



Public advice and guidance compendium – TD 2022/6

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2021/D4 *Income tax: aggregated turnover – application of the public entity exception to the indirect control test*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
All legislative references in this Compendium are to the <i>Income Tax Assessment Act 1997</i> .		
1	In Example 2 of the draft Determination, whether US Sub Co 2 is an affiliate of US Listed Parent Co, within the meaning of section 328-130 of the <i>Income Tax Assessment Act 1997</i> should be addressed rather than carved out from the example.	<p>We acknowledge that the concept of 'affiliate' is a complex issue that can be challenging to apply in practice. It is also a concept used in a number of different contexts throughout the tax law.</p> <p>We are of the view that it is not appropriate to address the issue of whether or not an affiliate relationship exists within Example 2 of the final Determination, which is a Determination specifically concerning the application of the public entity exception to the indirect control test for aggregated turnover purposes.</p> <p>The key purpose of Example 2 of the Determination is to illustrate at what layer of entity the public entity exception to the indirect control test applies regarding multiple subsidiary structures since we are aware of competing interpretations on this issue.</p> <p>We are currently considering whether there is a need for ATO guidance concerning the affiliate concept and what separate guidance can be provided.</p>

Issue number	Issue raised	ATO response
2	The ATO should consider developing guidance on the application of the Commissioner’s discretion in subsection 328-125(6), which concerns a determination that one entity does not control another if the control percentage is at least 40% and less than 50%.	The circumstances in which the Commissioner will exercise the discretion pursuant to subsection 328-125(6) involves a number of interpretive and practical considerations which are beyond the scope of this Determination. The ATO is considering what separate guidance can be provided to address these issues.