Public advice and guidance compendium – TD 2019/10

This is a compendium of responses to the issues raised by external parties to draft Taxation Determination TD 2018/D6 *Income tax: can the debt and equity rules in Division 974 of the Income Tax Assessment Act 1997 limit the operation of the transfer pricing rules in Subdivision 815-B of the Income Tax Assessment Act 1997?*

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

Summary of issues raised and responses

Issue No.	Issue raised	ATO response / action taken
1	Query whether it is reasonable for the final Determination to have retrospective effect, applying to income years commencing on or after 29 June 2013, given the product has been anticipated for some time.	We consider that the Determination should apply to income years commencing on or after 29 June 2013 as Subdivision 815-B[1], and subsection 815-110(1) in particular, applies to those income years. [1] All legislative references in this Compendium are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.
2	There is no real question of conflict or priority as asserted by the ATO and the provisions can operate separately and simultaneously to achieve their intended objects.	External parties raised a number of specific arguments concerning conflict and priority.
3	It would seem to be the better view that Division 974 operates independently of Subdivision 815-B in working out the transfer pricing benefit when a debt or equity interest is involved. • There is no doubt that the outcome of classification of any instrument under Division 974 is subject to Subdivision 815-B but there is nothing in the income tax law that would justify interference by Subdivision 815-B **before** the debt or equity outcome has been determined.	Subdivision 815-B does not change the operation of Division 974. However, the application of Division 974 to the arm's length conditions instead of the actual conditions is relevant to determining whether there is a transfer pricing benefit. This is consistent with paragraphs 3.4 and 3.5 of the Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (which introduced Subdivision 815-B). To the extent there is a transfer pricing benefit, subsection 815-110(1) has the effect that Division 974 cannot limit the operation of

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	• The arm's length conditions cannot be imposed in applying the debt or equity test in Division 974. • Subdivision 815-B and arm's length conditions are not relevant to the debt test in Division 974 and hence cannot be applied to re-characterise an instrument as either a 'debt interest' or an 'equity interest'. • It is not open to the ATO to disregard the intent of Parliament to specifically and explicitly propose a particular approach or test (which includes the 10-year statutory rule as prescribed in section 974-35) in determining whether an arrangement is debt or equity for the purposes of Division 974.	Subdivision 815-B (including the substitution of the arm's length conditions for the actual conditions under section 815-115). Accordingly, we disagree with the views submitted.
4	The characterisation of debt or equity in Division 974 is not a critical consideration in the application of Subdivision 815-B. • Subdivision 815-B and Division 974 would operate independently of each other and Subdivision 815-B could adjust the amount of the return of the instrument that would be included in taxable income. • For example, the arm's length conditions in Subdivision 815-B cannot apply to Division 974 to re-characterise the arrangement from an equity interest to a debt interest for the purposes of Subdivision 768-A as set out in Example 1 of TD 2018/D6. • This outcome is consistent with the interaction of	The application of Division 974 to the arm's length conditions instead of the actual conditions is relevant to determining whether an entity gets a transfer pricing benefit. Whilst subsection 815-110(2) provides that the operation of Division 820 is not limited by Subdivision 815-B, there is no corresponding exception in respect of other provisions of the income tax law.

Issue No.	Issue raised	ATO response / action taken
	Subdivision 815-B with Division 820, where the role of Division 820 in respect to an entity's amount of debt is preserved and Subdivision 815-B would focus on the arm's length pricing or the rate of return of the debt interest.	
5	The product should clarify that Division 974 characterisation is not a substituted condition under the arm's length conditions, but the Division 974 characterisation may change because of the substituted conditions. For example, in relation to Example 1 at paragraph 9 of TD 2018/D6, the first sentence concludes that, under arm's length conditions, the arrangement would be treated as a debt interest. This suggests that the Commissioner firstly determines the arm's length conditions under Subdivision 815-B, and then applies Division 974 to a hypothetical instrument with those arm's length conditions. However, the second sentence at paragraph 9 then says that "Under Subdivision 815-B, there would be a loan with interest". That appears to suggest a contrary approach to the preceding paragraph and implies that Subdivision 815-B is not only determining the arm's length conditions, but that the scope of Subdivision 815-B goes further to identify a hypothetical loan (paragraph 9 refers to loan and not to debt interest), such that the tax benefit (and possibly the taxable income) of the taxpayer is determined wholly by reference to Subdivision 815-B, without any need to	The Determination explains that where the arm's length conditions differ from the actual conditions, the process of working out if an entity gets a transfer pricing benefit necessitates applying Division 974 to the arm's length conditions instead of the actual conditions. In the final Determination, the second sentence of paragraph 9 has been revised to remove any doubt as to the approach used.

Issue No.	Issue raised	ATO response / action taken
	re-engage with Division 974.	
6	The final Determination should confirm that Division 974 does not apply to the arm's length conditions where there is no transfer pricing benefit.	We do not consider the inclusion of such a statement to be necessary. Example 3 of the Determination confirms that Subdivision 815-B does not apply where an entity does not get a transfer pricing benefit.
7	The final Determination should clarify that the arm's length conditions described in each example are merely an assumption for that particular example. For example, Example 1 of the final Determination should clarify that the conclusion that the loan would give rise to a debt interest under the arm's length conditions is merely an assumption, as there are many situations where a profit-participating loan is entered into under arm's length conditions, as recognised by section 25-85.	Paragraph 4 of the Determination states that each example assumes certain arm's length conditions. We consider this is sufficient in dealing with the issue raised.
8	The final Determination should provide further guidance on the identification of the arm's length conditions and the scope of the 'reconstruction powers' under section 815-130. Paragraph 4 (which states that each example assumes certain arm's length conditions) of TD 2018/D6 should be deleted in the final Determination so that taxpayers can draw conclusions and inferences as to how the ATO would determine arm's length conditions in analogous factual circumstances.	The issue is outside the scope of the Determination. The identification of the arm's length conditions and the scope of section 815-130 are already the subject of Taxation Ruling TR 2014/6 *Income tax: transfer pricing – the application of section 815-130 of the Income Tax Assessment Act 1997*. Accordingly, we have not deleted paragraph 4 in the final Determination as the focus of the product is on the interaction of Subdivision 815-B with Division 974.
9	Example 1 of TD 2018/D6, when finalised, should give consideration to the hybrid mismatch rules and amendments to Subdivision 768-A with effect from 1 January 2019. In particular, the return to Australian Company may not be non-assessable non-exempt	The interaction of Subdivision 815-B and the hybrid mismatch rules is outside the scope of this Determination. The Determination is focused on providing guidance on the interaction of Subdivision 815-B with Division 974. It is not intended that the

Issue No.	Issue raised	ATO response / action taken
	income under the hybrid mismatch rules, in which case there would be no transfer pricing benefit. Does Subdivision 815-B override any potential hybrid mismatch which may otherwise be denied (on the basis of section 815-110) or could this be a relevant factor to consider in making a 'fair and reasonable' adjustment to the profits of the Australian borrower?	Determination cover all interactions between these provisions and other parts of the tax law.
10	It is unclear how the arm's length conditions in Example 2 of TD 2018/D6 were determined. A simpler approach would be to say that under arm's length conditions, the arrangement would be a normal interest-bearing loan.	Paragraph 4 of the Determination states that each example assumes certain arm's length conditions for the purposes of illustrating the effect of the transfer pricing rules on the debt equity rules. Accordingly, we do not consider it is necessary or within the scope of the product to expand on how the arm's length conditions were determined. Paragraph 14 of the final Determination is sufficiently close to what has been suggested such that we consider that change is not warranted.
11	It is unclear whether Subdivision 815-B could apply in Example 2 of TD 2018/D6 because the object of the Subdivision according to section 815-105 is to ensure that the amount brought to tax in Australia is *not less than* it would be under arm's length conditions, on the basis that interest withholding tax payable under the arm's length conditions would be offset by a deduction for the payer.	The entity that gets the transfer pricing benefit in Example 2 of the Determination is Foreign Company, the non-resident company. We consider that the amount to be 'brought to tax in Australia' for the purposes of subsection 815-105(1) is the amount Foreign Company receives that would otherwise be subject to interest withholding tax under the arm's length conditions Whether the payer is entitled to a consequential adjustment to its taxable income or tax loss of a particular sort is subject to the operation of section 815-145, which is beyond the scope of the Determination. Accordingly, we do not agree that Subdivision 815-B would not apply in that example. Were such a view adopted, it would mean that Subdivision 815-B never applies in relation to a transfer pricing benefit relating to interest withholding tax.
12	In Example 2 of TD 2018/D6, we query whether a consequential adjustment can be allowed at all under	The operation of section 815-145 does not extend to provide a consequential adjustment for withholding tax paid in respect of

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	section 815-145 for dividend withholding tax paid under the actual conditions, as dividend withholding tax is not included in the definition of 'transfer pricing benefit' in subsection 815-120(1). If not, Foreign Company may be liable for both dividend withholding tax and interest withholding tax, which is an unreasonable outcome.	dividends. Nevertheless, the Commissioner will consider if the dividend withholding tax can be refunded in these circumstances.
13	In the final Determination, Example 2 should include guidance on when the Commissioner will make a determination to allow a consequential adjustment under section 815-145, and what information the Commissioner would require in order to make such a determination.	We consider that detailed guidance on the operation of section 815-145 is outside the scope of the Determination.
14	In the final Determination, Example 2 should clarify whether, if there is a transfer pricing benefit, it would only be to the extent of the withholding tax payable under the relevant double taxation agreement.	Example 2 does not state that Foreign Company is a resident of a country with whom Australia has entered a tax treaty. As a result, in some instances, there may be no tax treaty that applies. However, in the final Determination, the word 'full' in the second sentence of paragraph 15 has been deleted.
15	In the final Determination, Example 2 should include guidance on any flexibility available to the Commissioner in relation to arrangements involving potential unpaid interest withholding tax for loss makers, as articulated in Taxation Rulings TR 1999/8 *Income tax: international transfer pricing: the effects of determinations made under Division 13 of Part III, including consequential adjustments under section 136AF* (now withdrawn) and TR 2007/1 *Income tax: international transfer pricing: the effects of determinations made under Division 13 of Part III of the Income Tax Assessment Act 1936, including*	We consider this guidance is outside the scope of the Determination. The Commissioner continually reviews the currency and relevance of rulings dealing with repealed legislation and whether replacement guidance is required in respect of new law.

Issue No.	Issue raised	ATO response / action taken
	consequential adjustments under section 136AF of that Act.	
16	In Example 3 of TD 2018/D6, the statement in paragraph 20 (that is, there is no transfer pricing benefit where the arm's length conditions would give rise to an equity interest) may not always be correct if, for example, a deduction is claimed for, *inter alia*, a loss on the full or part write-off of the loan when the subsidiary is wound up, foreign exchange losses in relation to the loan and amounts incurred in deriving the foreign source non-assessable non-exempt income under section 25-90.	The application of Subdivision 815-B to any particular taxpayer will depend on the relevant facts and circumstances in each case. Example 3 of the Determination is limited to the facts stated in the example. It cannot be relied upon if a taxpayer's facts and circumstances differ in any way from the example, including the presence of additional facts not mentioned in the example. The identification of arm's length conditions is already the subject of TR 2014/6.
17	In practice, the facts outlined in Example 3 of TD 2018/D6 are common amongst outbound mining exploration businesses, whereas an injection of equity would *never* be extended to an early phase mining exploration subsidiary under arm's length conditions. The example is unrealistic and should be deleted. External parties (taxpayers or their advisors) are likely to rely on Example 3 of TD 2018/D6 as supporting the view that any interest-free related party loan from an Australian company to a foreign subsidiary that carries on an early phase mining exploration business will be an equity interest if the arm's length conditions applied instead of the actual conditions under section 815-115. Such an approach would support the long-standing view adopted by external parties that Taxation Ruling TR 92/11 *Income tax: application of the Division 13 transfer pricing provisions to loan arrangements and*	The application of Subdivision 815-B and Division 974 to any particular taxpayer will depend on the relevant facts and circumstances in each case. Example 3 of the Determination merely demonstrates the possibility that an outbound interest-free related party loan may be an equity interest under the arm's length conditions. It is still the case that appropriate transfer pricing analysis needs to be performed in the particular case to determine what the arm's length conditions are. Paragraph 4 of the Determination states that each example assumes certain arm's length conditions for the purpose of illustrating the effect of Subdivision 815-B on Division 974. Accordingly, the examples do not delve into transfer pricing analysis specifics at all, for example, specifying the factors to be taken into consideration in determining arm's length conditions. Including the specifics involved with transfer pricing analysis for each example would detract significantly from the focus of the Determination.

Issue No.	Issue raised	ATO response / action taken
	credit balances treated an interest-free outbound loan as equivalent to a contribution of equity or 'quasi-equity' under the former transfer pricing rules in Division 13 of the *Income Tax Assessment Act 1936* (ITAA 1936).	
18	Example 3 of TD 2018/D6 suggests that the approach in Taxation Ruling TR 92/11 of recognising 'quasi-equity' in outbound arrangements under Division 13 of the ITAA 1936 is brought into Subdivision 815-B.	We consider that TR 92/11 only applies in respect of Division 13 of the ITAA 1936. The final Determination does not provide that TR 92/11 has application in relation to arrangements that are subject to Subdivision 815-B.
19	The arm's length conditions in Example 1 (debt interest) and Example 3 (equity interest) of TD 2018/D6 are difficult to reconcile given the economic features of the borrowers in each example seem similar. In particular, it is not clear why Example 1 relies on section 815-115 to substitute the arm's length conditions but Example 3 appears to rely on section 815-130 to get that outcome.	The identification of arm's length conditions is outside the scope of the Determination. However, any perceived similarity as to the economic features of the borrowers is not a determining factor in identifying arm's length conditions. Both Example 1 and Example 3 of the Determination rely on the application of sections 815-115 and 815-130. However, in the final Determination the reference to section 815-130 has been removed from Example 3.
20	The final Determination should clarify whether, if section 815-115 applies to substitute the arm's length conditions for the actual conditions, it applies for all taxation purposes. • If an instrument is reclassified, say, from debt to equity, would that reclassification apply for all purposes of the income tax law? Would it apply for franking, thin capitalisation and anti-hybrid purposes? • This means that Subdivision 815-B is capable of re-characterising an instrument from a debt interest into an equity interest and vice versa. The issue then arises as to whether this new characterisation	Section 815-115 applies to substitute the arm's length conditions for the actual conditions for the purposes outlined in subsection 815-115(2) – that is, to work out the relevant entity's taxable income, loss of a particular sort, tax offsets and withholding tax payable in respect of interest or royalties (depending on the particular transfer pricing benefit that arises under section 815-120). Subject to the limitation set out in subsection 815-110(2) in respect of Division 820, other parts of the income tax law used in working out the relevant entity's taxable income etc are to be applied to the arm's length conditions, rather than to the actual conditions. This is consistent with paragraphs 3.4 and 3.5 of the Explanatory Memorandum to Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (which introduced

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	due to the operation of Subdivision 815-B infiltrates the remaining parts of the income tax law where there is a reference to debt interest and equity interest.	Subdivision 815-B).
21	The final Determination should clarify the interactions with double taxation agreements if section 815-115 applies to substitute the arm's length conditions for the actual conditions. • If an 'adjustment/reconstruction' were needed under Subdivision 815-B before applying the debt/equity rules (for example, as a result of an Example 1 type reconstruction or in using Division 974 to clarify an instrument that had first been 'modified' by Subdivision 815-B) and that altered the amount of Division 974/Division 820 debt deductions how would that alteration interact for tax treaty purposes? That is, would appropriate adjustments be allowed under treaties (and under what article) to ensure double taxation did not occur? This is particularly important if there is no 'transfer pricing adjustment' but rather any adjustment is occurring as a result of domestic legislation only (for example, under Division 974 or Division 820). What process would taxpayers need to go through to ensure the correct economic outcome prevails?" • If Subdivision 815-B was intended to defeat and override the purpose and intent of Division 974 as legislated, taxpayers will be at risk of suffering double taxation with no treaty mechanism to get	The Determination focuses on providing guidance on the interaction of Subdivision 815-B with Division 974. It is not intended that the Determination deal with the interaction of these provisions with other parts of the tax law, including Australia's international tax agreements. Relevantly, the operation of Subdivision 815-B is subject to the *International Tax Agreements Act 1953*, which overrides the ITAA 1997 to the extent of any inconsistency.

Issue No.	Issue raised	ATO response / action taken
	relief through mutual agreement procedures (MAP) for the consequential adjustments. Specifically, if a transfer pricing adjustment results in the change in treatment of an instrument under Division 974 (for example, change in characterisation from equity to debt) this could result in debt deductions being disallowed under Australia's domestic provisions (without a change in the foreign jurisdiction), and with no recourse available for the relief of double taxation under MAP.	
22	The final Determination should provide guidance on the operation of section 815-140 (modification of Subdivision 815-B for the operation of the thin capitalisation rules in Division 820). The final Determination should state explicitly that section 815-140 limits the operation of section 815-115. In particular, how does section 815-140 work where a debt interest under actual conditions has been re-characterised as an equity interest under the arm's length conditions? For cases of inbound debt, it would appear to defeat the intention of section 815-140 and render this provision circular and redundant if the transfer pricing rules can operate to alter the characterisation of a debt interest from debt to equity, and in turn deny a deduction on a debt interest (subject to the thin capitalisation provisions applying). Specifically, a key objective of section 815-140 is to effectively respect the **quantum** … of debt actually issued by a taxpayer and apply an arm's length interest rate to the …**debt interest the entity**	The Determination focuses on providing guidance on the interaction of Subdivision 815-B with Division 974. It is not intended that the Determination deal with the interaction of these provisions with other parts of the tax law. In the final Determination, the reference to section 815-140 in the Legislative References list has been removed.

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	actually issued. This provision was specifically included to preserve interest deductions on debt interests that may have at arm's length been equity contributions (in whole or in part), and to only adjust the interest rate on these interests (that is, not impact the quantum). If the transfer pricing rules were to operate to first deem that the debt interest actually issued be equity instead of debt, then section 815-140 cannot operate effectively.	
23	Further guidance is necessary regarding the mechanical application of the interaction of Division 815 with other taxation laws.	The view is noted. The Determination focuses on providing guidance on the interaction of Subdivision 815-B with Division 974. It is not intended that the Determination deal with the interaction of Division 815 with other parts of the tax law.
24	The examples provided in TD 2018/D6 are too theoretical and are not typical of commercial arrangements by taxpayers. The final Determination should include additional examples addressing the following: • inbound financing where the financing instrument is a debt interest under the actual conditions, and • where all or part of the financing arrangement is an equity interest under the actual conditions.	The additional examples provided deal with aspects of Subdivision 815-B that are not within the scope of the Determination, particularly the operation of section 815-140.
25	TD 2018/D6 does not include an example involving at-call loans, which is expected to significantly impact a number of taxpayers and raises a number of related issues.	The examples in the Determination sufficiently demonstrate the interaction of Subdivision 815-B with Division 974, which is the sole purpose of the product.
26	The final Determination should clarify how the outcomes in the examples are reflected in the tax return of the affected taxpayer.	We consider this issue is outside the scope of the Determination.

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	In particular, whether the 'arm's-length condition[s] are taken to operate for income tax and withholding tax purposes' is a notional operation only for the purposes of calculating a transfer pricing benefit which is reflected in an amended assessment as a one-line adjustment or whether the separate components must be reflected.	
27	Typographical errors: • paragraph 6 of TD 2018/D6 – the reference to 'Australian Company' should be a reference to 'Foreign Company' • paragraph 8 of TD 2018/D6 – the first reference to 'Foreign Company' should be a reference to 'Australian Company' • paragraph 15 of TD 2018/D6 – the reference to 'Australian Company' should be a reference to 'Foreign Company' on the basis that the relevant 'entity' referred to in subparagraph 815-120(1)(c)(iv) is the entity with whom the withholding tax liability arises – being the recipient of the interest had the arm's length conditions operated (that is, Foreign Company in Example 2).	The typographical errors have been rectified in the final Determination.
28	Typographical error in footnote 19 of TD 2018/D6 – pinpoint references for cases (except for CLR reference) are paragraph numbers, not page numbers.	The typographical errors have been rectified in footnote 17 of the final Determination.