

TD 2022/5 - Income tax: aggregated turnover - application of the 'connected with' concept to corporate limited partnerships

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Status: **legally binding**

Taxation Determination

Income tax: aggregated turnover – application of the ‘connected with’ concept to corporate limited partnerships

📌 Relying on this Determination

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

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

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Ruling

1. All legislative references in this Determination are to the *Income Tax Assessment Act 1997* (ITAA 1997), unless otherwise indicated.
2. A ‘corporate limited partnership’¹ is treated as a company for income tax purposes.² Therefore, the rules for determining an entity’s ‘aggregated turnover’³ in Subdivision 328-C also apply to a corporate limited partnership as though it were a company, rather than a partnership.

¹ As defined in section 94D of the *Income Tax Assessment Act 1936* (ITAA 1936).

² Under Division 5A of Part III of the ITAA 1936.

³ As defined in section 328-115.

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3. Accordingly, for the purposes of determining whether an entity is 'connected with'⁴ a corporate limited partnership by virtue of directly controlling the corporate limited partnership within the meaning of subsection 328-125(2):

- an entity is capable of directly controlling a corporate limited partnership by operation of either the 'general control tests'⁵ or the 'voting control test'⁶, and
- the specific test for determining whether an entity directly controls a partnership⁷ does not apply to determining whether an entity directly controls a corporate limited partnership.

4. Further, a corporate limited partnership is capable of being an 'affiliate' of another entity within the meaning of section 328-130.⁸

Example 1 – application of the general control test to a corporate limited partnership

5. *ABC LP (ABC), a corporate limited partnership, needs to work out its aggregated turnover for the 2020–21 income year to determine its eligibility for temporary full expensing.*

6. *Under ABC's limited partnership agreement, ABC's profits for an income year are to be allocated and distributed to each of its limited partners in accordance with their respective percentage of contributed capital relative to ABC's total capital.*

7. *ABC's limited partners have contributed a total of \$20 million of capital to ABC. ABC's limited partners include EFG Pty Ltd (EFG), which contributed \$12 million of capital to ABC (equating to 60% of ABC's total capital). ABC also has four other limited partners, which each contributed \$2 million of capital to ABC (equating to a total of 40% of ABC's capital, or 10% each). ABC's limited partners are not affiliates of each other within the meaning of section 328-130.*

8. *ABC wants to know whether it is connected with any of its limited partners in accordance with section 328-125.*

9. *By virtue of holding a 60% interest in ABC's capital, EFG has the right to receive 60% of any distributions of income made by ABC. Therefore, EFG is connected with ABC under the general control test in subparagraph 328-125(2)(a)(i).*

10. *The other limited partners each hold less than 40% of the interests in ABC and, based on the facts, are not connected with ABC.*

11. *Therefore, ABC needs to include the annual turnover of EFG in its aggregated turnover for the 2020–21 income year.*

Note: *In accordance with paragraph 328-115(3)(a), ABC's aggregated turnover does not include amounts derived by ABC or EFG from their dealings with each other, to the extent those amounts would otherwise be included in the respective annual turnovers of ABC or EFG under section 328-120.*

⁴ An entity is 'connected with' another entity within the meaning of section 328-125.

⁵ The general control tests (as are applicable to determining the direct control of a corporate limited partnership) are in subparagraphs 328-125(2)(a)(i) and (iii).

⁶ The voting control test is in paragraph 328-125(2)(b).

⁷ The specific test for determining whether an entity directly controls a partnership is in subparagraph 328-125(2)(a)(ii).

⁸ For completeness, whether a corporate limited partnership is actually an affiliate of another entity is dependent on the specific facts and circumstances and whether they satisfy the requirements in section 328-130.

Status: **legally binding**

Example 2 – application of the voting control test to a corporate limited partnership

12. XYZ LP (XYZ), a corporate limited partnership, needs to work out its aggregated turnover for the 2020–21 income year to determine its eligibility for the temporary loss carry back tax offset.
13. XYZ's limited partners are A Pty Ltd (A), B Pty Ltd (B) and C Pty Ltd (C). A, B and C are not affiliates of each other within the meaning of section 328-130.
14. The limited partners hold interests in the capital of XYZ as follows:
- A – 36%
 - B – 54%, and
 - C – 10%.
15. The terms of the limited partnership agreement of XYZ operate such that each limited partner has the right to exercise voting power in XYZ in accordance with their equity interest. That is, the limited partners hold voting power in XYZ as follows:
- A – 36%
 - B – 54%, and
 - C – 10%.
16. XYZ wants to know whether it is connected with any of its limited partners.
17. Based on the facts, B has the right to exercise 54% of the voting power in XYZ and is therefore connected with XYZ under paragraph 328-125(2)(b).
18. XYZ is not connected with A or C under the voting control test in paragraph 328-125(2)(b) or the general control tests in subparagraphs 328-125(2)(a)(i) and (iii).
19. Therefore, XYZ needs to include B's annual turnover in its aggregated turnover for the 2020–21 income year.

Note: In accordance with paragraph 328-115(3)(a), XYZ's aggregated turnover does not include amounts derived by XYZ or B from their dealings with each other, to the extent those amounts would otherwise be included in the respective annual turnovers of XYZ or B under section 328-120.

Date of effect

20. This Determination applies both before and after its date of issue. However, the Determination 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 Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
30 March 2022

Status: **not legally binding**

Appendix – Explanation

❶ *This Explanation 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.*

Background to Subdivision 328-C

21. Under Subdivision 328-C⁹, an entity will be a small business entity for an income year if it carries on a business and its aggregated turnover is under the relevant threshold.¹⁰ An entity's aggregated turnover for an income year is comprised of its annual turnover¹¹, together with the annual turnover of any entity (including foreign resident) that is connected with it¹², or is an affiliate of it¹³, at any time during the income year.¹⁴

22. The concepts of 'small business entity' and 'aggregated turnover' in Subdivision 328-C are utilised in a number of provisions in the taxation law, including the temporary loss carry back¹⁵ and temporary full expensing¹⁶ measures. These measures cover entities that would meet the definition of a small business entity in section 328-110 if the aggregated turnover threshold under that definition was \$5 billion (instead of \$10 million).¹⁷ Consequently, the aggregation provisions in Subdivision 328-C (and related concepts) are relevant to determining whether an entity is eligible to carry back a tax loss or claim a deduction under temporary full expensing. As a result, these provisions now apply to a broader range of business structures and entities, including large businesses and multinational entities.

Meaning of 'corporate limited partnership'

23. Subsection 995-1(1) defines a 'limited partnership' as¹⁸:

- (a) an association of persons (other than a company) carrying on business as partners or in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited; or
- (b) an association of persons (other than one referred to in paragraph (a)) with legal personality separate from those persons that was formed solely for the purpose of becoming a VCLP, an ESVCLP, an AFOF or a VCMP and to carry on activities that are carried on by a body of that kind.

24. Division 5A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) operates to treat certain limited partnerships as companies for income tax purposes; such

⁹ Subdivision 328-C applies in relation to the 2007–08 and later income years; see paragraphs 1.37 and 2.69 of the Explanatory Memorandum to the Tax Laws Amendment (Small Business) Bill 2007.

¹⁰ Section 328-110.

¹¹ 'Annual turnover' is defined in section 328-120.

¹² An entity is connected with another entity within the meaning of section 328-125.

¹³ An entity is an affiliate of yours within the meaning of section 328-130.

¹⁴ Section 328-115. This is subject to the excluded amounts listed in subsection 328-115(3).

¹⁵ The temporary loss carry back provisions are contained in Division 160.

¹⁶ The temporary full expensing provisions are contained in Subdivision 40-BB of the *Income Tax (Transitional Provisions) Act 1997*.

¹⁷ For temporary loss carry back, see subparagraph 160-20(b)(i) which amends the reference in Subdivision 328-C from \$10 million to \$5 billion. For temporary full expensing, see subparagraph 40-155(b)(i) of the *Income Tax (Transitional Provisions) Act 1997* which amends the reference in Subdivision 328-C from \$10 million to \$5 billion.

¹⁸ VCLP, ESVCLP, AFOF and VCMP are defined in subsection 995-1(1) as 'venture capital limited partnership', 'early stage venture capital limited partnership', 'Australian venture capital fund of funds' and 'venture capital management partnership' respectively.

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partnerships are referred to as 'corporate limited partnerships'.¹⁹ A limited partnership (within the meaning of paragraph (a) of the definition) is a corporate limited partnership if it was formed on or after 19 August 1992.²⁰

25. However, the following types of limited partnership cannot be a corporate limited partnership:

- a limited partnership within the meaning of paragraph (b) of the definition of 'limited partnership' in subsection 995-1(1)²¹, and
- a limited partnership that is a foreign hybrid limited partnership within the meaning of section 830-10.²²

26. In addition, an unincorporated association of persons acting only in Australia who do not carry on a business in common with a view to profit cannot be a corporate limited partnership within the meaning of section 94D of the ITAA 1936.²³ However, an unincorporated association of persons formed outside of Australia that is not carrying on a business in common with a view to profit but is in receipt or ordinary or statutory income jointly is capable of being a corporate limited partnership, provided that the liability of at least one of the persons is limited under the applicable legal system.²⁴

The treatment of corporate limited partnerships for income tax purposes

27. If a limited partnership is a corporate limited partnership in relation to an income year, sections 94H to 94X of the ITAA 1936 set out a number of modifications to the income tax law²⁵ to treat the corporate limited partnership as a company by deeming, among other things, that²⁶:

- a reference to a company (other than a reference to a private company)²⁷ or a body corporate includes a corporate limited partnership²⁸
- a reference to a partnership does not include a corporate limited partnership (with the implication being that Division 5 of Part III of the ITAA 1936 does not apply to corporate limited partnerships)²⁹
- a reference to a dividend (other than a reference to a dividend in subsection 44(1A) of the ITAA 1936) includes a distribution made by a corporate limited partnership to partners in a partnership³⁰

¹⁹ Sections 94A and 94D of the ITAA 1936.

²⁰ Paragraph 94D(1)(b) of the ITAA 1936. Special rules apply for limited partnerships formed prior to 19 August 1992; see subsection 94D(1) and sections 94E, 94F and 94G of the ITAA 1936.

²¹ Subsection 94D(2) of the ITAA 1936.

²² Subsection 94D(5) of the ITAA 1936.

²³ See Taxation Determination TD 2008/15 *Income tax: can an unincorporated association of persons acting only in Australia who do not carry on a business in common with a view to profit be a corporate limited partnership within the meaning of section 94D of the Income Tax Assessment Act 1936?*

²⁴ See TD 2008/15.

²⁵ The 'income tax law' as defined in section 94B of the ITAA 1936 includes, among other things, 'this Act' (other than Division 5A of Part III of the ITAA 1936 and Division 830). Under subsection 6(1) of the ITAA 1936, 'this Act' includes, among other things, the ITAA 1997 (including Subdivision 328-C).

²⁶ Section 94H of the ITAA 1936.

²⁷ Section 94N of the ITAA 1936.

²⁸ Section 94J of the ITAA 1936. This does not include a reference to a company or a body corporate in the definitions of 'dividend', 'resident' or 'resident of Australia' in subsection 6(1) of the ITAA 1936, or in Division 355.

²⁹ Section 94K of the ITAA 1936.

³⁰ Section 94L of the ITAA 1936.

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- a reference to a share includes a reference to an interest in a corporate limited partnership³¹, and
- a reference to a shareholder includes a reference to a partner in a corporate limited partnership.³²

Application of the ‘connected with’ concept to determine whether an entity directly controls a corporate limited partnership

28. An entity is connected with another entity if either entity controls the other entity in a way described in section 328-125 or both entities are controlled in a way described in that section by the same third entity.³³

29. Subsection 328-125(2) sets out the test for determining whether an entity directly controls another entity other than a discretionary trust³⁴, as follows:

An entity (the **first entity**) controls another entity if the first entity, its affiliates, or the first entity together with its affiliates:

- (a) except if the other entity is a discretionary trust – own, or have the right to acquire the ownership of, interests in the other entity that carry between them the right to receive a percentage (the **control percentage**) that is at least 40% of:
 - (i) any distribution of income by the other entity; or
 - (ii) if the other entity is a partnership – the net income of the partnership; or
 - (iii) any distribution of capital by the other entity; or
- (b) if the other entity is a company – own, or have the right to acquire the ownership of, equity interests in the company that carry between them the right to exercise, or control the exercise of, a percentage (the **control percentage**) that is at least 40% of the voting power in the company.

30. Paragraph 328-125(2)(b) provides a specific test for determining whether an entity directly controls a company based on its control of the voting power in the company. Paragraph 2.46 of the Explanatory Memorandum to the Tax Laws Amendment (Small Business) Bill 2007 explains that this is an additional test that applies for the control by entities of companies. If either this test or the 40% ownership test is satisfied, that entity controls the company. Therefore, where an entity does not directly control a company under paragraph 328-125(2)(b), the entity will still need to consider whether direct control of the company is established under the general control tests in subparagraphs 328-125(2)(a)(i) or (iii).

31. Accordingly, a partner will directly control a corporate limited partnership under paragraph 328-125(2)(b) where the partner, its affiliate or the partner together with its affiliate have, by virtue of their interests in the corporate limited partnership, the right to exercise or control the exercise of at least 40% of the voting power in the corporate limited partnership. In this context, what constitutes the right to exercise or control the exercise of a percentage of the voting power in a corporate limited partnership is dependent on the specific facts and circumstances of the corporate limited partnership.

³¹ Section 94P of the ITAA 1936.

³² Section 94Q of the ITAA 1936.

³³ Subsection 328-125(1).

³⁴ Subsections 328-125(3) to (5) set out the tests for determining whether an entity controls a discretionary trust.

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Application of the 'affiliate' concept to corporate limited partnerships

32. Under subsection 328-130(1), an individual or company is an affiliate of yours if they act, or could reasonably be expected to act, in accordance with your directions or wishes, or in concert with you, in relation to their business affairs. However, an individual or a company is not your affiliate merely because of the nature of the business relationship you and the individual or company share.³⁵

33. Therefore, by virtue of being treated as a company under the income tax law, a corporate limited partnership is capable of being an affiliate of another entity. For completeness, whether a corporate limited partnership is actually an affiliate of another entity is dependent on the specific facts and circumstances and whether they satisfy the requirements in section 328-130.

³⁵ Subsection 328-130(2).

Status: **not legally binding**

References

Previous draft:

TD 2021/D3

Related Rulings/Determinations:

TR 2006/10; TD 2008/15

Legislative references:

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- ITAA 1936 44(1A)
- ITAA 1936 Div 5
- ITAA 1936 Div 5A
- ITAA 1936 94A
- ITAA 1936 94B
- ITAA 1936 94D
- ITAA 1936 94D(1)
- ITAA 1936 94D(1)(b)
- ITAA 1936 94D(2)
- ITAA 1936 94D(5)
- ITAA 1936 94E
- ITAA 1936 94F
- ITAA 1936 94G
- ITAA 1936 94H
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- ITAA 1997 328-115
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- ITAA 1997 328-125
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- ITAA 1997 328-125(2)(a)(ii)
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- ITAA 1997 328-125(2)(b)
- ITAA 1997 328-125(3)
- ITAA 1997 328-125(4)
- ITAA 1997 328-125(5)
- ITAA 1997 328-130
- ITAA 1997 328-130(1)
- ITAA 1997 328-130(2)
- ITAA 1997 Div 355
- ITAA 1997 Div 830
- ITAA 1997 830-10
- ITAA 1997 995-1(1)
- ITTPA 1997 Subdiv 40-BB
- ITTPA 1997 40-155(b)(i)
- TAA 1953

Other references:

Explanatory Memorandum to the Tax Laws Amendment (Small Business) Bill 2007

ATO references

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