TR 2014/D4 - Income tax: transfer pricing: documentation requirements

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Draft Taxation Ruling

Income tax: transfer pricing: documentation requirements

Contents Para

PROPOSED LEGALLY BINDING SECTION:

What this Ruling is about **1**

Ruling **23**

Date of effect **57**

NOT LEGALLY BINDING SECTION:

Appendix 1:

Explanation **59**

Appendix 2:

Your comments **135**

Appendix 3:

Detailed contents list **137**

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This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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What this Ruling is about

1. This draft Ruling is published as part of a package of products dealing with transfer pricing documentation and should be read in conjunction with:

- PS LA 3672 that provides guidance in respect of the administration of transfer pricing penalties; and
- PS LA 3673 that provides guidance for a process for documenting transfer pricing.

2. This draft Ruling sets out the Commissioner's views on the transfer pricing documentation an entity should prepare and keep as required by section 284-255 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). Where an entity does not meet these requirements, Division 284 of Schedule 1 to the TAA 1953 (dealing with administrative penalties) will apply as though a matter were not reasonably arguable.

3. This draft Ruling articulates the Commissioner's views on the interpretation of specific phrases in several paragraphs of section 284-255 of Schedule 1 to the TAA 1953. These are:

(a) 'prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter (or matters)' (paragraph 284-255(1)(a))

(b) 'explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c))

(c) 'explain why the application of the Subdivision to the matter (or matters) in that way best achieves the consistency mentioned in sections 815-135 or 815-235' of the *Income Tax Assessment Act 1997* (ITAA 1997) (the relevant guidance material) (paragraph 284-255(1)(d))

(d) 'explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-130 of the ITAA 1997

(e) 'explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-140 of the ITAA 1997, and

(f) 'readily ascertained' (subsection 284-255(2)).

4. This draft Ruling explains the need for transfer pricing records to address matters that might give rise to a transfer pricing benefit.

5. This draft Ruling explains the interaction between section 262A of the *Income Tax Assessment Act 1936* (ITAA 1936) (which deals with the general record keeping requirements) and Subdivision 284-E of Schedule 1 to the TAA 1953.

6. This draft Ruling clarifies the documentation requirements for trusts and partnerships under Subdivision 815-D of the ITAA 1997.

7. This draft Ruling applies to dealings where the actual conditions that operate satisfy the cross-border test under subsection 815-120(3) of the ITAA 1997 (referred to in this draft Ruling as 'relevant dealings'). The cross-border test will generally be met where the actual conditions are not purely on a domestic basis. The relevant dealings may apply to entities and entities that operate at or through permanent establishments (PEs).

8. Except where otherwise specified, all legislative references in this draft Ruling are to section 284-255 of Schedule 1 to the TAA 1953.

Background

9. As part of the modernisation of Australia's transfer pricing rules, the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* introduced Subdivisions 815-B, 815-C and 815-D of the ITAA 1997 and Subdivision 284-E of Schedule 1 to the TAA 1953 (collectively referred to in this draft Ruling as 'the transfer pricing rules').

10. The transfer pricing rules replace the former provisions of Division 13 of the ITAA 1936 and Subdivision 815-A of the ITAA 1997 for income years commencing on or after 29 June 2013. Australia's bilateral tax treaties continue to apply.

11. The broad aim of the transfer pricing rules is to ensure that the amount brought to tax in Australia from relevant dealings is determined through the arm's length principle. The definition of the arm's length principle may be summarised as follows:[1]

> [Where] conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

12. Sections 815-135 and 815-235 of the ITAA 1997 require the application of Subdivisions 815-B and 815-C of the ITAA 1997 in a way that best achieves consistency with the OECD Guidance material, which is currently:

- the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, 22 July 2010 (OECD Guidelines), and
- the Model Tax Convention on Income and on Capital and its Commentaries, as adopted by the Council of the OECD and last amended on 22 July 2010 (OECD Commentary).[2]

13. It is important to note that the transfer pricing rules also allow for regulations to prescribe documents under the list of guidance material that would need to be taken into account where applicable.

14. The former transfer pricing rules under Division 13 of the ITAA 1936 and Subdivision 815-A of the ITAA 1997 required the Commissioner to make determinations. By contrast, Subdivisions 815-B and 815-C of the ITAA 1997 are self-executing in their operation.[3] This better aligns Australia's transfer pricing rules with the design of Australia's domestic tax system which generally operates on a self-assessment basis.

15. Generally, the statutory requirements for a person carrying on a business is to keep records that explain all transactions and other acts as set out in section 262A of the ITAA 1936 for any purpose of this Act,[4] which includes transfer pricing.

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[1] "Arm's length principle" as defined in the *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD, 22 July 2010, Glossary on page 23.

[2] Subdivision 815-B is intended to apply in non-treaty cases as well as treaty cases. In non-treaty cases normal source and residency rules apply.

[3] The Commissioner may still make determinations for consequential adjustments under section 815-145 the ITAA 1997.

[4] "This Act" is defined under subsection 6(1) of the ITAA 1936 to include the ITAA 1997, Schedule 1 to the TAA 1953 and Part IVC of the TAA 1953.

16. The transfer pricing documentation requirements in subsection 284-255(1) further specifies that the records kept by an entity will meet the requirements for applying or not applying Subdivisions 815-B or 815-C so as to enable that entity to take a reasonably arguable position for the purposes of the penalty provisions[5] if they:

(a) are prepared before the time the entity lodges its income tax return for the income year relevant to the matter (or matters), and

(b) are in English, or readily accessible and convertible into English, and

(c) explain the particular way in which Subdivision 815-B or 815-C applies (or does not apply) to the matter (or matters), and

(d) explain why the application of Subdivision 815-B or 815-C to the matter (or matters) in that particular way best achieves the consistency with the relevant guidance material.

17. Further, subsection 284-255(2) specifies that the records must allow each of the following to be readily ascertained:

(a) the arm's length conditions relevant to the matter (or matters),

(b) the particulars of the method used and comparable circumstances relevant to identifying those arm's length conditions,

(c) where records explain the application (as opposed to the non-application) of Subdivision 815-B or 815-C, the records must also explain the result that the application in that particular way has as compared to the non-application, and

(d) for Subdivision 815-B – the actual conditions relevant to the matter (or matters),

(e) for Subdivision 815-C – the actual profits and the arm's length profits as well as the particulars of the activities and circumstances to the extent they are relevant to the matter (or matters).

18. Section 284-250 provides that Division 284[6] has effect as if the entity's position on Subdivisions 815B and 815-C of the ITAA 1997 was not reasonably arguable in the context of working out a base penalty amount.[7]

[5] Refer to section 284-50.
[6] Administrative penalties for statements, unarguable positions and schemes.
[7] Section 284-160. Guidelines for the application of transfer pricing administrative penalties are set out in PS LA 3672.

19. While the transfer pricing documentation requirements do not mandate the preparation or keeping of documentation,[8] it is a requirement under section 262A of the ITAA 1936 that every taxpayer carrying on a business must keep records that record and explain all transactions and other acts engaged in by the taxpayer that are relevant for tax purposes, which necessarily includes transactions and other acts relevant to the self-assessment regime established by the transfer pricing rules.

20. Keeping records in accordance with the documentation requirements in section 284-255 will satisfy an entity's record keeping obligations under section 262A of the ITAA 1936 and may reduce the risk of a transfer pricing audit.

21. Keeping records in accordance with the documentation requirements in section 284-255 is also likely to streamline risk assessment, audit activity and assist in minimising additional compliance costs. In the event that the Commissioner makes a transfer pricing adjustment by amending an assessment, or issuing a notice for additional withholding tax, such contemporaneous records could assist an entity particularly should amounts be disputed and there is an exposure to possible penalty.

22. In addition to the Commissioner's views set out in this draft Ruling, PS LA 3673 gives practical guidance by stepping through a process for documenting transfer pricing.

Ruling

'Prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter (or matters)' (paragraph 284-255(1)(a))

23. For an entity to avoid the removal of its ability to reasonably argue the position it took in applying or not applying the transfer pricing rules the relevant records kept by an entity need to be 'prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter (or matters)'.

24. For an entity to meet to meet its self-assessment transfer pricing rules regime obligations it is the Commissioner's view is that the records need to exist and be kept by the relevant entity. This includes records in the entity's possession or ready and available to it before the income tax return is lodged for the income year relevant to the matter (or matters).

25. Preparing and keeping records in this way is referred to in this draft Ruling as 'contemporaneous documentation'.

[8] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 2.34.

26. Records not kept by the entity applying Subdivision 815-B or 815-C of the ITAA 1997 or records prepared after the income tax return for the income year has been lodged cannot be taken into account in determining whether the documentation requirements have been met.

'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c))

27. The Commissioner considers that, to explain the particular way Subdivisions 815-B or 815-C of the ITAA 1997 applies (or does not apply) to the matter (or matters), the records should demonstrate that the cross border conditions that operate between the entity and other entities in connection with commercial or financial relations, and the entity and its PE in the case of attribution of profits, are consistent with the arm's length principle, and that the entity did not obtain a transfer pricing benefit.[9]

28. To establish that these conditions (as reflected in their overall Australian tax position) accords with the arm's length principle, an entity needs to document the process they undertook to identify the arm's length conditions. This should include documentation of the steps undertaken in selecting the most appropriate and reliable method or combination of methods, and the way in which the entity evaluated the degree of comparability having regard to all relevant factors inclusive of those listed at subsection 815-125(3). The entity would also need to demonstrate that there were no material differences between actual and comparable circumstances or that accurate and reliable adjustments were made to neutralise any differences.

29. To satisfy Subdivision 815-B, the records must identify and explain the arm's length conditions, being conditions that might be expected to operate between independent entities dealing wholly independently with one another in comparable circumstances.

30. To satisfy Subdivision 815-C, the records must identify and explain the process used to determine the arm's length profits the PE might be expected to make if the PE were a distinct and separate entity engaged in the activities being undertaken by the PE in the circumstances faced by the PE and operating under arm's length conditions.[10] These are worked out by allocating the actual expenditure and income of an entity between itself and its PE so that the profits attributed to the PE equal the profits the PE might be expected to make if the PE were a distinct and separate entity operating under arm's length conditions. It is the Commissioner's view that this process requires an identification of reliable comparables inclusive of an analysis of the PE's functions, assets and risks borne.

[9] Sections 815-120 and 815-220 of the ITAA 1997.
[10] Subsection 815-255(1) of the ITAA 1997.

'Explain why the application of the Subdivision to the matter (or matters) in that way best achieves the consistency mentioned in sections 815-135 or 815-235' of the ITAA 1997 (the relevant guidance material) (paragraph 284-255(1)(d))

31. The requirements to explain why the application of the transfer pricing rules to the matter (or matters) in a way that best achieves consistency with the relevant guidance material listed in sections 815-135 or 815-235 of the ITAA 1997 ensures a consistency of approach.

32. The test requires an objective examination of all the relevant steps in the identification of arm's length conditions and arm's length profits for the purposes of the transfer pricing rules. The scope of the test will include in the Commissioner's view whether the most appropriate and reliable method or methods are used and whether the comparable circumstances identified are relevant to the matter (or matters).

33. Section 815-135 of the ITAA 1997 states, for the purpose of determining the effect of Subdivision 815-B of the ITAA 1997 in relation to an entity, that the arm's length conditions must be identified in the way that best achieves consistency with the relevant guidance material.

34. Similarly, section 815-235 of the ITAA 1997 states, for the purpose of determining the effect of Subdivision 815-C of the ITAA 1997 in relation to an entity, that the arm's length profits must be worked out, and the arm's length conditions identified, in the way that best achieves consistency with the relevant guidance material.

35. The Commissioner considers that paragraph 284-255(1)(d) requires an entity to identify and record or reference relevant parts of the guidance material in their transfer pricing documentation. The documentation should also explain how the relevant guidance material has been taken into account by the entity in applying the Subdivision. That is, the documentation must explain the way the entity applied the Subdivision and how and why the approach adopted best achieves consistency with the relevant guidance material. Any departure from the relevant guidance material should be documented, explained and justified.

'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-130 of the ITAA 1997

36. The application of section 815-130 of the ITAA 1997 is discussed in Taxation Ruling TR 2014/D3.

37. The basic rule in subsection 815-130(1) of the ITAA 1997 requires that the identification of the arm's length conditions be based on the commercial or financial relations in connection with which the actual conditions operate.

38. As the transfer pricing rules operate on a self-assessment basis, an entity needs to prepare and maintain documentation to demonstrate that they addressed the steps involved in applying section 815-130 and identified arm's length conditions on the basis required by the section. The records will need to evidence whether the basic rule and the three exceptions apply or do not apply.

39. Subsection 284-255(2) requires that records kept by an entity, to support a reasonably arguable position, must (amongst other things) allow the arm's length conditions relevant to the matter to be readily ascertained.

'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-140 of the ITAA 1997

40. Section 815-140 of the ITAA 1997 may operate to modify the way an entity works out its taxable income or its loss of a particular sort for an income year.

41. Subsection 815-140(1) will apply if:

(a) Division 820 (about thin capitalisation) applies to the entity for the income year; and

(b) the arm's length conditions affect costs that are debt deductions of the entity for the income year.

42. If working out the costs in accordance with the arm's length conditions involves applying a rate to a debt interest, an entity is required under subsection 815-140(2) of the ITAA 1997 to:

(a) work out the rate as if the arm's length conditions had operated; but

(b) apply the rate to the debt interest the entity actually issued.

43. In working out the rate in paragraph 815-140(2) of the ITAA 1997 an entity will be required to identify the relevant arm's length condition as set out in section 815-130 of the ITAA 1997.

44. As the transfer pricing rules operate on a self-assessment basis, if the modifications set out under section 815-140 of the ITAA 1997 apply, entities need to prepare and maintain documentation to demonstrate that they have appropriately applied section 815-140.

'Readily ascertained' (subsection 284-255(2))

45. For the information set out in subsection 284-255(2) to be 'readily ascertained', the Commissioner considers that an entity must keep records that objectively enable the information specified in the subsection 284-255(2) to be quickly and easily understood.

46. Under subsection 284-255(2), the Commissioner considers that an entity must keep records that contain all the necessary factual information pertaining to each item listed. The records must allow the arm's length conditions relevant to the matter (or matters), particulars about the method used, the comparable circumstances relevant to identifying the arm's length conditions and the actual conditions or profits relevant to the matter (or matters) to be tested and evaluated with due regard to the relative complexity of the case and in accordance to the law. Entities should document explanations of the process undertaken in identifying the most appropriate and reliable method or combination of methods and the comparable circumstances used in that process.

47. In identifying the arm's length conditions under Subdivision 815-B of the ITAA 1997, an entity must use the method or methods that produces the most appropriate and reliable assessment of the conditions.[11] One of the factors in selecting and applying a method is the degree of comparability between the actual circumstances and any circumstances being compared.[12]

48. The identification of arm's length conditions involves hypothesising, on the basis of reliable evidence, what independent entities would have done in comparable circumstances to the entities. Therefore, any or all alternative conditions, hypothesised as potentially operating between entities and relied upon or otherwise reliably ruled out, should be documented. This will necessarily include the identification and selection of the most appropriate and reliable condition as the arm's length condition.[13]

The need for transfer pricing records to address matters that might give rise to a transfer pricing benefit

49. Sections 815-120 and 815-220 of the ITAA 1997 define the circumstances in which an entity obtains a transfer pricing benefit. Broadly, those benefits arise through an understatement of taxable income, the overstatement of a tax loss, over claiming of tax offsets or (in the case of cross border dealings between separate legal entities) the underpayment of interest or royalty withholding tax. The purpose of Subdivisions 815-B and 815-C of the ITAA 1997 is to prevent the obtaining of such benefits by ensuring that the amount subject to tax in Australia is calculated by reference to arm's length conditions.

[11] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 3.107.
[12] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 3.121.
[13] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraphs 3.72, 3.85 and 3.86.

50. An entity is required to work out its taxable income, loss of a particular sort, tax offsets or withholding tax payable on the basis that the arm's length conditions operated. In addition, for a PE of an entity, under this approach the allocation of profits to the PE will be constrained to the allocation of actual income and expenses of the entity.[14]

51. Since each of the transfer pricing benefits relates to a calculation of an amount that is subject to income tax or withholding tax, or a calculation that demonstrates that no transfer pricing benefit has been obtained, an entity's records should contain all the necessary information relevant to the operation of the arm's length conditions in relation to those calculations. The determination of an entity's tax position must therefore include all questions (for example the identification of specific amounts of income and expenditure) that would ordinarily be considered in calculating any elements of the entity's tax position.[15]

The interaction between section 262A of the ITAA 1936 (which deals with the general record keeping requirements) and Subdivision 284-E of Schedule 1 to the TAA 1953

52. Section 262A of the ITAA 1936 sets out the statutory requirements for a person carrying on a business to keep records that explain transactions and other acts for any purpose of this Act,[16] which include transactions and other acts concerning transfer pricing.

53. Under the transfer pricing rules, an entity is required to address the provisions of Subdivisions 815-B and 815-C of the ITAA 1997 as applying, or not applying, to a matter in a particular way. Subdivision 284-E of Schedule 1 to the TAA 1953 sets out the records to be prepared and maintained to demonstrate that the entity has correctly applied Subdivisions 815-B or 815-C of the ITAA 1997. These documentation requirements under the transfer pricing rules are focused specifically on how to best evidence consistency with the arm's length principle. Should a transfer pricing adjustment take place, adherence to the transfer pricing documentation requirements will provide an entity with the opportunity to argue that a reasonably arguable position was adopted in complying with Subdivisions 815-B and 815-C of the ITAA 1997.

[14] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 2.12.
[15] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 3.17.
[16] "This Act" is defined under subsection 6(1) of the ITAA 1936 to include the ITAA 1997, Schedule 1 to the TAA 1953 and Part IVC of the TAA 1953.

54. Section 262A mandates the keeping of transfer pricing records and imposes an administrative penalty for failing to meet this obligation. Subdivision 284-E sets out the documentation required to be created contemporaneously and maintained by an entity to manage its risk exposure and provides an opportunity for an entity to support its position in applying Subdivisions 815-B or 815-C of the ITAA 1997 in the event of a transfer pricing adjustment.

55. If an entity has records that meet the requirements of Subdivision 284-E it will have met its section 262A obligations, though the reverse may not necessarily apply. The practical difference plays out through the different consequences for failing to comply with either provision.

Documentation requirements for trusts and partnerships under Subdivision 815-D of the ITAA 1997

56. Subdivision 284-E of Schedule 1 to the TAA 1953 sets out the record requirements for the application of Subdivisions 815-B and 815-C of the ITAA 1997 as they relate to entities and entities that operate at or through PEs. The special rules under Subdivision 815-D of the ITAA 1997 ensure that Subdivisions 815-B and 815-C apply appropriately to trusts and partnerships as well as trusts and partnerships operating at or through PEs.

Date of effect

57. When the final Ruling is issued, it is proposed to apply to income years commencing on or after 29 June 2013 in relation to income tax. In relation to withholding tax, the final Ruling is proposed to apply to income derived, or taken to have derived, in income years commencing on or after 29 June 2013. This is consistent with the application of the new transfer pricing rules.

58. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

16 April 2014

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

Overview: documentation for transfer pricing

59. In the context of Subdivision 815-B of the ITAA 1997, transfer pricing that is consistent with the arm's length principle is achieved if the actual conditions that operate between entities in their commercial or financial relations are the conditions that might be expected to operate between independent entities dealing wholly independently with one another in comparable circumstances.

60. In the context of Subdivision 815-C of the ITAA 1997, transfer pricing that is consistent with the arm's length principle is achieved where the arm's length profits have been attributed to a PE of an entity.

61. The Commissioner considers that an entity should prepare and maintain documentation in respect of those conditions that are both material and relevant. A condition is relevant if it relates to the application or non-application of the transfer pricing rules (arm's length principle). A condition is material if it affects the entity's Australian tax position.

62. In determining whether the conditions are material and relevant, it is expected that an entity will undertake a risk assessment of its relevant dealings and prepare and maintain transfer pricing documentation that best evidences those matters which could be the subject of dispute with the Commissioner.[17]

63. In considering the level of documentation to be prepared and maintained, it is useful to refer to the OECD Guidelines, which state:

> 5.4 The taxpayer's process of considering whether transfer pricing is appropriate for tax purposes should be determined in accordance with the same prudent business management principles that would govern the process of evaluating a business decision of a similar level of complexity and importance. It would be expected that the application of these principles will require the taxpayer to prepare or refer to written materials that could serve as documentation of the efforts undertaken to comply with the arm's length principle, including the information on which the transfer pricing was based, the factors taken into account, and the method selected.

[17] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 6.26.

64. Entities need to prepare and maintain documentation evidencing conditions consistent with arm's length conditions thereby demonstrating that the transfer pricing satisfies the arm's length principle and properly establishes the entity's Australian tax position. In so doing entities will minimise the likelihood of a transfer pricing adjustment by the Commissioner. Entities would not be expected to prepare and maintain documentation that goes beyond these requirements.

65. All entities with relevant dealings are subject to the documentation requirements under the transfer pricing rules. These require entities to prepare and maintain records that identify and evidence the arm's length conditions.

66. Entities need to explain all of the steps undertaken in the process for establishing the arm's length conditions including that the most appropriate and reliable method was selected and that the comparable circumstances are relevant in identifying the arm's length conditions.[18] However, as the OECD Guidelines point out, the extent of this documentation should be proportional to, and in accordance with, the same prudent business management principles that would govern the process of evaluating a business decision of a similar level of complexity and importance of the particular entity.

67. Entities with relatively low levels of relevant dealings are not expected to prepare and maintain documentation beyond the minimum necessary to arrive at the arm's length conditions in the context of their business. Therefore, entities will need to exercise good commercial judgement in determining the level of documentation required.

68. Entities with relatively low levels of relevant dealings are required to consider the conditions relevant to the application or non-application of the transfer pricing rules, and whether there is a material effect on the entity's Australian tax position. Entities should undertake a risk assessment to assess the appropriate level of documentation for their transfer pricing exposure.

'Prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter (or matters)' (paragraph 284-255(1)(a))

69. The transfer pricing documentation requirements specify that the records kept by an entity for the application of Subdivision 815-B or 815-C of the ITAA 1997 need to be 'prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter (or matters)'.

[18] Guidelines for the steps in the process for documenting transfer pricing are set out in PS LA 3673.

70. The entity applying Subdivision 815-B or 815-C of the ITAA 1997 is the entity required to keep the relevant records, which will include the records 'prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter (or matters)'. The records both prepared and kept are collectively referred to in this draft Ruling as 'contemporaneous documentation'.

71. Records are considered to be kept by an entity where the records are in the possession of the entity or otherwise ready and available to it. That is, the entity will need to have full and free access to the records, which may be in paper or electronic form.[19]

72. Paragraph 284-255(1)(a) requires that records are prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter. This permits records to be prepared beyond the end of the income year, up to the point when the relevant income tax return is lodged.

73. The term 'prepared' is not defined in the ITAA 1936, the ITAA 1997, or the TAA 1953. The *Shorter Oxford English Dictionary,*[20] relevantly defines 'prepare' to mean:

> 5. *verb trans*. Produce….

In turn, the *Shorter Oxford English Dictionary* defines the term 'produce' to mean:

> 3. verb trans. & intrans. **a** Bring (a thing) into existence.

74. The Commissioner considers that records are 'prepared' in the context of the paragraph 284-255(1)(a) when the records are brought into existence. It is therefore expected that this information should form part of the contemporaneous documentation that is brought into existence before the income tax return is lodged.

75. It is the Commissioner's view that the entity applying Subdivision 815-B or 815-C of the ITAA 1997 will need to have the records in its possession or ready and available to it in order to properly apply the relevant Subdivision before the income tax return is lodged for the income year relevant to the matter (or matters).

76. Records not in the keeping of the entity applying Subdivision 815-B or 815-C of the ITAA 1997 or prepared after the income tax return for the income year has been lodged cannot be taken into account in determining whether the documentation requirements have been met. Failing to meet the documentation requirements will result in an entity not being able to demonstrate that it has a reasonably arguable position in the event of a transfer pricing adjustment.

[19] Taxation Ruling TR 2005/9 provides the Commissioner's views on record keeping requirements for electronic records in the context of section 262A of the ITAA 1936.
[20] The *Shorter Oxford English Dictionary* Oxford University Press, Sixth Edition 2007.

Example – Records prepared and kept

77. US Co is a US resident company for tax purposes that operates a global multinational enterprise producing merchandise and selling the merchandise around the world.

78. Aus Co is an Australian resident company for tax purposes and a subsidiary of US Co. Aus Co purchases merchandise from US Co and on sells the merchandise to unrelated Australian buyers.

79. Aus Co and US Co operate under a standardised global contract that includes terms for the cost of the merchandise. Aus Co maintains source documentation comprising the global contract and transactional data prepared by US Co at the time of the transaction. This information is held partly in paper form by Aus Co in Australia and partly in electronic form on a global shared drive. Aus Co has full and free access to the global shared drive. Aus Co did not have any other records that evidenced the application of Subdivision 815-B, such as the methods used or the comparable circumstances, as Aus Co relied on assurances from US Co that the costs were arm's length in accordance with the OECD Guidelines.

80. Aus Co lodges its income tax return on the basis that there is no transfer pricing benefit as the arm's length conditions and the actual conditions are the same. Aus Co then receives notification that a transfer pricing audit is to be conducted by the ATO. Aus Co subsequently obtains access to information from US Co that was brought into existence by US Co prior to Aus Co lodging its income tax return detailing the method used and a functional analysis that was not available on the global shared drive. Aus Co also subsequently submits a transfer pricing report produced by their tax agent after Aus Co has lodged its income tax return that supports the position that arm's length conditions equate to the actual conditions.

81. The Commissioner conducts an audit and establishes that Aus Co got a transfer pricing benefit as, had the arm's length conditions operated instead of the actual conditions, Aus Co's taxable income would have been greater as specified in subparagraph 815-120(1)(c) of the ITAA 1997.

82. In considering whether Aus Co satisfied the transfer pricing documentation requirements under section 284-255, the Commissioner determined that:

(a) the source documentation comprising the global contract and transactional data was accepted as being kept by Aus Co for the purposes of applying Subdivision 815-B of the ITAA 1997 as these records were prepared before the time Aus Co lodged its income tax return and was in the possession or otherwise ready and available to Aus Co. The documentation held in electronic form on the global shared drive is taken to be kept by Aus Co as Aus Co had full and free access to these records both at the time it applied Subdivision 815-B and on an ongoing basis;

(b) the documentation that Aus Co subsequently obtained from US Co that was brought into existence by US Co prior to Aus Co lodging its income tax return detailing the method used and a functional analysis was not accepted as being 'kept' by Aus Co for the purposes of applying Subdivision 815-B of the ITAA 1997 as, even though these records were prepared before the time Aus Co lodged its income tax return, these records were not in the possession or otherwise ready and available to Aus Co for the purposes of applying the Subdivision; merely relying on assurances is not sufficient to satisfy the statutory requirement. For a record to be kept by an entity that entity is required to have knowledge of more than the record's existence, it needs to have knowledge of its existence, format and content and be reasonably assured that it is fit for purpose i.e. that it is ready and available;

(c) the transfer pricing report produced by Aus Co's tax agent was not accepted as kept by Aus Co for the purposes of applying Subdivision 815-B of the ITAA 1997 as these records were not prepared before the time by which Aus Co lodged its income tax return for the income year relevant to the matter.

83. Records that are not kept by an entity for the application of Subdivision 815-B or 815-C of the ITAA 1997 or prepared after the income tax return for the income year is lodged cannot be taken into account for the purposes of meeting the transfer pricing documentation requirements under subsection 284-255(1) and paragraph 284-255(1)(a).

84. When applying the transfer pricing rules, entities are required to self-assess whether they would otherwise get a tax advantage from actual conditions that differ from arm's length conditions. That is, the entity is required to assess their Australian tax position for income tax and withholding tax purposes as if the arm's length condition had operated.[21] In this context, entities are encouraged to ensure that their documentation is prepared contemporaneously.

85. Contemporaneous documentation is generally considered to provide a stronger indication of independent dealings as opposed to after-the-event documentation, which raises the issue of hindsight.[22] Contemporaneous documentation can be prepared prior to, at the time of undertaking the dealings, or up to the time of lodging the relevant tax return.

[21] Section 815-105 of the ITAA 1997.

[22] *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, 22 July 2010, paragraph 5.20.

'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters) (paragraph 284-255(1)(c))

86. In order for records to meet the documentation requirements, the entity needs to explain the particular way Subdivisions 815-B or 815-C of the ITAA 1997 applies (or does not apply) to the matter (or matters).

87. In the case of relevant dealings between entities, Subdivision 815-B requires that the records identify and explain the actual conditions and the arm's length conditions relevant to the matter (or matters).

88. The arm's length conditions of an entity are those conditions that might be expected to operate between independent entities dealing wholly independently with one another in comparable circumstances.

89. In the case of relevant dealings involving PEs, Subdivision 815-C of the ITAA 1997 requires that records identify and explain the actual profits and the arm's length profits for the PE of an entity to the extent that they are relevant to the matter (or matters).

90. The arm's length profits of a PE of an entity are worked out by allocating the actual expenditure and income of an entity between itself and its PE so that the profits attributed to the PE equal the profits the PE might be expected to make if the PE were a distinct and separate entity.

91. The Commissioner considers that to explain the particular way Subdivisions 815-B or 815-C of the ITAA 1997 applies (or does not apply) to the matter (or matters), the records should demonstrate that the entity's transfer pricing is consistent with the arm's length principle. In establishing that an entity's Australian tax position accords with the arm's length principle, the entity needs to show all the steps in the process whereby they have identified the arm's length conditions, including documentation that explains the steps undertaken in selecting the methods used and the comparable circumstances.[23]

[23] Guidelines for the steps in the process for documenting transfer pricing are set out in PS LA 3673.

'Explain why the application of the Subdivision to the matter (or matters) in that way best achieves the consistency mentioned in sections 815-135 or 815-235' of the ITAA 1997 (the relevant guidance material) (paragraph 284-255(1)(d))

92. The Commissioner considers that this requires entities to record or reference relevant parts of the guidance material in their transfer pricing documentation. The documentation should also explain how the relevant guidance material has been considered in the way the entity has applied the Subdivision. That is, the documentation should explain how the application of the Subdivision best achieves consistency with the guidance material and any departure from the guidance material should also be documented, explained and justified.

93. This will require an objective examination of all the relevant steps, including whether the most appropriate and reliable method or methods are used and whether the comparable circumstances identified are relevant to the matter (or matters).

94. Whether that particular way best achieves consistency with relevant guidance material is an objective test which asks how and why the selected method or 'way' best equates to what an arm's length party acting reasonably would have or wouldn't have done in similar conditions or circumstances.

95. Paragraph 284-255(1)(d) requires that the records explain why application of Subdivisions 815-B or 815-C of the ITAA 1997 to the matter (or matters) in the particular way best achieves consistency with the relevant guidance material mentioned in sections 815-135 or 815-235 of the ITAA 1997.

96. Section 815-135 of the ITAA 1997 states that, for the purpose of determining the effect Subdivision 815-B of the ITAA 1997 has in relation to an entity, the identification of the arm's length conditions must be done in a way that best achieves consistency with the relevant guidance material.

97. The relevant guidance material is set out in section 815-135 of the ITAA 1997 as:

- the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, 22 July 2010 (OECD Guidelines): and
- any other documents, or part(s) of a document prescribed by the regulations for this purpose.

98. Similarly, section 815-235 of the ITAA 1997 states that, for the purpose of determining the effect of Subdivision 815-C of the ITAA 1997 in relation to an entity, working out the arm's length profits and the identification of the arm's length conditions must be done in a way that best achieves consistency with the relevant guidance material.

99. The relevant guidance material is set out in section 815-235 of the ITAA 1997 as:

- the documents covered by section 815-135 of the ITAA 1997 (notably the OECD Guidelines);
- the Model Tax Convention on Income and on Capital, and its Commentaries, as adopted by the Council of the OECD and last amended on 22 July 2010, to the extent that document extracts the text of Article 7 and its Commentary as they read before 22 July 2010 (OECD Commentary); and
- any other documents, or part(s) of a document prescribed by the regulations for this purpose.

100. The OECD Guidelines are considered to reflect the internationally accepted approach to dealing with transfer pricing issues.[24]

101. In establishing the effect of Subdivisions 815-B or 815-C of the ITAA 1997, the identification of the arm's conditions and the arm's length profits must be done in a way that best achieves consistency with the relevant guidance material. The OECD Guidance material comprises the OECD Commentary and the OECD Guidelines, as appropriate.

102. Insofar as it is possible, the OECD Guidance material is to be used in all cases to determine the arm's length conditions. That is, the OECD Guidance material will be applied to dealings between associated entities as well as dealings between non-associated entities, and in both treaty cases and non-treaty cases.[25]

103. It is noted that in addition to the OECD Guidance material, the guidance material under the transfer pricing rules allows for documents or part(s) of documents to be prescribed by the regulations.

'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-130 of the ITAA 1997

104. The application of section 815-130 of the ITAA 1997 is discussed in Taxation Ruling TR 2014/D3.

105. The steps involved in applying section 815-130 include:

(a) the identification of the commercial or financial relations and of the actual conditions that operate in connection with those relations;

[24] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 3.22.
[25] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 3.27.

(b) a consideration of the form and substance of the actual commercial or financial relations to determine the extent to which they are consistent;

(c) the disregarding of the form of the actual commercial or financial relations to the extent (if any) it is inconsistent with the substance of those relations;

(d) the identification of the commercial or financial relations entered into by independent entities dealing wholly independently with each other in comparable circumstances;

(e) an evaluation of the degree of comparability between the actual circumstances and the comparable circumstances by application of the comparability factors, concept of materiality and potential adjustments to improve comparability where reasonably accurate adjustments can be made in the course of identifying what independent entities dealing wholly independently would have done;

(f) the determination on the basis of a systematic comparability analysis of whether independent entities dealing wholly independently with one another in comparable circumstances would have entered into commercial or financial relations. In cases where independent entities would not have entered into commercial or financial relations a process of identifying the arm's length conditions on the basis that the actual relations did not exist. This step is not necessary in cases where a systematic comparability analysis establishes that independent entities dealing wholly independently with one another would have entered the actual relations or different relations;

(g) an evaluation, based on the evidence, of whether independent entities dealing wholly independently with one another would have entered into the actual relations or other commercial or financial relations that differ in substance to the actual commercial or financial relations. In relevant cases, a description of those other commercial or financial relations based on a systematic comparability analysis;

(h) the use of the actual relations, if they meet the economic substance and arm's length requirements, as a basis for identifying the arm's length conditions; and

(i) in other cases the use of the arm's length commercial or financial relations as a basis for identifying the arm's length conditions, provided independent entities dealing wholly independently with one another would have in fact entered into commercial or financial relations.

106. As the transfer pricing rules operate on a self-assessment basis, an entity needs to prepare and maintain documentation to demonstrate that they addressed the steps involved in applying section 815-130 and identified arm's length conditions on the basis required by the section. The records will need to evidence whether the basic rule and the three exceptions apply or do not apply.

107. Subsection 284-255(2) requires that records kept by an entity, to support a reasonably arguable position, must (amongst other things) allow the arm's length conditions relevant to the matter to be readily ascertained.

'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-140 of the ITAA 1997

108. Section 815-140 of the ITAA 1997 may operate to modify the way an entity works out its taxable income or its loss of a particular sort for an income year.

109. The modifications under subsection 815-140(1) will apply if:

(a) Division 820 (about thin capitalisation) applies to the entity for the income year; and

(b) the arm's length conditions affect costs that are debt deductions of the entity for the income year.

110. The Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (EM) notes at paragraph 3.147 that debt deductions, as defined under section 820-40 of the ITAA 1997, include any costs directly incurred in obtaining or maintaining a debt interest, such as interest, amounts in the nature of interest, guarantee fees, line fees and discounts on commercial paper.

111. If the substitution of the arm's length conditions involves applying a rate to a debt interest, an entity is required under subsection 815-140(2) of the ITAA 1997 to:

(a) work out the rate as if the arm's length conditions had operate; but

(b) apply the rate to the debt interest the entity actually issued.

112. Paragraphs 3.148 and 3.149 of the EM provides further guidance on the interaction of Subdivision 815-B with Division 820 and also provides examples.

113. As the transfer pricing rules are based on self-assessment, if the modifications set out under section 815-140 of the ITAA 1997 apply, entities need to prepare and maintain documentation to demonstrate that they have appropriately applied these modifications.

'Readily ascertained' for the purposes of subsection 284-255(2)

114. The documentation requirements specify that the records must allow for specified information to be 'readily ascertained'. This information comprises:

(a) the arm's length conditions relevant to the matter (or matters);

(b) the particulars of the method used and comparable circumstances relevant to identifying those arm's length conditions;

(c) in the case where the Subdivision applies, the result of applying the Subdivision in that particular way as opposed to not applying the Subdivision;

(d) in the case of Subdivision 815-B, the actual conditions relevant to the matters; and

(e) in the case of Subdivision 815-C, the actual profits and the arm's length profits to the extent that they are relevant to the matter (or matters), as well as the particulars of the activities of the activities and circumstances to the extent that they are relevant to the matter (or matters).

115. The term 'readily ascertainable' is not defined in the ITAA 1936, the ITAA 1997 or the TAA 1953. The Macquarie Dictionary Online [26] defines 'readily' as:

1. promptly; quickly; easily.

2. in a ready manner; easily.

Further, the Macquarie Dictionary defines 'ascertain' as:

> to find out by trial, examination or experiment, so as to know as certain; determine.

116. For the information to be 'readily ascertained' the Commissioner considers that an entity must keep records that objectively enable the information as specified in subsection 284-255(2) to be quickly and easily understood.

117. Subsection 284-255(2) also specifies that the records must allow the arm's length conditions together with particulars of the method selected and relevant comparable circumstances to be readily ascertained. The transfer pricing documentation should provide an explanation of all the steps undertaken in identifying the method selected and the comparable circumstances used in that process.[27]

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[26] *The Macquarie Dictionary Online*, Sixth Edition (published October 2013).

[27] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraphs 6.29 and 6.30. Guidelines for the steps in the process for transfer pricing documentation are set out in PS LA 3673.

118. In identifying the arm's length conditions under Subdivision 815-B of the ITAA 1997, an entity must use the method or combination of methods that produces the most appropriate and reliable assessment of the actual conditions and the arm's length conditions.[28] One of the factors in selecting and applying the most appropriate and reliable method is the degree of comparability between the actual circumstances and any circumstances being compared.[29]

119. The identification of arm's length conditions involves hypothesising what independent entities would have done in comparable circumstances to the actual conditions. Therefore any or all alternative conditions hypothesised as potentially operating between entities, and relied upon or otherwise reliably ruled out, should be documented. This will necessarily include the identification and selection of the most appropriate and reliable condition as the arm's length condition.[30]

120. Whilst the Commissioner considers that it is unnecessary to hypothesise all possible alternative conditions, the Commissioner considers that the alternative conditions that are appropriate and reliable need to be considered and documented.

121. Where the records explain the application of the transfer pricing rules (as opposed to the non-application of the rules) the records must also explain the result of the application and compare this to the result that would have been achieved had the transfer pricing rules not been applied. In other words, the records need to document the different tax result under the arm's length conditions relative to the actual conditions.[31]

122. Where Subdivision 815-B of the ITAA 1997 is applied, the records must explain the actual conditions relevant to the matter.[32]

123. Where Subdivision 815-C of the ITAA 1997 is applied, the records must explain the actual profits and arm's length profits attributed to the PE of an entity that are relevant to the matter, as well as the particulars of the activities and circumstances of the PE that were assumed as the result of the entity being deemed to be a separate and distinct entity.[33]

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[28] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 3.107.
[29] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 3.121.
[30] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraphs 3.72, 3.85 and 3.86.
[31] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 6.31.
[32] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 6.32.
[33] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 6.33.

The need for transfer pricing records to address matters that might give rise to a transfer pricing benefit

124. Sections 815-120 and 815-220 of the ITAA 1997 define the circumstances in which an entity obtains a transfer pricing benefit. Broadly, those benefits arise through an understatement of taxable income, the overstatement of a tax loss, over claiming of tax offsets or (in the case of cross border dealings between separate legal entities) the underpayment of interest or royalty withholding tax. The purpose of Subdivisions 815-B and 815-C of the ITAA 1997 is to prevent the obtaining of such benefits by ensuring that the amount subject to tax in Australia is calculated by reference to arm's length conditions.

125. An entity is required to work out its taxable income, loss of a particular sort, tax offsets or withholding tax payable on the basis that the arm's length conditions operated. In addition, for a PE of an entity, under this approach the allocation of profits to the PE will be constrained to the allocation of actual income and expenses of the entity.[34]

126. Since each of the transfer pricing benefits relates to a calculation of an amount that is subject to income tax or withholding tax, or a calculation that demonstrates that no transfer pricing benefit has been obtained, an entity's records should contain all the necessary information relevant to the operation of the arm's length conditions in relation to those calculations. The determination of an entity's tax position must therefore include all questions (for example the identification of specific amounts of income and expenditure) that would ordinarily be considered in calculating any elements of the entity's tax position.[35]

127. In the event that the Commissioner raises an amended assessment or issues a notice that additional withholding tax is payable, the Commissioner is required, to the extent it is ascertainable, to attribute the arm's length conditions to the value of individual components that form part of the tax equation.

The interaction between Section 262A of the ITAA 1936 (which deals with the general record keeping requirements) and Subdivision 284-E of Schedule 1 to the TAA 1953

128. Section 262A of the ITAA 1936 sets out the statutory requirements for a person carrying on a business to keep records that explain transactions and other acts for any purpose of this Act,[36] which include transactions and other acts concerning transfer pricing.

[34] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 2.12.
[35] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 3.17.
[36] "This Act" is defined under subsection 6(1) of the ITAA 1936 to include the ITAA 1997and Schedule 1 to the TAA 1953 and Part IVC of the TAA 1953.

129. To the extent that documents are prepared in accordance with Subdivision 284-E of Schedule 1 to the TAA 1953 that relate to transactions or acts that would otherwise need to be recorded under section 262A of the ITAA 1936, those documents are expected to satisfy the more general record keeping requirement under section 262A. However, section 262A continues to apply if the documentation under Subdivision 284-E does not sufficiently explain the transaction and related acts.[37]

130. For the purposes of section 262A, the documentation will be sufficient to record and explain the transfer pricing transaction and related acts if the liability under the transfer pricing rules can readily ascertained from the documentation. That is, the information recorded in the documentation will enable an ATO officer with accounting skills to understand the essential features of the matter or matters.[38]

131. Under the transfer pricing rules, an entity is required to address the provisions of Subdivisions 815-B and 815-C of the ITAA 1997 as applying, or not applying, to a matter in a particular way. Subdivision 284-E of Schedule 1 of the TAA 1953 sets out the records to be prepared and maintained to demonstrate that the entity has correctly applied Subdivisions 815-B or 815-C.

132. The practical difference plays out through the different consequences for failing to comply with either provision.

Documentation requirements for trusts and partnerships under Subdivision 815-D of the ITAA 1997

133. Subdivision 815-D of the ITAA 1997 sets out special rules for trusts and partnerships. Section 815-305 of the ITAA 1997 states that Subdivisions 815-B and 815-C apply in relation the net income of a trust in the same way as they apply in relation to the taxable income of an entity other than a trust. Similarly, section 815-310 of the ITAA 1997 states that Subdivisions 815-B and 815-C apply in relation to the net income (or a partnership loss) of a partnership in the same way as they apply in relation to the taxable income (or a tax loss) of an entity other than a partnership.

134. Subdivision 284-E of Schedule 1 to the TAA 1953 sets out the record keeping requirements relating to the application of Subdivisions 815-B and 815-C of the ITAA 1997 regarding entities and PEs of entities. The special rules under Subdivision 815-D of the ITAA 1997 ensure that Subdivisions 815-B and 815-C apply appropriately to trusts and partnerships as well as trusts and partnerships operating at or through PEs.[39]

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[37] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 6.6.
[38] See Taxation ruling TR 96/7 *Income tax: record keeping – section 262A – general principles*.
[39] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraphs 5.1 to 5.3.

Appendix 2 – Your comments

135. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

136. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments, and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**30 May 2014**
Contact officer:	**Frank Cipriano**
Email address:	**frank.cipriano@ato.gov.au**
Telephone:	**(03) 9285 1119**
Facsimile:	**(03) 9285 1461**
Address:	**Australian Taxation Office** **GPO Box 9990** **Melbourne VIC 3001**

Appendix 3 – Detailed contents list

137. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	**1**
Background	**9**
Ruling	**23**
'Prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter (or matters)' (paragraph 284-255(1)(a))	23
'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c))	27
'Explain why the application of the Subdivision to the matter (or matters) in that way best achieves the consistency mentioned in sections 815-135 or 815-235' of the ITAA 1997 (the relevant guidance material) (paragraph 284-255(1)(d))	31
'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-130 of the ITAA 1997	36
'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-140 of the ITAA 1997	40
'Readily ascertained' (subsection 284-255(2))	45
The need for transfer pricing records to address matters that might give rise to a transfer pricing benefit	49
The interaction between section 262A of the ITAA 1936 (which deals with the general record keeping requirements) and Subdivision 284-E of Schedule 1 to the TAA 1953	52
Documentation requirements for trusts and partnerships under Subdivision 815-D of the ITAA 1997	56
Date of effect	**57**
Appendix 1 – Explanation	**59**
Overview: documentation for transfer pricing	59
'Prepared before the time by which the entity lodges its income tax return for the income year relevant to the matter (or matters)' (paragraph 284-255(1)(a))	69
Example – Records prepared and kept	77
'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c))	86

'Explain why the application of the Subdivision to the matter (or matters) in that way best achieves the consistency mentioned in sections 815-135 or 815-235' of the ITAA 1997 (the relevant guidance material) (paragraph 284-255(1)(d)) 92

'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-130 of the ITAA 1997 104

'Explain the particular way in which the Subdivision applies (or does not apply) to the matter (or matters)' (paragraph 284-255(1)(c)) in the context of applying section 815-140 of the ITAA 1997 108

'Readily ascertained' (subsection 284-255(2)) 114

The need for transfer pricing records to address matters that might give rise to a transfer pricing benefit 124

The interaction between Section 262A of the ITAA 1936 (which deals with the general record keeping requirements) and Subdivision 284-E of Schedule 1 to the TAA 1953 128

Documentation requirements for trusts and partnerships under Subdivision 815-D of the ITAA 1997 133

Appendix 2 – Your comments **135**

Appendix 3 – Detailed contents list **137**

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 96/7; TR 2005/9; TR 2006/10; TR 2014/D3

Subject references:

- actual conditions
- arm's length conditions
- arm's length principle
- arm's length profits
- comparable circumstances
- cross-border test
- documentation
- methods used
- multinational enterprise
- organisation for economic co-operation & development
- risk assessment
- tax treaties
- transfer pricing

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 262A
- ITAA 1936 Pt III Div 13
- ITAA 1997 Subdiv 815-A
- ITAA 1997 Subdiv 815-B
- ITAA 1997 815-105
- ITAA 1997 815-120
- ITAA 1997 815-120(3)
- ITAA 1997 815-125(3)
- ITAA 1997 815-130
- ITAA 1997 815-130(1)
- ITAA 1997 815-135
- ITAA 1997 815-140
- ITAA 1997 815-140(1)
- ITAA 1997 815-140(2)
- ITAA 1997 815-145
- ITAA 1997 Subdiv 815-C
- ITAA 1997 815-220
- ITAA 1997 815-225
- ITAA 1997 815-235
- ITAA 1997 Subdiv 815-D
- ITAA 1997 815-305
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- TAA 1953 Pt IVC
- TAA 1953 Sch 1 Div 284
- TAA 1953 Sch 1 Subdiv 284-E
- TAA 1953 Sch 1 284-160
- TAA 1953 Sch 1 284-250
- TAA 1953 Sch 1 284-255
- TAA 1953 Sch 1 284-255(1)
- TAA 1953 Sch 1 284-255(1)(a)
- TAA 1953 Sch 1 284-255(1)(c)
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ATO references

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