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Page status: **not legally binding**

Page 1 of 3

Ruling Compendium – TD 2014/18

This is a compendium of responses to the issues raised by external parties to Draft Taxation Determination TD 2014/D8 – *Income tax: can the exemption in section 820-39 of the Income Tax Assessment Act 1997 apply to the special purpose finance entity established as part of the 'securitised licence structure' used in some social infrastructure Public Private Partnerships?*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the Draft Determination.

Summary of issues raised and responses

| Issue No. | Issue raised | ATO Response/Action taken |
|------------------|---|---|
| 1 | The structure is often called a 'securitised lease structure' and yet the TD only refers to it as a securitised licence arrangement. Refer to the structure as the 'securitised licence/lease structure' and all references to licence should be altered to 'licence/lease' | Footnote 2 will be amended to include a sentence that the securitised licence arrangement is occasionally referred to as the securitised lease arrangement. Regardless of the label of the arrangement, provided it does not satisfy the conditions in Divisions 40, 43 and 250 (that is the Project Company is not the owner of the relevant asset) then the rules in the TD should have application to the arrangement. |
| 2 | There are some errors in the example securitised licence structure. | Whilst many of the requested amendments to paragraph 6 were incorporated into the Final TD, the structure only focused on the general features of a securitised licence PPP arrangement. The principles in the TD will apply to securitised licence PPP arrangements provided the material features of such arrangements are present. |
| 3 | It is not always the project sponsors that establish a separate SPE (Fin Co), it can also be a third party (charitable trust). | Paragraph 6 of the TD is amended to state 'a separate SPE (Fin Co) is established to obtain the senior debt for the project. Fin Co may or may not be owned by the project sponsors.' |
| 4. | Amend reference in paragraph 6 from 'operating phase of the licence' to 'operating phase of the 'concession period'. | Amended. |

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Page 2 of 3

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| 5 | Include reference to both lump sum and progressive payments in securitisation arrangements. | Amended. |
| 6 | Make clear that it is the cash from the licence fees that are applied to the senior debt (as well as expenses). | Paragraph 6 of the TD amended to state 'Fin Co uses the cash generated from the licence fees assigned to it by the Government to repay the senior debt'. |
| 6 | Change quarterly service payments to periodic service payments | Amended. |
| 8 | The sentence in the last bullet point in paragraph 6 is ambiguous. | The sentence is amended to provide further clarity. |
| 9 | Include a footnote to make clear that at times the private sector may be required to procure and construct complementary assets which are not funded by the Government (such as car parks). | Footnote 6 included in TD to state that the private sector may be required to procure and construct complimentary assets (such as car parks) which are not funded by the Government. |
| 10 | 'Period of the PPP' in paragraph 18 is replaced with 'concession period' for consistency with paragraph 6 description. | Paragraph 18 amended. |
| 11 | In making the assessment of weight with respect to the relevant criterion of insolvency-remoteness, the Commissioner should consider jurisdictional factors. The argument is that the agencies may not have specific guidance on the application of the criteria to Australian issuers. | In so far as the relevant criteria are not written specifically with Australian circumstances in mind, this would need to be taken into account in giving them a sensible and practical reading, so far as their tenor and context permits. It is not thought necessary to state this in the TD. |
| 12 | Alter the sentence which states that the Commissioner may give weight to a legal opinion to will give weight to a legal opinion. | Sentence is amended to state the commissioner will give weight to a legal opinion. However, whilst the Commissioner will consider a legal opinion addressing whether Fin Co is an insolvency-remote SPE, the amount of weight to be given will depend on the nature of the legal advice and it may be outweighed by other factors. |

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Page 3 of 3

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|-----------|--|--|
| 13 | Remove the word 'explicitly' from paragraph 36 which states 'Provided an entity satisfies what are explicitly set out as the 'characteristics' of insolvency remoteness in the applicable criteria of an internationally recognised rating agency, then it will satisfy the requirements of paragraph 820-39(3)(c)'. | The word explicitly has been removed. |
| 14 | The TD should expressly confirm that 'off the shelf entities' be treated as having been 'established for the purposes of managing some or all of the economic risks...' in accordance with paragraph 820-39(3)(a). The reasoning is that often off the shelf entities are acquired and utilised as an SPE in an Infrastructure PPP however they may have been established for some other requisite purposes. | In accordance with the principles handed down by the High Court in <i>Brookton</i> , it is not only necessary to look at the circumstances existing at the time of incorporation or creation but also the circumstances existing at the time the status of the entity is being tested (so annually in the case of paragraph 820-39(3)(a)). The concept of 'established' captures those entities that were incorporated (organised, set up or put in place) for some other purpose (or for no particular purpose). However, the TD will not specifically reference 'off the shelf entities' on the basis that Shelf companies are subject to the same principles and tests which apply to 'non-shelf' companies as espoused in the relevant case law. |
| 15 | Clarify what 'throughout the income year' means for the purposes of the debt test in paragraph 820-39(3)(b) – that is whether the conditions must be met at all times through the income year or some other timing point. | Yes, throughout the income year means at all times during the income year. Clarified in paragraph 26. |
| 16 | The principles in the TD are extended to other 'genuine securitisation vehicle' structures. | The consultation undertaken by the Commissioner was undertaken purely in respect of PPP arrangements. The ATO has not been advised of any structures outside the securitised licence PPP model where subsection 820-39(3) is controversial. As such, the principles in the TD are limited to the securitised licence structures. However, the ATO encourages other entities to request a private binding ruling should they wish to apply the exemption in section 820-39. |