

***TD 2017/21 - Income tax: where an Australian corporate tax entity is a partner in a partnership, can the partnership 'hold' a direct control interest (within the meaning of section 350 of the Income Tax Assessment Act 1936 ) in a foreign company for the purpose of Subdivision 768-A of the Income Tax Assessment Act 1997 ?***

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## Taxation Determination

Income tax: where an Australian corporate tax entity is a partner in a partnership, can the partnership ‘hold’ a direct control interest (within the meaning of section 350 of the *Income Tax Assessment Act 1936*) in a foreign company for the purpose of Subdivision 768-A of the *Income Tax Assessment Act 1997*?<sup>1</sup>

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This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner’s opinion about the way in which a relevant 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.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

### Ruling

1. Yes. Therefore the Australian corporate tax entity can have an indirect participation interest in the foreign company through the partnership for the purpose of satisfying the participation test in section 768-15.<sup>2</sup>

### Example 1

2. *Partner Company is an Australian corporate tax entity and is a partner in ABC Partnership. Partner Company is entitled to 60% of the net income of ABC Partnership under the Partnership Deed.*

<sup>1</sup> All legislative references in this Taxation Determination are references to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.

<sup>2</sup> Provided that the partnership (as defined in subsection 995-1(1)) is not a corporate limited partnership and therefore not a corporate tax entity within the meaning of section 960-115.

3. *B Company is also a partner in ABC Partnership and is entitled to 40% of the net income of ABC Partnership.*
4. *B Company is the registered shareholder of 70% of the shares in Foreign Company on behalf of and for the benefit of ABC Partnership.*
5. *On 1 April 2015, Foreign Company paid a dividend to B Company as the registered shareholder.*
6. *On 30 June 2015, the income of ABC Partnership was distributed to its partners.*
7. *On the basis that as at 1 April 2015 Partner Company is entitled under the Partnership Deed to 60% of the net income of ABC Partnership, Partner Company holds a direct control interest in ABC Partnership of 60%.*
8. *On the basis that as at 1 April 2015 B Company holds 70% of the shares in Foreign Company on behalf of and for the benefit of ABC Partnership, the partnership has a direct control interest of 70% in Foreign Company.*
9. *Partner Company's direct participation interest in ABC Partnership (60%) multiplied by ABC Partnership's direct participation interest in Foreign Company (70%) is 42%.*
10. *Partner Company satisfied the participation test in section 768-15 at the time Foreign Company paid the dividend because Partner Company's participation interest in Foreign Company at that time is greater than 10%.*

## **Date of effect**

11. This Determination applies to foreign equity distributions made on or after 17 October 2014, being the date Subdivision 768-A commenced operation. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

18 October 2017

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## Appendix 1 – Explanation

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

12. Subdivision 768-A provides that in certain circumstances an equity distribution made by a foreign company to an Australian resident corporate tax entity is not assessable and not exempt income (NANE income).

13. A foreign equity distribution can be NANE income where the Australian corporate tax entity receives the distribution 'directly or indirectly through one or more interposed trusts or partnerships'.<sup>3</sup>

14. For the distribution to be NANE income the Australian corporate tax entity must satisfy the participation test in relation to the foreign company at the time the distribution is made.<sup>4</sup>

15. The Australian corporate tax entity will satisfy the participation test if the sum of its direct and indirect participation interests in the foreign company (disregarding certain rights on winding-up) is at least 10%.<sup>5</sup>

16. Where the Australian corporate tax entity holds its interest in the foreign company indirectly, section 960-185 states that its indirect participation interest is worked out by multiplying its direct participation interest in the intermediate entity by the intermediate entity's direct participation interest in the foreign company.

17. Where the Australian corporate tax entity holds its interest in the foreign company indirectly through a partnership, the intermediate entity for the purpose of section 960-185 will be the partnership.<sup>6</sup> A partnership is recognised as an entity.<sup>7</sup>

18. The partnership's direct participation interest is worked out by reference to its direct control interest in the foreign company under section 350 of the *Income Tax Assessment Act 1936* (ITAA 1936).<sup>8</sup>

19. The direct control interest that the partnership 'holds' in the foreign company 'at a particular time' is equal to the percentage of share capital, rights to distributions or rights to vote that the shareholder partner holds in the foreign company at that time.<sup>9</sup>

20. The 'particular time' when applying section 350 of the ITAA 1936 for the purpose of paragraph 768-5(2)(d) will be the time the foreign equity distribution is made.<sup>10</sup>

<sup>3</sup> Section 768-1.

<sup>4</sup> Paragraph 768-5(2)(d).

<sup>5</sup> Section 768-15.

<sup>6</sup> However a corporate limited partnership cannot be an intermediate entity for the purposes of applying the participation test in section 768-15. Where the intermediate entity is a trust refer to Taxation Determination TD 2017/22 *Income tax: where an Australian corporate tax entity is a beneficiary of a trust, can the trust 'hold' a direct control interest (within the meaning of section 350 of the Income Tax Assessment Act 1936) in a foreign company for the purpose of Subdivision 768 A of the Income Tax Assessment Act 1997?*

<sup>7</sup> Section 960-100.

<sup>8</sup> Item 1 of subsection 960-190.

<sup>9</sup> Where the percentages differ, the greater percentage is used (subsection 350(1) of the ITAA 1936). In calculating the percentage of rights to distributions, the percentage needs to be calculated at the end of the statutory accounting period (subsections 350(3) and 350(4) of the ITAA 1936).

<sup>10</sup> See reference to 'at the time the distribution is made' in paragraph 768-5(2)(d), 'at a time' in section 768-15 and 'at a particular time' in subsection 960-185(1) and section 350 of the ITAA 1936. See also Taxation Ruling TR 2017/3 *Income tax: distributions from foreign companies - meaning of 'at the time the distribution is made' when applying the participation test* for guidance on the meaning of 'at the time the distribution is made' when applying the participation test.

21. It is then necessary to work out the direct participation interest that the Australian corporate tax entity (partner) holds in the partnership. This is worked out by determining the partner's direct control interest in the partnership under item 3 of subsection 960-190(1) and section 350 of the ITAA 1936 (as modified by subsection 960-190(3)).

22. The direct control interest the partner holds in the partnership 'at a particular time' is equal to the percentage share of contributed capital, distribution rights or decision making rights that the partner holds at that time.<sup>11</sup> Again, the 'particular time' for the purpose of paragraph 768-5(2)(d) will be the time the foreign equity distribution is made.

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<sup>11</sup> Section 350 of the ITAA 1936 and subsection 960-190(3). Where these percentages differ, the greater percentage is used (subsection 350(1) of the ITAA 1936).

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## References

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*Previous draft:*

TD 2016/D6

- ITAA 1997 Subdiv 768-A
- ITAA 1997 768-1
- ITAA 1997 768-5(2)(d)

*Related Rulings/Determinations:*TD 2008/24, TD 2017/22; TR 2006/10;  
TR 2017/3

- ITAA 1997 768-15
- ITAA 1997 960-100
- ITAA 1997 960-115
- ITAA 1997 960-185

*Legislative references:*

- ITAA 1936
- ITAA 1936 350
- ITAA 1936 350(1)
- ITAA 1936 350(3)
- ITAA 1936 350(4)
- ITAA 1997

- ITAA 1997 960-185(1)
- ITAA 1997 960-190
- ITAA 1997 960-190(1)
- ITAA 1997 960-190(3)
- ITAA 1997 995-1(1)
- TAA 1953

## ATO references

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