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## Taxation Determination

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Income tax: can an unincorporated association of persons acting only in Australia who do not carry on a business in common with a view to profit be a corporate limited partnership within the meaning of section 94D of the *Income Tax Assessment Act 1936*?

**❗ This publication provides you with the following level of protection:**

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. No. An unincorporated association of persons acting only in Australia who do not carry on a business in common with a view to profit cannot be a corporate limited partnership within the meaning of section 94D of the *Income Tax Assessment Act 1936* (ITAA 1936).
2. An association of persons cannot be a corporate limited partnership unless it is a limited partnership under paragraph (a) of the definition of 'limited partnership' in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).
3. One of the requirements of that paragraph is that the liability of at least one of the associated persons must be limited. For unincorporated associations acting only in Australia – that is, associations that carry on business as partners only in Australia, or that are in receipt of income jointly only in Australia – liability relating to that business or that joint income must be limited in Australia.
4. That can only happen by operation of the Australian State laws relating to limited partnerships. One of the requirements to be a limited partnership under such Australian State laws is that the association is a partnership under the general law which, in itself, requires that the association be carrying on a business in common with a view to profit.

## **Example 1**

5. *Tom and QLDABC Pty Ltd are registered as a limited partnership in Queensland. QLDABC Pty Ltd is recorded as the general partner and Tom as the limited partner. On the facts of their particular circumstances, Tom and QLDABC Pty Ltd are not carrying on a business in common with a view to profit. Although their association is in receipt of dividend income jointly from jointly owned shares in QLDXYZ Pty Ltd, an associated Australian company, the liability of at least one of those persons (namely Tom) is not limited by virtue of the Queensland legislation relating to limited partnerships because their association does not carry on a business in common with a view to profit. (No other law might apply to limit the liability of either person in this case.)*

6. *Their association is not a 'limited partnership' as defined in paragraph (a) of the definition of 'limited partnership' in subsection 995-1(1) of the ITAA 1997 and so is not a 'corporate limited partnership' as defined in section 94D of the ITAA 1936.*

## **Date of effect**

7. This Determination applies to years of income commencing both before and after its date of issue. However, the Determination 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 issue of the Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 Income Tax, fringe benefits and product grants and benefits: Public Rulings).

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**Commissioner of Taxation**

25 June 2008

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## Appendix 1 – Explanation

**❶** *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

8. An association cannot be a 'corporate limited partnership' as defined in section 94D of the ITAA 1936 unless it is a 'limited partnership'.<sup>1</sup>

9. 'Limited partnership' is defined in subsection 6(1) of the ITAA 1936 to have the same meaning as in the ITAA 1997.

10. 'Limited partnership' is defined in subsection 995-1(1) of the ITAA 1997 to mean:

- (a) an association of persons (other than a company) carrying on business as partners or in receipt of \*ordinary income or \*statutory income jointly, where the liability of at least one of those persons is limited; or
- (b) an association of persons (other than one referred to in paragraph (a)) with legal personality separate from those persons that was formed solely for the purpose of becoming a \*VCLP, an \*ESVCLP, an \*AFOF or a \*VCMP and to carry on activities that are carried on by a body of that kind.

11. A limited partnership within the meaning of paragraph (b) cannot be a corporate limited partnership.<sup>2</sup>

12. A key requirement to satisfying paragraph (a) is that the liability of at least one of the persons in the association of persons is limited, in respect of their carrying on of business as partners or in respect of their joint receipt of income, whichever character their association has.

### ***Meaning of limited liability in the context of paragraph (a)***

13. The reference to the liability of at least one of the 'partners' being limited is a reference to a limitation (applying under the legal system applicable to the association) of their liability to third parties for, or to contribute to, the debts, obligations or other liabilities of the 'partnership'. Those debts, obligations or other liabilities will be those arising from the partners carrying on business as partners, or from their joint receipt of income, whichever character their association has.

14. This is made clear by the Explanatory Memorandum to the Bill that introduced Division 5A of Part III of the ITAA 1936 which explained the purposes of the Bill as addressing the possibility under the former law that a limited partner could utilise partnership losses for tax purposes although in law they had limited personal liability to make good or to discharge the underlying debts, obligations or other liabilities of the partnership.<sup>3</sup>

<sup>1</sup> See subsection 94D(1) of the ITAA 1936.

<sup>2</sup> Subsection 94D(2) of the ITAA 1936.

<sup>3</sup> See the Explanatory Memorandum to Taxation Laws Amendment Bill (No. 6) 1992, 'Background to the legislation' and 'What is a limited partnership?' sections under 'Taxation of limited partnerships as companies'.

15. An agreement between 'partners' for one or more of them to indemnify another or others of them (or hold the others harmless) in relation to debts, obligations or other liabilities of the 'partnership' does not limit the liability of any 'partner', as the benefit of such an indemnity does not limit or avoid any obligation to third parties to make good or to discharge underlying debts, obligations or other liabilities.
16. An agreement by 'partners' with third parties to limit recourse by the third party such as to identified assets or cash flows similarly does not limit the liability of any 'partner' to the third party. Rather, what is restricted is recourse in relation to the particular debt, obligation or other liability of the 'partnership', which remains joint and several to the 'partners'.
17. The corporate limited partnership provisions were enacted by Parliament on the basis that no such extended meaning was being given to limitation of the liability of a 'partner' (as to include a 'partner' benefiting from an indemnity or from a liability being subject to limited recourse): see consideration by the Senate Finance and Public Administration Committee of Taxation Laws Amendment Bill (No. 6) 1992, 11 December 1992, Hansard pages SFP 79-80, and 83-85, showing such extended meaning being expressly put to the Parliament and rejected by and for the government.
18. The Australian State laws relating to limited partnerships are the only applicable laws under which a person's liability as a 'partner' in a 'partnership' either carrying on business as partners only in Australia or receiving income jointly only in Australia could be limited in the sense required by paragraph (a) of the definition of 'limited partnership in subsection 995-1(1) of the ITAA 1997.

***Limited partnerships under State legislation are a special sub-class of partnership***

19. In the jurisdiction of each of the Australian States, limited partnerships are constituted and governed as a special sub-class of partnership under the applicable Partnership Act or a special statute<sup>4</sup> and are subject to the ordinary law of partnership except to the extent of the modified rules and registration requirements under the limited partnership provisions.<sup>5</sup> Consistently with the way ordinary partnerships are treated, these statutes do not contain provisions that give such limited partnerships any separate legal personality.<sup>6</sup> Limitation of the liability of a member is only available in the States if the requirements of the limited partnership laws are met.

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<sup>4</sup> Part 3 of the *Partnership Act 1892* (NSW); Chapter 3 of the *Partnership Act 1891* (Qld); Part 3 of the *Partnership Act 1891* (SA); *Limited Partnerships Act 1908* (Tas); Part 3 of the *Partnership Act 1958* (Vic); *Limited Partnerships Act 1909* (WA). Limited partnership legislation has not been enacted in the Australian Capital Territory or Northern Territory.

All references in this Taxation Determination to provisions of Australian state partnership legislation are to provisions of these Acts unless otherwise specified.

<sup>5</sup> NSW, sections 49, 50 and 50A; Qld, sections 5A and 49; SA, sections 47 and 48; *Limited Partnerships Act 1908* (Tas), sections 4 and 7; Vic, sections 49 and 50; *Limited Partnerships Act 1909* (WA), sections 4 and 7.

<sup>6</sup> Several Australian states, the Australian Capital Territory and the Northern Territory have created another special sub-class of partnership – incorporated limited partnerships – which are given separate legal personality. They are not the subject of this Taxation Determination because they are not unincorporated associations.

***Limited partnerships under State law must carry on a business in common with a view to profit***

20. One of the fundamental requirements to be a limited partnership under the law of the Australian States is the requirement to be a 'partnership', which each of the State Partnership Acts defines<sup>7</sup> as being the relation which subsists between persons carrying on a business in common with a view to profit.

21. Therefore, an unincorporated association of persons acting only in Australia cannot satisfy paragraph (a) of the definition of 'limited partnership' in subsection 995-1(1) of the ITAA 1997, and therefore cannot be a 'corporate limited partnership' as defined in section 94D of the ITAA 1936, unless that association of persons carries on a business in common with a view to profit.

22. At first blush it might be thought that this conclusion leaves no scope for the operation of the part of the definition of 'limited partnership' that refers to an association of persons (other than a company) in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited. However, the definition has a wider application than to limited partnerships under Australian State law. It is made clear by the Explanatory Memorandum to the Bill that introduced Division 5A of Part III of the ITAA 1936 that the intention was that the Division not be confined to limited partnerships formed in Australia. The definition of 'limited partnership' was therefore made 'sufficiently general to apply to limited partnerships as formed under many legal systems'.<sup>8</sup> The part of the definition of 'limited partnership' referred to above may thus apply presently to an unincorporated association formed other than in Australia that does not carry on a business in common with a view to profit, where the liability of at least one of the members is limited.

***Conclusive evidence provisions under State law do not override that requirement***

23. It has been suggested the construction of the registration and conclusive evidence provisions in certain Australian States override any requirement for an association of persons inter alia to carry on a business to be a limited partnership under the Australian State legislation.

24. In each Australian State a certificate must be issued on registration of a limited partnership. In New South Wales, Queensland, South Australia and Victoria such a certificate is conclusive evidence that the limited partnership was formed on the date of registration and the partnership to which it refers consisted at the relevant time of the general partners and limited partners named in the certificate.<sup>9</sup>

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<sup>7</sup> NSW, subsection 1(1); Qld, subsection 5(1); SA, subsection 1(1); *Partnership Act 1891* (Tas), subsection 6(1); Vic, subsection 5(1); *Partnership Act 1895* (WA), subsection 7(1). This definition is adopted from the common law.

<sup>8</sup> See the Explanatory Memorandum to Taxation Laws Amendment Bill (No. 6) 1992, 'What is a limited partnership?' section under 'Taxation of limited partnerships as companies'.

<sup>9</sup> NSW, subsection 58(4); Qld, subsection 51(4); SA, subsection 56(4); Vic, subsection 58(4).

25. The Commissioner considers while a certificate is conclusive evidence of the time of formation of an association entitled to be registered as a limited partnership, it is not conclusive evidence of an entitlement to register in the first place. If the association is incapable of being a limited partnership, for example, because it is not a partnership (because the association of persons is not carrying on a business in common with a view to profit), then its registration and the relevant 'conclusive evidence' provision do not change that. That view is consistent with that taken in a line of authorities relating to the effect of 'conclusive evidence' provisions concerning the registration of trade unions.<sup>10</sup>

26. Registration as a limited partnership does not establish that there is at any particular time, or ever, any partner whose liability to contribute to the liabilities of the partnership actually is limited. In each Australian State while a supposed limited partner takes part in the management of the business of the limited partnership that partner has the same liability as a general partner in relation to liabilities of the partnership incurred during that period.<sup>11</sup> The liability of the supposed limited partner is then not limited during such a period. As a supposed limited partner may take part in the management of the business of the limited partnership from the commencement of that business and throughout the continuance of the limited partnership, each Australian State's legislation is consistent with the possibility of there being no partner actually enjoying any limitation of liability although the limited partnership is registered.

27. As registration in each Australian State does not conclusively establish that there is at any particular time, or ever, any partner enjoying limitation of liability, there is no reason to infer that the matters conclusively established by State registration must in any way override the requirement that an association of persons carry on business in common with a view to profit in order to be a limited partnership under the Australian State legislation or must be taken to establish conclusively that the members do carry on business in that way.

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<sup>10</sup> See the High Court's decision in *Federated Engine-Drivers and Firemen's Association of Australasia v. The Broken Hill Proprietary Company Limited* (1911) 12 CLR 398, the New South Wales Court of Appeal's decision in *Australian Workers' Union v. Shop Distributive and Allied Employees' Association* [1978] 1 NSWLR 387, and the Federal Court's discussion and application of those decisions in *Sharpe v. Goodhew* (1990) 96 ALR 251, at 265-266.

<sup>11</sup> NSW, subsection 67(2); Qld, subsection 60(4); SA, subsection 65(2); *Limited Partnerships Act 1908* (Tas), subsection 6(3); Vic, subsection 67(2); *Limited Partnerships Act 1909* (WA), subsection 6(1).

## References

*Previous draft:*

TD 2008/D1

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- limited partnerships
- partnerships

*Legislative references:*

- ITAA 1936 Pt III Div 5A
- ITAA 1936 6(1)
- ITAA 1936 94D
- ITAA 1936 94D(1)
- ITAA 1936 94D(2)
- ITAA 1997
- ITAA 1997 995-1(1)
- Partnership Act 1892 (NSW) Pt 3
- Partnership Act 1892 (NSW) 1(1)
- Partnership Act 1892 (NSW) 49
- Partnership Act 1892 (NSW) 50
- Partnership Act 1892 (NSW) 50A
- Partnership Act 1892 (NSW) 58(4)
- Partnership Act 1892 (NSW) 67(2)
- Partnership Act 1891 (Qld) Chap 3
- Partnership Act 1891 (Qld) 5(1)
- Partnership Act 1891 (Qld) 5A
- Partnership Act 1891 (Qld) 49
- Partnership Act 1891 (Qld) 51(4)
- Partnership Act 1891 (Qld) 60(4)
- Partnership Act 1891 (SA) Pt 3
- Partnership Act 1891 (SA) 1(1)
- Partnership Act 1891 (SA) 47
- Partnership Act 1891 (SA) 48
- Partnership Act 1891 (SA) 56(4)

- Partnership Act 1891 (SA) 65(2)
- Partnership Act 1891 (Tas) 6(1)
- Limited Partnerships Act 1908 (Tas)
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- Limited Partnerships Act 1908 (Tas) 7
- Partnership Act 1958 (Vic) Pt 3
- Partnership Act 1958 (Vic) 5(1)
- Partnership Act 1958 (Vic) 49
- Partnership Act 1958 (Vic) 50
- Partnership Act 1958 (Vic) 58(4)
- Partnership Act 1958 (Vic) 67(2)
- Partnership Act 1895 (WA) 7(1)
- Limited Partnerships Act 1909 (WA)
- Limited Partnerships Act 1909 (WA) 4
- Limited Partnerships Act 1909 (WA) 6(1)
- Limited Partnerships Act 1909 (WA) 7
- TAA 1953

*Case references:*

- Australian Workers' Union v. Shop Distributive and Allied Employees' Association [1978] 1 NSWLR 387
- Federated Engine-Drivers and Firemen's Association of Australasia v. The Broken Hill Proprietary Company Limited (1911) 12 CLR 398
- Sharpe v. Goodhew (1990) 96 ALR 251

*Other references:*

- Explanatory Memorandum to Taxation Laws Amendment Bill (No. 6) 1992
- Senate Finance and Public Administration Committee, 11 December 1992, Taxation Laws Amendment Bill (No. 6) 1992

## ATO references

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