a loss pursuant to s 707-145 is not among that long list of exceptions.

49 A taxpayer who is dissatisfied with an assessment can also object against it in the manner set out in Part IVC of the TAA: ITAA 1936, s 175A. Subject to the Commissioner's power to extend time, if the taxpayer is a company (which is not a small or medium business entity) the objection must be lodged within four years after the notice of assessment is given: TAA, ss 14ZW and 14ZX.

50 Evolution provided the following example which, it submitted, shows that the construction that the choice to cancel the transfer of the loss can be made at any time will have extraordinary consequences in conjunction with the operation of s 170 of the ITAA 1936, in some cases where losses are utilised and then cancelled outside the four-year period.

51 By way of illustration, let it be assumed that in the 2005 income year a single entity joins an existing consolidated group and the requirements of s 707-120 are satisfied such that the losses are automatically transferred to the head company of the joined group. The head company does not cancel the transferred losses in the joining year, but instead utilises all of those transferred losses in that income year and the following income year. The head company lodges tax returns for the 2005 to 2014 income years, which are deemed assessments. In the 2015 income year, the head company makes a choice pursuant to s 707-145 to cancel the transfer of losses that occurred at the joining time. That choice "operates for all income years ending after the transfer as if it had not occurred under section 707-120": s 707-145(2). That includes the 2005 and 2006 income years in which the losses were utilised. As a result of the cancellation of the transfer of the loss, an increase of the allocable cost amount is necessary to account for the losses which were subtracted in step 6 in calculating the allocable cost amount: see ss 705-60 and 705-110. Evolution submitted that it follows from the Commissioner's construction (which in its then form was that the choice can be made at "any time") that the head company will have the benefit of both (a) the transferred losses that the head company utilised in the 2005 and 2006 income years because of the Commissioner being out of time to issue an amended assessment by reason of s 170 of the ITAA 1936, and (b) the benefit of the higher allocable cost amount at least from the 2015 year but potentially also for the income years within the objection period provided for by s 14ZW of the TAA. So, for example, if the joining entity brought capital gains tax assets into the consolidated group, the head company can dispose of those assets in the 2015 income year or later years with a higher cost base by reason of the higher allocable cost amount which will result in a smaller capital gain.

52 Evolution acknowledged that a potential answer to this consequence of the Commissioner's then construction is to read a limitation into the operation of s 707-145 or another provision within Part 3-90 (such as s 705-110, in which the losses of the joining entity are subtracted in calculating the allocable cost amount). However, Evolution submitted that the Court should prefer the simplicity of its construction, rather than reading in limitations to other provisions to allow the purpose of s 707-145 to be achieved.

53 Further, Evolution submitted that the difficulties with the Commissioner's construction of s 707-145 are not limited to a situation in which a head company utilises the losses and then chooses to cancel the transfer of those losses in a later year. Evolution submitted that difficulties also arise in the converse situation in which a head company does not utilise the losses but subsequently cancels the transfer of the loss in a later income year.

54 Let it be assumed again in this example that in the 2005 income year a single entity joins an existing consolidated group and the requirements of s 707-120 are satisfied such that the losses of the single entity are automatically transferred to the head company of the joined group. The head company does not choose to cancel the transfer of the losses under s 707-145, and in the 2006 income year disposes of capital assets that are acquired from the joining entity. As a consequence of not cancelling the transfer of the losses, the joining entity has a commensurately lower allocable cost amount such that the capital assets it brought into the group have a lower cost base and the head company paid greater capital gains tax on the disposal of those assets in the 2006 income year. The head company lodges its returns for the 2005 to 2014 income years which are deemed assessments. In the 2015 income year, the head company makes a choice to cancel the transfer of losses that occurred at the joining time which choice "operates for all income years ending after the transfer as if it had not occurred": s 707-145(2). Because of the operation of s 14ZW of the TAA, the head company will not have the benefit of either (a) the ability to utilise the transferred losses, or (b) the higher allocable cost amount, because the head company is unable to object to its assessment for the 2006 income year when it disposed of the capital assets.

55 Given the identified purpose of s 707-145, Evolution submitted that these results tell strongly against the construction contended for by the Commissioner. Evolution submitted that it is unlikely that the legislature intended to confer on taxpayers a useless choice.

56 Evolution submitted that even in relation to assessments that are within the four-year period, the process of objecting to those assessments would involve a consolidated group recalculating

for a number of income years the capital gains, capital allowances, income on sales and write-off of trading stock, and the use of losses as well as any other consequence which flows from those recalculations. Evolution submitted that the absence of an equivalent regime to Subdivision 705-E for choices made under s 707-145 after the joining year weighs heavily against the construction for which the Commissioner contends.

57 In relation to the available fraction, Evolution submitted that the transfer of a bundle of losses under Subdivision 707-A can cause the available fraction for other bundles to be recalculated: s 707-320(3). Evolution submitted that it follows that the omission of a choice to cancel the transfer of a loss under s 707-145 from the adjustment events in s 707-320(2) tells against the construction contended for by the Commissioner in the same way as the absence of an equivalent regime in Subdivision 705-E for the cancellation of the transfer of a loss does.

58 Further, in relation to the Commissioner's submissions concerning "bundles of losses", Evolution submitted that, as s 707-315(1) explains, a "bundle of losses" is all of the losses that are transferred from the joining entity to the head company of the consolidated group under Subdivision 707-A. Evolution relied on the Consolidation EM, which states at [8.71]: "[a] head company can choose to cancel the transfer of a loss. The choice is made on a loss by loss (as opposed to bundle by bundle) basis". Evolution submitted that this means that there is no answer to its point with respect to the lack of statutory architecture to facilitate a consequential recalculation of the available fraction of a loss upon a later cancellation of a loss transfer.

59 Evolution submitted that the position is even more difficult for the Commissioner if he is correct that the cancellation of the transfer cannot be made on a "loss by loss basis". If that were so, Evolution submitted that there would be a further reason why its purported cancellation in its tax return for the 2014 income year was ineffective. That is because the applicant in its tax return for the 2014 income year purported to cancel some of the losses that were transferred from Conquest. The purported cancellation was only in relation to losses of Conquest for the 2007 to 2010 income years but not the losses for the 2011 income year and the period between 1 July 2011 to 1 November 2011, all of which were transferred at the joining time in the 2012 income year.

The Commissioner's Submissions

60 The Commissioner submitted that the language of s 707-145(1) is simple and straightforward, and does not make any prescription of the time or manner of the relevant choice. The Commissioner submitted that the Court should not read into s 707-145(1) the words "in the

head company's tax return for the year in which the joined entity became a member of the consolidated group". The Commissioner submitted that, in the absence of clear necessity, it is wrong to read words into a statute which are not there, citing *Thompson v Goold* [1910] AC 409 at 420 (Lord Mersey); *Vickers, Sons & Maxim Ltd v Evans* [1910] AC 444 at 445 (Lord Loreburn); *Wills v Bowley* [1983] 1 AC 57 at 78 (Lord Lowry). The Commissioner submitted that it is no part of the judicial function to fill gaps disclosed in legislation, citing *Marshall v Watson* [1972] HCA 27; (1972) 124 CLR 640 at 649 (Stephen J), which has been followed on numerous occasions by the Full Federal Court, including in *Sterling Guardian Pty Ltd v Commissioner of Taxation* [2006] FCAFC 12; (2006) 149 FCR 255 at [18] (Heerey, Dowsett and Conti JJ). The Commissioner's oral submissions picked up the leading High Court cases on the point, namely *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [37]–[41] (French CJ, Crennan and Bell JJ); [65] (Gageler and Keane JJ); *HFM043 v Republic of Nauru* [2018] HCA 37; (2018) 359 ALR 176 at [24] (Kiefel CJ, Gageler and Nettle JJ).

61 Further, the Commissioner submitted that s 707-145 provides a beneficial choice to taxpayers, such that if (contrary to the Commissioner's argument) the terms of the provision were unclear as to whether there existed a limitation of the kind suggested, then a construction facilitating the enjoyment of the benefit should be preferred over one that serves to limit it, citing *Collector of Customs v Cliffs Robe River Iron Associates* (1985) 7 FCR 271 at 274–5 (Bowen CJ, Morling and Neaves JJ); and *Eichmann v Federal Commissioner of Taxation* [2020] FCAFC 155; (2020) 280 FCR 10 at [38] (McKerracher, Steward and Stewart JJ), However, it must be borne in mind, as Evolution submitted, that the principle that beneficial legislation is to be construed beneficially is a manifestation of the more general principle that all legislation is to be construed purposefully, and legislation rarely pursues a single purpose at all costs: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; (2016) 260 CLR 232 at [92] (Gageler J).

62 The Commissioner submitted that s 707-145 does not contain: (a) an express requirement that the irrevocable choice provided for in that provision is to be made in a particular form (e.g. in a tax return for a specific income year); or (b) any express time limitation for the making the choice.

63 The Commissioner submitted that the text of s 707-145(2) expressly provides for the cancellation of the transfer, once the choice is made, to operate retrospectively from the joining

time for all subsequent years. That is, according to the Commissioner's submissions, the provision clearly contemplates that a choice may be made some time after the lodgment of the head company's tax return for the joining year. The Commissioner submitted that Evolution's construction would render s 707-145(2) unnecessary, and drew attention to the use of the plural "income years" in that sub-section.

64 Further, the Commissioner submitted that the terms of s 707-145 can be contrasted with s 703-50, which requires that the choice to consolidate a "consolidatable group" be made in writing by a company and by a particular time. Section 703-50 provides (emphasis added):

> **Choice to consolidate a consolidatable group**
>
> (1) A company may make a choice in writing 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.
>
> Note 1: **The head company of the group must give the Commissioner a notice in the approved form** containing information about the group (see sections 703-58 and 703-60).
>
> ….
>
> *Choice is irrevocable*
>
> (2) The choice cannot be revoked, and the specification of the day cannot be amended, after the choice is made under subsection (1).
>
> (3) **The choice can be made no later than:**
> (a) if the company is required to give the Commissioner its *income tax return for the income year during which the specified day mentioned in subsection (1) occurs – the day on which the company gives the Commissioner that income tax return; or
> (b) otherwise – **the last day in the period within which the company would be required to give the Commissioner such a return if it were required to give the Commissioner such a return.**
>
> *Choice has no effect after consolidated group ceases to exist*
>
> (4) The choice **does not have effect after** the *consolidated group that came into existence because of the choice **ceases to exist**. To avoid doubt, this subsection does not prevent the choice from:
> (a) being made by the company at a time when it is not a head company; or
> (b) having effect in relation to a time before the consolidated group ceased to exist, even if that time is before the choice is made.

65 However, as Evolution submitted, the choice under s 703-50 has immediate administrative consequences, including the cessation of the obligation for subsidiary members of the consolidated group to lodge tax returns. Evolution submitted, and I accept, that given that the choice must be separately communicated to the Commissioner by way of an approved form

(s 703-50(1)), it is unsurprising that s 703-50(3) expressly provides for a time within which that choice is to be communicated.

66 Similarly, the Commissioner relied on other provisions in Part 3-90 that expressly require that certain choices be made by the time the company lodges its income tax return, or provide for the preparation of the income tax return to be evidence of the choice, referring specifically to ss 705-27 and 705-62. However, as Evolution submitted, ss 705-27 and 705-62 were inserted by the *Tax Laws Amendment (2010 Measures No 1) Act 2010* (Cth), and were thus not in existence when s 707-145 was enacted, and do not form part of the statutory context upon the enactment of s 707-145.

67 The Commissioner thus submitted that the absence of an express requirement that the choice in s 707-145 be made in a specific manner (as opposed to "a notice in the approved form") or by a particular time (as opposed to "by the day on which the company gives the Commissioner that income tax return"), indicates that no limitation on s 707-145 of the kind Evolution suggests was intended.

68 As to the distinction drawn by Evolution between cancelling the transfer of a loss, on the one hand, and cancelling the loss, on the other hand, the Commissioner submitted that nothing relevantly turns on that distinction. The Commissioner accepted that the transfer occurs at the "joining time" (s 707-120(1)), but pointed out that the head company's tax return for the joining year is intended to reflect the position as at the end of the joining year (that is, after the joining time). The Commissioner submitted that subs 707-145(2) has the consequence that any choice to cancel the transfer operates for all income years ending after the transfer "as if" the anterior transfer had not occurred. The Commissioner submitted that that express wording tells strongly against a construction whereby the choice must be made in the tax return for the income year in which the transfer of the loss would otherwise automatically occur. The Commissioner also drew attention to a passage in the Consolidation EM at [6.108] referring to s 707-145, stating that if the choice is made, "the transfer is taken never to have occurred which means that the loss itself is effectively cancelled in that it can never be used by any entity".

69 The Commissioner developed that argument further in oral address, by referring to the deeming language "as if" in ss 707-140 and 707-145(2) as a statutory fiction, reflecting the fact that the head company did not itself make the loss. The Commissioner submitted that the statutory fiction of a transfer of losses is made in order to allow the head company of the consolidated group to choose to utilise losses in income years after the transfer of losses, which were in fact

made by the joining entity. The Commissioner then submitted that the statutory fiction (or deeming) operates only so far as is necessary to achieve its purpose, citing *Ziegler v Federal Commissioner of Taxation* [2025] FCAFC 168; (2025) 313 FCR 574 at [25] (Bromwich, Thawley and Jackman JJ). According to the Commissioner's submissions, when the head company chooses to utilise losses transferred to it from the joining entity, the statutory fiction "has achieved its purpose", and "the operation of the transfer is spent", such that there is no relevant transfer that exists thereafter that is then capable of being cancelled (T63.28–35). The Commissioner submitted that, to the extent the transferred losses were utilised, the transfer cannot be cancelled, but to the extent the losses were not utilised it remains open for the head company to make a choice to cancel the transfer (T63.43–64.2).

70 The Commissioner thus submitted that the Commissioner's construction of s 707-145 does not give rise to the unreasonable or extraordinary consequences suggested by Evolution's worked examples (T64.6–9). The argument was later put in terms that once a head company has made the choice to utilise any of the losses made by a joining entity arising from the transfer, it waives its right to cancel the transfer (T71.18–34). Accordingly, the Commissioner's argument is not that the choice to cancel the transfer of losses can be made at any time in relation to any income year from the joining year; rather the Commissioner contends that the choice to cancel the transfer can be made at any time before any tax losses have been utilised (T73.1–4, 76.43–77.14).

71 In relation to Evolution's second worked example, the Commissioner submitted that: (a) the Commissioner could agree to a request by a taxpayer to deal with an objection lodged out of time as if it had been lodged within time; (b) if the Commissioner did not do so, the taxpayer in the example would still have the benefit of a higher allocable cost amount for years that are within time; and (c) in any event, the fact that the head company paid greater capital gains tax on the disposal of its assets in 2006 is simply a consequence of the head company's own delay in making the choice to cancel the transfer (T73.42–74.25).

72 As to Evolution's submission contrasting the language of cancelling the transfer in s 707-145 and cancelling the losses in s 719-325, the Commissioner submitted that if a choice is made to cancel a transfer of a loss, then the bundle of losses for the purposes of ITAA 1997 does not arise because of the effect of s 707-315 (T75.7–10). In particular, subs 707-315(4) provides that a loss ceases to be included in a bundle at the first time for which it is true that the loss cannot be utilised.

73 As to Evolution's submission that there is no statutory mechanism in Part 3-90 by which the consequences of a choice made after the joining year can be "unscrambled", the Commissioner made the following submissions.

74 In circumstances where there is a recalculation of the allocable cost amount, and the special adjustment treatment provided by Subdivision 705-E does not apply, it would be necessary for the taxpayer to request, or for the Commissioner of his own accord to give effect to, amendments to assessments for prior years that were affected by the previously incorrect allocable cost amount, which the Commissioner notes would be subject to the operation of the relevant amendment period under s 170 of the ITAA 1936. The Commissioner drew attention to Note 2 to s 705-320(1) within Subdivision 705-E, which contemplates that the Commissioner can specifically "amend any assessments necessary to correct the errors", subject to s 705-320(1). The Commissioner submitted that the term "errors" in Subdivision 705-E extends to the recalculation of the allocable cost amount which may be required to be performed by reason of a choice being made to cancel the transfer under s 707-145 in relation to an income year after the joining year, even though the original calculation was correctly performed (T79.6–29). However, as I have said at [43] above, in my view the word "errors" means mistakes, and does not extend to calculations which are correct but which may call for adjustment because of later events.

75 The Commissioner thus submitted that, if the choice in s 707-145 is made after the head company's tax return for the joining year is lodged, there is an existing statutory mechanism for:

(a) simply recalculating (as opposed to "unscrambling") the allocable cost amount under s 705-60 as at the joining time; and

(b) reflecting any associated tax consequences arising for relevant income years in amended assessment(s).

76 In relation to the available fraction, the Commissioner accepted that the available fraction for a bundle of losses worked out under s 707-320 remains the available fraction until any of the adjustment events listed in the table in s 707-320(2) occurs. However, the Commissioner submitted that a bundle of losses only comes into existence if there is, relevantly, a transfer of the loss (see s 707-315(1)), and if the choice is made to cancel the transfer of the loss under s 707-145(1) then the ITAA 1997 operates for all income years ending after the transfer "as if" it had not occurred (see s 707-145(2)). Thus, the Commissioner submitted, if the choice is made

then there is no relevant bundle of losses and no available fraction for that bundle. Further, the Commissioner relied on Item 3 in s 707-320(2) as applying to enable modification of the available fraction in circumstances where the head company chooses to cancel the transfer in relation to an income year after the joining year, but the submission appears to turn on a misreading of Item 3 which refers to the circumstance where there are multiple bundles, and there may need to be an adjustment because the head company has had transferred to it one or more additional bundles.

77 The Commissioner also relies on the legislative history of the loss transfer provisions, which the Commissioner submitted strongly suggests that the omission of an express time limitation in s 707-145 was a deliberate choice by Parliament. The Commissioner submitted that the historic loss transfer provisions each expressly provided for a time limitation for the transfer of the loss (in circumstances where, under the historic provisions, a positive step had to be taken to give effect to the transfer). That is in contradistinction to Part 3-90, under which the transfer of the loss is automatic and there is a noticeable absence of any express time limitation to make the choice to cancel the transfer in s 707-145.

78 Section 80G was introduced into ITAA 1936 by the *Income Tax Assessment Amendment Act (No 4) 1984* (Cth), with effect from 1 July 1984. Section 80G of the ITAA 1936 represented the first statutory mechanism for the transfer of losses between members of wholly-owned corporate groups. Subsection 80G(6)(c) of the ITAA 1936 expressly required that both the “loss company” and “income company” gave to the Commissioner a written notice (containing the prescribed information) on or before the date of lodgment of the income tax return of the “income company” for the relevant year (or within such further time as the Commissioner allowed) in order for the relevant loss to be transferred. Unlike s 707-145, there was no automatic transfer of losses.

79 Section 80G of the ITAA 1936 was amended in 1992, following the introduction of the regime for self-assessment. The amendments maintained the prior time limitation expressly provided for in s 80G(6)(c) of the ITAA 1936, but changed the manner in which the decision to transfer the losses was made, in that written notice did not need to be provided to the Commissioner, and instead the two companies had to enter into an agreement as prescribed.

80 Following the enactment of the ITAA 1997, the group loss transfer provisions formerly contained in s 80G of the ITAA 1936 were rewritten into Subdivision 170-A of the ITAA 1997. Relevantly, s 170-50 provided (emphasis added):

Transfer by written agreement

(1) The transfer must be made by a written agreement between the *loss company and the *income company.

(2) The agreement must:

(a) specify the income year of the transfer (which may be earlier than the income year in which the agreement is made); and

(b) specify the amount of the *tax loss being transferred; and

(c) be signed by the public officer of each company; and

(d) **be made on or before the day of lodgement of the *income company's *income tax return for the *deduction year, or within such further time as the Commissioner allows.**

…

81 Section s 170-50(2)(d) thus expressly provided for a time limitation for the making of the transfer, that is "on or before the day of lodgement of the *income company's *income tax return for the *deduction year, or within such further time as the Commissioner allows".

82 Following the enactment of Part 3-90 in 2002, the loss transfer provisions in Subdivision 170-A of the ITAA 1997 were amended so that they only applied in respect of Australian branches of foreign banks: see the Consolidation EM [13.5]–[13.8] and s 170-1 as presently drafted.

83 The Commissioner submitted that there is a noticeable absence of a time limitation in s 707-145. The Commissioner therefore submitted that the legislative history strongly suggests that the omission of an express time limitation is a deliberate choice by Parliament. The Commissioner submitted that the conclusion that the absence of an express limitation is a deliberate omission is further bolstered by the guidance in the Consolidation EM that the new provisions were intended to:

(a) ensure that the tax system did not "stand in the way" of commercial group restructures (see Consolidation EM [6.10]); and

(b) address the previous "impediments" that had resulted in a "large store of unused losses" in the system (see Consolidation EM [6.6]). The Commissioner submitted that the express drafting of Subdivision 707-A does not require any positive step to be taken by a particular time in order to effect or cancel any transfer and so can be seen to remove the prior "impediments". However, as I read that passage in the Consolidation EM, it is directed to explaining that the legislature was seeking to ensure that the use of the joining entity's losses by the group approximates the rate at which they would have been used had the entity not joined the group, so as to avoid too great a cost to the revenue.

Consideration

84 By the end of the hearing, the competing positions on the construction of s 707-145 were as follows:

(a) Evolution contended that any choice to cancel the transfer must be made in relation to the joining year, being the income year in which the joining time occurred (typically, but not necessarily, in the income tax return lodged for the joining year); and

(b) the Commissioner contended that the choice to cancel the transfer can be made at any time in relation to any income year before the head company has utilised any of the transferred losses.

85 Before dealing with the question of construction, I should deal with the preliminary question whether the choice purportedly made by Evolution to cancel the transfer of the Updated Conquest Tax Losses was made in relation to the 2014 income year and not the 2012 income year. In my view, it was. The choice was purportedly made in the tax return lodged by Evolution for the 2014 income year. By contrast, the tax returns lodged by Evolution for the 2012 and 2013 income years expressly stated that no choice had been made to cancel the transfer of the Updated Conquest Tax Losses. The Commissioner submitted that wherever a choice is made under s 707-145, it is always directed to the subject matter of the provision, which is the transfer of the loss that occurred at the joining time, such that the choice purportedly made in the 2014 income year was in relation to the 2012 income year and every year thereafter (T85.35–86.8). I reject that submission, as it is inconsistent with the fact that Evolution expressly did not make such a choice in relation to the 2012 and 2013 income years. The question is one of fact, as to which the statutory deemed consequences under s 707-145(2) may be relevant but are not determinative.

86 Turning then to the question of construction, several observations may be made at the outset concerning s 707-145. First, in contrast to its historical counterparts, the transfer of the loss from a joining entity to a head company occurs automatically at the joining time under s 707-120(1), unless a choice to cancel the transfer is made under s 707-145. Second, the cancellation under s 707-145 is of "the transfer of the loss", not the cancellation of the losses themselves, in contrast to s 719-325. Third, the transfer occurs at the joining time, and the choice to cancel the transfer operates for all income years ending after the transfer, which includes the joining year itself, and thus the consequences of the choice to cancel take root in the joining year.

87 The third of those observations indicates one way in which s 707-145(3) is capable of having an independent operation apart from the effect of s 707-145(2). Taking the facts of the present case by way of illustration, it was open to Evolution to choose to cancel the transfer of losses from Conquest at the joining time on 2 November 2011 or shortly afterwards, for example by letter delivered to the Commissioner. By force of s 707-145(3), Evolution could not revoke such a cancellation before or upon lodging its tax return for the 2012 income year (or at any later time). By force of s 707-145(2), the ITAA 1997 operates in perpetuity for that income year and all future income years as if that transfer had not occurred. Further, I note that, to the extent that s 707-145(2) and (3) have an overlapping operation, the express inability to revoke the choice to cancel reinforces the perpetual effect of the choice.

88 The automatic transfer which occurs under s 707-120(1) has important consequences for the head company as at the joining time, in terms of the allocable cost amount and the available fraction, as well as potential capital gains tax events. These can all be calculated without undue difficulty in the head company's income tax return in relation to the joining year. The legislation contemplates that the allocable cost amount and the available fraction will be calculated at the joining time, with immediate implications from the joining year onwards. It is a striking feature of the legislative context of s 707-145 that there is no provision which expressly contemplates these matters being re-calculated in the event that a choice to cancel the transfer under s 707-145 is sought to be made in relation to an income year after the joining year. The point is not merely that such a re-calculation and re-assessment may well be very difficult, especially after four years have elapsed; rather, the real force in Evolution's submissions is that the legislation does expressly deal with similar problems in circumstances where the legislation contemplates that they might arise but contains no such provision in relation to s 707-145. There is no statutory mechanism for a subsequent recalculation of the allocable cost amount, and the events which can cause a re-calculation of the available fraction under s 707-320(2) do not include a subsequent choice under s 707-145 by the head company in relation to a later income year to cancel the transfer of the loss. Further, there is no regime corresponding to Subdivision 705-E to deal with such a subsequent choice in circumstances where it would be unreasonable to require recalculations of capital gains or losses. Moreover, the long list of exceptions to the four-year rule in s 170 of the ITAA 1936 for amendments to assessments does not include such a subsequent choice under s 707-145. As Evolution submits, express provision for recalculations and amendments to assessments for a choice under s 707-

145 made in relation to an income year after the joining year could very readily have been included if such a subsequent choice were contemplated as a possibility.

89 As Evolution submits, the absence of any mechanism to deal with the obvious potential and problematic consequences of a choice to cancel the transfer being made in relation to an income year after the joining year provides a strong indication that the choice to cancel the transfer (like the transfer itself) is contemplated as necessarily taking root in various aspects of the tax profile of the head company in the joining year. A key purpose of the legislation is to provide the head company with the choice between (a) utilising transferred losses from a joining entity, and (b) cancelling the transfer and avoiding an adjustment to the allocable cost amount and available fraction, and not to allow both those outcomes. As Evolution submits, its construction is consistent with that purpose, and avoids the kind of outcomes illustrated by its worked examples, which are inconsistent with that purpose.

90 Further, as Evolution submits, its construction does not require that words be read into s 707-145 in order to fill a gap in the legislation or otherwise to undertake a process of judicial repair of the legislation. Rather, Evolution's construction identifies the meaning which is implicit in the language chosen in s 707-145, when read in the context of other relevant provisions.

91 The Commissioner's contentions were modified in the course of oral addresses in order to accommodate the difficulties exposed by the first of Evolution's worked examples (which I have set out at [51] above). The Commissioner thus submitted that, in light of the deeming language "as if" in ss 707-140 and 707-145, the operation of the transfer is "spent" upon the head company choosing to utilise losses transferred to it by the joining entity, and there is then no relevant transfer that continues to exist. However, the notion that the transfer ceases to exist finds no support in the legislation. On the contrary, s 707-140(1) provides that the transfer operates in perpetuity for income years ending after the transfer, and s 707-145(2) provides that a choice to cancel the transfer operates in perpetuity for all income years ending after the transfer.

92 As to the Commissioner's alternative formulation, that the head company "waives" its right to cancel the transfer once it utilises any of the losses made by a joining entity arising from the transfer, the notion of waiver finds no support in the legislation. The Commissioner did not identify which of the various senses of the term "waiver" was sought to be invoked, or whether the term was used as no more than a conclusionary word stating the consequences of the operation of a more specific principle: see *Agricultural and Rural Finance Pty Ltd v Gardiner*

[2008] HCA 57; (2008) 238 CLR 570 at [51] (Gummow, Hayne and Kiefel JJ). Relevantly, the only decision which the legislation contemplates as being open to the taxpayer is the choice under s 707-145 to cancel the otherwise automatic transfer, and not a decision to "waive" the right to make that choice.

93 In sum, in my view, the Commissioner's attempts to construe s 707-145 in a way that can accommodate the problems exposed by Evolution's first worked example are more pragmatic than principled. Those attempts are inconsistent with accepted principles of statutory construction.

94 As to the Commissioner's response (see [71] above) to Evolution's second worked example (set out at [54] above), it strikes me as most improbable that the legislation should be construed as solving the problem by contemplating the Commissioner exercising his discretion to allow a request by a taxpayer to lodge an objection out of time, particularly in circumstances where express legislative provision was made for other problems arising from decisions by taxpayers affecting earlier calculations or assessments.

95 As to the Commissioner's submissions based on the historical antecedents to s 707-145, s 80G of the ITAA 1936 originally required both companies to give a written notice to the Commissioner in order for the relevant loss to be transferred, and from 1992 required the two companies to enter into an agreement as prescribed. Section 170-50 of the ITAA 1997 similarly required a written agreement by the two companies. Those provisions stand in stark contrast to the automatic transfer under s 707-120(1). In circumstances where a notice or agreement is required by the legislation in order to effect the transfer, it is an ordinary and natural feature of such legislation to stipulate a timeframe in which that is to be done. Similarly, s 703-50 of the ITAA 1997 requires an approved form to be given to the Commissioner, with immediate administrative consequences, and it is natural to expect that the provision would stipulate a timeframe in which that had to be done. In circumstances where the transfer is automatic at the joining time, subject to a choice to cancel the transfer, it is implicit in the legislative scheme that the choice to cancel must be made in relation to the joining year.

96 For completeness, as indicated at [65] above, s 703-50 is distinguishable from s 707-145 as it requires exercise of the choice by an approved form. Further, as indicated at [66] above, ss 705-27 and 705-62 were not part of the ITAA 1997 when s 707-145 was enacted, and cannot shed light on the intended meaning of s 707-145.

97 Accordingly, in my view, the construction advanced by Evolution is correct. The upshot is that Evolution's purported choice to cancel the transfer of the Updated Conquest Tax Losses in its income tax return for the 2014 income year, contrary to the absence of such a choice in relation to the 2012 income year, was too late to be effective under s 707-145. The separate question should therefore be answered in the negative

98 I have set a date for a case management hearing for the preparation of the hearing on the remaining issues. The costs of the proceedings to date are reserved.

I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate:

Dated: 17 July 2026