



Public advice and guidance compendium – TD 2022/7

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2021/D2 *Income tax: aggregated turnover – application of the ‘connected with’ concept to partnerships, foreign hybrids and non-entity joint ventures*. 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	How the ‘connected with’ concept applies in the context of tax law partnerships – the issue is whether individuals or entities who jointly own an income-producing asset (for example, a rental property), and who are treated as partners in a tax law partnership, are considered to own an interest in the partnership for the purposes of paragraph 328-125(2)(a).	Notwithstanding that a tax law partnership is recognised for tax purposes only, by virtue of being a partner of a ‘partnership’ within the meaning of subsection 995-1(1), a partner is taken to own interests in the tax law partnership for the purposes of paragraph 328-125(2)(a) in accordance with their individual interests in the joint income received by the partnership.
2	The final Determination would benefit from Example 1 in it confirming that any dividends paid to the Partnership by XYZ and any partnership distributions paid to AB and CD from the Partnership can be excluded in the aggregated turnover calculations of XYZ pursuant to paragraphs 328-115(3)(a) and (b).	An entity’s (the ‘reporting entity’s’) aggregated turnover for an income year is the sum of its annual turnover, together with the annual turnover of each of its relevant entities (the ‘relevant annual turnovers’), excluding any amounts covered by subsection 328-115(3). Therefore, to the extent that the relevant annual turnovers include amounts derived from dealings between the reporting entity and its relevant entities or from dealings between the relevant entities themselves, paragraphs 328-115(3)(a) and (b) operate to exclude those amounts from the reporting entity’s aggregated turnover. Examples 1 and 2 in the final Determination have been updated to demonstrate this point in the context of the examples.

Issue number	Issue raised	ATO response
3	<p>The final Determination should cover how the 'direct control' tests in subsection 328-125(2) apply in relation to:</p> <ul style="list-style-type: none"> • partnerships with fixed distribution entitlements, where taxpayers may receive a different percentage of the distributions made each year, depending on the profits of the partnership, and • waterfall profit-sharing entitlements, where there is a hierarchical order in which the shareholders or partners are entitled to profits, resulting in entities receiving varying distributions each year. 	<p>We acknowledge that the application of the direct control tests in subsection 328-125(2) can involve practical difficulties in the context of determining direct control of partnerships with fixed distribution entitlements, as well as arrangements involving waterfall profit-sharing entitlements.</p> <p>However, the application of the direct control tests in subsection 328-125(2) in these contexts needs to be considered in light of the specific facts and circumstances associated with such arrangements. Taxpayers encountering this issue are encouraged to approach the Commissioner for advice on their specific circumstances.</p>
4	<p>The application of the 'connected with' concept in section 328-125 to discretionary trusts and unit trusts with non-fixed elements should be covered in the final Determination or another ATO product.</p>	<p>The application of the 'connected with' concept in section 328-125 to discretionary trusts and unit trusts with non-fixed elements is outside the scope of this Determination, which focuses on the application of the direct control tests in subsection 328-125(2) in the specific context of partnerships, foreign hybrids and non-entity joint ventures.</p> <p>We encourage taxpayers encountering issues in relation to the application of the 'connected with' concept in this context to approach the Commissioner for advice on their specific circumstances.</p>
5	<p>The ATO should consider developing guidance on the application of the Commissioner's discretion in subsection 328-125(6) to make a determination that one entity does not control another if the control percentage is at least 40% and less than 50%.</p>	<p>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.</p> <p>The ATO is considering what separate guidance can be provided to address these issues.</p>