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Page status: **not legally binding**

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## **Public advice and guidance compendium – TD 2019/12**

This is a compendium of responses to the issues raised by external parties to draft Taxation Determination TD 2018/D5 *Income tax: what type of costs are debt deductions within the scope of subparagraph 820-40(1)(a)(iii) 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**

<b>Issue No.</b>	<b>Issue raised</b>	<b>ATO response / action taken</b>
1	Including amounts indirectly incurred, such as tax advisory fees, is not correct.	The ATO considers that certain tax advisory costs can be directly incurred. Appendix 1 of the final Determination explains this further.
2	Explain why tax advisory costs are directly incurred and how they are distinguished from foreign currency /hedging losses in relation to a debt interest.	Foreign currency/hedging losses are indirect costs as the losses related to commercial risk mitigation strategies and are not directly related to the obtaining or maintaining of the financial benefits under the debt capital – the direct relationship is with the hedging instrument.
3	If the ATO expansive view of subparagraph 820-40(1)(a)(iii) were correct, it could render provisions such as subsection 820-946(2) redundant.	The ATO disagrees that the view in the Determination will render provisions such as subsection 820-946(2) redundant, because cost-free debt capital is debt capital that does not give rise to any debt deductions at any time.
4	Clarification is needed that normal interest-free financing (quasi-equity) arrangements, which do not raise integrity concerns, will continue to be excluded from the calculation of adjusted average debt.	For the purposes of Division 820, any debt capital that give rise to any debt deductions (including debt deductions that meet the requirements of subparagraph 820-40(1)(a)(iii)) at any time are not considered to be quasi-equity, and are included in the calculation of an entity's adjusted average debt.
5	The ATO should provide more detailed explanation on why costs incurred for pre- and post-loan tax advice position are or are not debt deductions.	Appendix 1 of the final Determination explains this further.
6	There is concern about the retrospective application of TD 2018/D5.	The final Determination does not change the ATO's application of subparagraph 820-40(1)(a)(iii).

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7	The better view is that unless tax advice was directly linked to the loan (a requirement to obtain tax advice is embedded in the loan documentation) they should not be treated as debt deductions for thin capitalisation.	The ATO does not agree. Our view is consistent with paragraph 1.58 of the Explanatory Memorandum to the New Business Tax System (Thin Capitalisation) Bill 2001, which highlights that a 'cost of debt capital may not be explicit in an arrangement'.