TD 2009/2EC - Compendium

Ruling Compendium – TD 2009/2

This is a compendium of responses to the issues raised by external parties to draft TD 2008/D13 – Income tax: when is 'foreign income tax… imposed… on the partners, not the partnership' under paragraph 830-10(1)(b) of the *Income Tax Assessment Act 1997* for the purpose of determining whether a foreign limited partnership is a foreign hybrid limited partnership under Division 830 of that Act?

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

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1	The policy intent of the foreign hybrid rules was to provide partnership treatment to foreign entities where the entity is not taxed in respect of its income in the foreign country. As such, the provision should be interpreted so that an entity is a foreign hybrid where: • the country of formation does not impose tax on the entity or its members/partners; or alternatively • the country of formation does not impose tax on the partners where the entity is exempt from tax, but could impose tax were the circumstances different.	The Tax Office has not reflected this interpretative approach in the ruling for the following reasons: • the wording of the provision requires both the non-imposition of tax on the entity, and the imposition of tax on the partners/members • the Explanatory Memorandum to Taxation Laws Amendment Bill (No. 7) 2003 (EM) specifically notes the requirement that tax is imposed on the partners (at paragraphs 9.2 and 9.25 of the EM.
2	Failing to include LPs established in tax havens will result in higher compliance costs for Australian investors indirectly investing in FIFs via tax haven limited partnerships (compared to Australian investors investing in the FIF directly) since FIF exemptions potentially may not be able to be accessed in respect of FIF interests held by the limited partnership.	While the policy intent of the foreign hybrid rules was to reduce compliance costs and address some difficulties with the application of the FIF provisions to certain foreign flow-through vehicles, this intent can only be reasonably interpreted as applying to those entities that do fall within the 'foreign hybrid' definition.

Issue No.	Issue raised	Tax Office Response/Action taken
3	There is an inconsistency between the interpretative approach taken in Example 1A and Example 5.	The Tax Office does not agree that the approach taken in the two examples is inconsistent. Example 1A illustrates a case where a country applies tax to the members of a particular type of entity, but because of the residency of the members and the foreign source of the income earned, there is no tax liability. Example 5 illustrates a case where a country does not apply tax to a particular type of entity or its members. If the entity acts in a certain way, it may change status to be treated as a different type of entity for tax law purposes, and therefore has a different tax treatment. It is not accepted that the concept of 'tax being imposed' can extend to situations where the partners are not taxed but, were the entity to act in such a way that it lost its 'exempt' status, the partners would be taxed, as this is an inherent change in the status of the entity itself. That is, the 'hypothetical' facts used in determining whether tax is imposed on the partners and not on the entity can include changes to the character of the partners (for example from non-resident to resident) and the income (for example from foreign source to domestically sourced), but not to changes in the tax status of the entity itself. Clarifying changes have been made to Example 5 to illustrate this distinction.