


TR 2024/2 - Income tax: when does a corporate limited partnership 'credit' an amount to a partner in that partnership?

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Taxation Ruling

Income tax: when does a corporate limited partnership ‘credit’ an amount to a partner in that partnership?

❶ Relying on this Ruling

This publication is a public ruling for the purposes of the Taxation Administration Act 1953.

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

Table of Contents	Paragraph
What this Ruling is about	1
Ruling	4
Applying the principles in this Ruling	8
Taxation of corporate limited partnerships	9
The meaning of ‘credits’ in section 94M	11
<i>‘Credits’ does not mean ‘pays’ or ‘distributes’</i>	13
<i>‘Credits’ requires more than a mere credit entry in a corporate limited partnership’s accounts</i>	15
<u>Example 1 – mere credit entry in a corporate limited partnership’s accounts</u>	18
<i>There must be, in substance, an application or appropriation by the corporate limited partnership of its resources to confer a benefit on one or more of its partners</i>	22
<u>Example 2 – application of a partnership distribution to increase a partner’s investment in the partnership</u>	25
<i>The benefit conferred on the partner must be legally enforceable and not subject to a condition precedent</i>	30
<u>Example 3 – creation of a debt owing</u>	31
<i>Benefit subject to conditions precedent</i>	35
<u>Example 4 – conditional right to receive profits</u>	36
<u>Example 5 – partially exercised right to make drawing</u>	40
<i>Benefit subject to a condition subsequent</i>	45
<i>Has a legally enforceable benefit been conferred on a partner?</i>	47
<u>Example 6 – discharge of running loan account</u>	49
<i>Has there been, in substance, an application or appropriation by a corporate limited partnership of its resources to confer a legally enforceable benefit on a partner?</i>	55

Status: **legally binding**

Example 7 – application of partnership profits to discharge an obligation to contribute to the liabilities of the corporate limited partnership 57

The benefit conferred on the partner must be separate and distinct from the partner's existing interest in the corporate limited partnership 64

Date of effect 66

What this Ruling is about

1. This Ruling sets out the Commissioner's view on when a corporate limited partnership (CLP) 'credits' an amount to one of its partners within the meaning of section 94M of the *Income Tax Assessment Act 1936*.
2. All legislative references in this Ruling are to the *Income Tax Assessment Act 1936*, unless otherwise indicated.
3. This Ruling does not deal with:
 - whether an amount credited to a partner in a CLP is against the profits or anticipated profits of the CLP, or
 - how the anti-overlap provisions apply to avoid double taxation where an amount credited is subsequently paid or distributed.

Ruling

4. A CLP credits an amount to one of its partners within the meaning of section 94M if, in substance, it applies or appropriates its resources to confer a benefit on the partner that:
 - is not subject to a condition precedent and is legally enforceable by the partner, and
 - is separate and distinct from the partner's existing interest in the CLP and its assets.
5. A mere credit entry in a CLP's accounts is not a crediting within the meaning of section 94M, unless it records an underlying act or transaction that meets the requirements in paragraph 4 of this Ruling.
6. A CLP does not need to make a distribution or pay an amount to a partner in order for it to credit an amount to that partner.
7. If the requirements in paragraph 4 of this Ruling are satisfied, a partner of the CLP is credited with that amount, even if a future event may occur which requires the benefit to be relinquished or returned to the partnership.

Applying the principles in this Ruling

8. The following 3 steps are involved in applying the principles in this Ruling.
 - Step 1:
 - Has the CLP, in substance, applied or appropriated its resources to confer a benefit on one or more of its partners? See paragraphs 22 to 24, 48 to 49, and Example 2 of this Ruling.

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- Note 1: It is not necessary for an amount to be paid or distributed in order for there to be a crediting. See paragraphs 13 and 14 of this Ruling.
- Note 2: A mere credit entry is not sufficient; there must be an underlying act or transaction which satisfies the criteria in Steps 2 and 3 below. See paragraphs 15 and 16, and Example 1 of this Ruling.
- Step 2:
 - Is the benefit conferred on the partner legally enforceable? See paragraphs 30, 48 and 49, and Examples 3, 6 and 7 of this Ruling.
 - Is the benefit conferred on the partner subject to a condition precedent? See paragraph 35 and Examples 4 and 5 of this Ruling.
 - Note 3: A crediting may still occur even if a future event may occur which requires the benefit to be relinquished or returned to the partnership. See paragraphs 45 to 47 of this Ruling.
- Step 3:
 - Is the benefit conferred on the partner separate and distinct from the partner's existing interests in the CLP and its assets? See paragraphs 65 to 86 of this Ruling.

Taxation of corporate limited partnerships

9. CLPs and their partners are taxed according to the rules set out in Division 5A of Part III.¹ The object of Division 5A of Part III is to tax partners in CLPs as if they were shareholders in a company,² rather than as partners in a partnership (who are taxed under Division 5 of Part III).

10. Sections 94L and 94M deem certain distributions, payments and credits made by a CLP to a partner to be dividends. These deemed dividends are included in the partner's assessable income by subsection 44(1).

The meaning of 'credits' in section 94M

11. 'Credits' is not defined for the purposes of section 94M, nor is there any case law that has considered its meaning in that context.

12. The Oxford and Macquarie Dictionaries relevantly defines a 'credit' as credit entries in books of accounts that represent a right to obtain funds, record a payment made or a sum due.³

'Credits' does not mean 'pays' or 'distributes'

13. 'Credits' is one of 3 events used in sections 94L and 94M to define when a dividend is deemed to be paid to a partner in a CLP. Those events are when an amount is

¹ Section 94H.

² Section 94A; page 30 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 6) 1992.

³ Onions, CT (ed.) (1939) *Shorter Oxford English Dictionary*, 2nd edition, Clarendon Press, Oxford; Delbridge A (ed.) (2001) *The Macquarie Dictionary*, revised 3rd edition, The Macquarie Library Pty Ltd.

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distributed, paid or credited to a partner by the partnership. It follows that ‘credits’ means neither paid nor distributed.⁴

14. This is consistent with the case law on the meaning of credits.⁵ The context⁶ and case law do, however, suggest that a crediting involves something akin to a payment or distribution.⁷

‘Credits’ requires more than a mere credit entry in a corporate limited partnership’s accounts

15. For an amount to be credited within the meaning of section 94M, there must be more than a mere credit entry in the CLP’s accounts. The concept of crediting concerns an analysis of whether a benefit has been conferred.

16. If the position were otherwise, it would create a tax treatment in respect of the profits of a CLP that is substantively identical to that created under Division 5. It would effectively mean the partners in CLPs are taxed on their individual interest in the net income of a CLP as if it were a normal partnership.⁸ This is inconsistent with the object of Division 5A of Part III to tax partners in a CLP as if they were shareholders in a company.⁹

17. Such an approach would also mean that a partner in a CLP may be taxed on amounts they have not received in fact or substance, may never receive and may have no right to demand payment of from the CLP. This is inconsistent with how shareholders in a company are taxed under section 44.

Example 1 – mere credit entry in a corporate limited partnership’s accounts

18. *Thomas is the general partner in Optibee limited partnership (LP), an unincorporated CLP. At the end of the financial year, Optibee LP prepares a Statement of Financial Performance, showing a profit of \$100,000. Thomas’ share of the profit is \$20,000, which is credited to Thomas’ retained profit account in Optibee LP’s accounts. The credit entry does not entitle Thomas to any greater share of the future profits, capital or voting rights of Optibee LP relative to the other partners, or any other benefit.*

19. *Under Optibee LP’s partnership agreement, the general partner has the discretion to retain any profits Optibee LP makes. The general partner makes that election and notifies the partners in writing.*

20. *The law governing Optibee LP does not give partners in CLPs a legally enforceable right to receive or demand payment of the profits credited to them in a CLP’s accounts.*

⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [71].

⁵ For example, *Commissioner of Taxes (Vic) v Nicholas* [1938] HCA 18 (*Nicholas*); 59 CLR 230, at [244], per Rich J, confirmed on appeal to the Privy Council in *George Richard Nicholas v The Commissioner of Taxes of the State of Victoria (Australia)* [1940] UKPC 19, and *Lonsdale Sand & Metal Pty Ltd v Commissioner of Taxation* [1998] FCA 155 (*Lonsdale*); 162 ALR 220 at [228–229], which discussed the leading cases on credits.

⁶ *Avondale Motors (Parts) Pty Ltd v Commissioner of Taxation (Cth)* [1971] HCA 17; 45 ALJR 280 at [13].

⁷ For example, *Nicholas* 59 CLR 230 at [244], per Rich J; *Lonsdale* 162 ALR 220 at [228–229].

⁸ Subsection 92(1).

⁹ Section 94A; section 94Q.

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21. *The credit entry of \$20,000 to Thomas in Optibee LP's accounts does not confer any legally enforceable benefit on Thomas separate or distinct from Thomas' existing interest in Optibee LP. It is therefore not a crediting within the meaning of section 94M.*

There must be, in substance, an application or appropriation by the corporate limited partnership of its resources to confer a benefit on one or more of its partners

22. The case law shows that the first element required for there to be a crediting is that there must be an in-substance appropriation or application of the resources of the CLP to confer a benefit on a partner.¹⁰

23. This distinction can be seen by contrasting *McNeil*, where the conferral of a proprietary right on a shareholder was found not to be a crediting, with cases in which the conferral of benefits was found to be a crediting.¹¹ In contrast to those cases, the benefit conferred on the shareholder in *McNeil* did not require, or involve, as a matter of substance, any application or appropriation of the company's resources.¹²

24. The 'benefit' conferred on the partner which results from a crediting may be any type of legally enforceable right. For example, it may be a debt¹³, new property right¹⁴, a right to receive a distribution or payment¹⁵ or a release from a liability.¹⁶

Example 2 – application of a partnership distribution to increase a partner's investment in the partnership

25. *Edward is a limited partner in TEDNY LP. By written agreement, Edward agrees to contribute an additional \$100,000 in capital to the partnership and thus increase his interest in the profits and capital of the partnership. It is agreed that Edward will contribute this by way of \$50,000 in cash and by forgoing his entitlement to receive a \$50,000 profit distribution from TEDNY LP out of retained profits. Edward pays TEDNY LP \$50,000 and signs a release in respect of their entitlement to receive the \$50,000 profit distribution.*

26. *Under the relevant state partnership law, such additional investments of capital by partners are permitted but, to be legally enforceable, must be recorded in the partnership's statutory record.*

27. *The agreement is executed and the change in Edward's liability to contribute is notified to the relevant statutory authority and recorded in TEDNY LP's statutory record. As the statutory requirements are satisfied, it follows that Edward's interest in TEDNY LP is increased by \$100,000.*

¹⁰ *Lonsdale* 162 ALR 220 at [228–229]; *Nicholas* 59 CLR 230 at [244]; *Commissioner of Taxation (Cth) v WE Fuller Pty Ltd* [1959] HCA 41 (*Fuller*), per Fullagar and Menzies JJ; *Commissioner of Taxation v McNeil* [2005] FCAFC 147 (*McNeil*).

¹¹ For example, *Fuller*, *Nicholas* and *Lonsdale*.

¹² See *McNeil* at [97].

¹³ For example, *Brookton Co-operative Society Ltd v Commissioner of Taxation (Cth)* [1981] HCA 28 (*Brookton*).

¹⁴ For example, *Nicholas*, *Webb v Federal Commissioner of Taxation* [1922] HCA 27 (*Webb*), *Fuller* and *James v Federal Commissioner of Taxation* [1924] HCA 34 (*James*).

¹⁵ For example, *Brookton*.

¹⁶ For example, *Lonsdale*. See also Taxation Determination TD 2015/20 *Income tax: Division 7A: is a release by a private company of its unpaid present entitlement a 'payment' within the meaning of Division 7A of Part III of the Income Tax Assessment Act 1936?*.

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28. *In substance, TEDNY LP has applied its resources to confer a legally enforceable benefit of \$50,000 on Edward, which is separate and distinct from Edward's existing interest in TEDNY LP. Edward has been credited \$50,000 by TEDNY LP.*

29. *For the avoidance of doubt, the application of a partnership distribution in order to effectively increase a partner's interest in the profit or capital of a partnership, or voting rights in respect of the partnership, may not be in response to a formal commitment to contribute capital by that partner. For example, TEDNY LP might allocate an amount to Edward and retain the relevant funds, rather than using those funds to make a distribution to Edward or any other partner. Such an application of partnership resources might increase Edward's relative interest in the future profit or capital of TEDNY LP, by the lawful action of the partnership agreement. If such an application gives rise to an increase in Edward's rights relative to other partners, thereby reflecting a substantive reinvestment of the allocated amounts, then TEDNY LP will have applied its resources to confer that benefit on Edward.*

The benefit conferred on the partner must be legally enforceable and not subject to a condition precedent

30. The benefit conferred on the partner must be legally enforceable for there to be a crediting.¹⁷

Example 3 – creation of a debt owing

31. *Lucia is a limited partner in Corn LP, an incorporated CLP. On finalising its accounts for the year, Lucia's share of Corn LP's profits is calculated to be \$400,000. Corn LP credits \$400,000 to Lucia in its accounts.*

32. *Under Corn LP's partnership agreement, the finalisation of its accounts for a financial year causes 50% of each partners' share of the profits for the year to become a debt unconditionally payable on demand to the partner. Any distribution of profits beyond this is entirely at the discretion of the general partner.*

33. *The finalisation of its accounts for the year confers a legally enforceable benefit upon Lucia: a debt of \$200,000. This is separate and distinct from Lucia's existing interest in the partnership.*

34. *Corn LP has credited \$200,000 to Lucia within the meaning of section 94M.*

Benefit subject to conditions precedent

35. If the benefit is subject to a condition precedent that prevents the partner from enforcing it (that is, not including a condition that is effectively at the discretion of the partner themselves) it will not be credited until the condition is satisfied and it becomes legally enforceable.¹⁸ For example, where the benefit is revocable by unilateral action of the CLP prior to it becoming enforceable by the partner, this will not be a legally enforceable benefit sufficient to amount to a crediting until it is no longer revocable.¹⁹

¹⁷ *Brookton* 147 CLR 441 at [456], per Mason J.

¹⁸ *Brookton; R v Brown* [1912] HCA 6, 14 CLR 17, at [25].

¹⁹ *Brookton* 147 CLR 441 at [455–456] per Mason J.

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Example 4 – conditional right to receive profits

36. Leo is a limited partner in Inghill LP, an incorporated CLP. On finalising its accounts for the year, Leo's share of Inghill LP's profits is calculated to be \$400,000. Inghill LP credits \$400,000 to Leo in its accounts.

37. Under Inghill LP's partnership agreement, the general partner may elect to retain all or part of a partner's share of the profits within 30 days of the finalisation of its accounts. If it does not do so, 50% of each partner's share of the profits becomes an immediately enforceable debt payable on demand.

38. On the finalisation of the accounts, Leo obtains a conditional right to receive a distribution of \$200,000 from Inghill LP. As it is contingent on the general partner not electing to retain all or part of the conditional distribution, Leo has no legally enforceable right to demand payment of any part of the \$400,000 credited to Leo in Inghill LP's accounts. There is no crediting to Leo on the finalisation of Inghill LP's accounts.

39. Twenty days after the finalisation of accounts, the general partner waives, in writing, the right to retain the \$200,000 of Leo's share of the profits. At this time, a legally enforceable debt of \$200,000 payable on demand becomes owing to Leo by Inghill LP. The debt is separate and distinct from Leo's existing interest in Inghill LP. Inghill LP has credited Leo \$200,000 within the meaning of section 94M.

Example 5 – partially exercised right to make drawing

40. Under Elony LP's partnership agreement, on the third day of each month the general partner is entitled to make a drawing of up to 70% of their share of the partnership's estimated profits for the preceding month. In July, the general partner's share of the estimated profits of Elony LP is estimated to be \$100,000. The general partner is entitled to make a drawing of up to \$70,000.

41. The general partner draws \$30,000 of their entitlement. Being paid to the partner out of anticipated profits, the \$30,000 is deemed to be a dividend under subsection 94M(1).

42. Whether the unexercised entitlement to draw \$40,000 is a crediting will depend on whether the general partner has a legally enforceable right (which is not subject to a condition precedent) to demand payment of the \$40,000.

43. If, after the day on which the entitlement can be exercised passes, the partnership agreement provides that any undrawn entitlement becomes a debt owing to the general partner payable on demand, an unconditional and legally enforceable right (a debt) is created in the general partner's favour. Elony LP will have credited \$40,000 to the general partner.

44. If the partnership agreement gives the partnership the right to refuse to pay the undrawn amount of \$40,000 even if called for, the entitlement is conditional and no legally enforceable right will have been conferred on the general partner. No amount is credited to the general partner.

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Benefit subject to a condition subsequent

45. Section 94M deems payments out of anticipated profits to partners to be dividends when they are paid or credited to the partner. This is so, whether or not the amount of the profits or anticipated profits is ascertainable or the amount may be required to be repaid if a future event occurs. For example, a partnership agreement of a CLP may provide that payments of interim distributions of profits are to be repaid in some circumstances, such as if the final annual profits are less than a specified level.²⁰

46. This means that once a benefit is actually conferred on or received by the partner that meets the requirements in paragraph 4 of this Ruling, there is a crediting to the partner within the meaning of section 94M. This is so even if the benefit is subject to a condition subsequent that may require it to be relinquished or returned to the CLP on the occurrence of a future event.

Has a legally enforceable benefit been conferred on a partner?

47. When determining whether a legally enforceable benefit has been conferred on a partner by the CLP it is necessary to consider²¹:

- the partnership agreement
- the laws governing
 - the partnership, and
 - the benefit in question.

48. These laws and agreements may contain restrictions that mean no legally enforceable benefit has been conferred on a partner – for example, where a partner's right to receive a distribution of profits from the CLP is said to be offset against the partner's unpaid obligation to contribute to the partnership liabilities. Such transactions may not satisfy the rules governing how limited partners may discharge their liability to make contributions towards the liabilities of the CLP and consequently confer no legally enforceable benefit on the partner.²² This may be as a result of the transaction not being recorded in the CLP's statutory record.²³

Example 6 – discharge of running loan account

49. *Sebastian is a partner in Loan Co LP. Under its partnership agreement, Sebastian has a running loan account under which Sebastian may borrow amounts from the partnership during a financial year.*

50. *Over the 2011–12 financial year, Sebastian borrows \$100,000 from Loan Co LP under this loan facility.*

51. *At the end of the financial year, Loan Co LP may offset all or part of Sebastian's share of the profits for the year against the amount owing by Sebastian to the partnership under the loan facility.*

²⁰ I'Anson Banks, R (2010) *Lindley & Banks on Partnership*, 19th edition, Sweet & Maxwell, London, p. 233.

²¹ See generally, *Rowella Pty Ltd v Abfam Nominees Pty Ltd* [1989] HCA 65; *Brookton*; *Nicholas*; *Jolly v Federal Commissioner of Taxation* [1934] HCA 66 (*Jolly*); *James*, per Isaacs J; *Fuller*, per Fullagar and Menzies JJ; *Bluebottle UK Limited v Deputy Commissioner of Taxation* [2007] HCA 54.

²² For example, section 65 of the *Partnership Act 1892* (NSW).

²³ For example, sections 60, 61 and 66 of the *Partnership Act 1892* (NSW).

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52. At the end of the 2011–12 financial year, Loan Co LP calculates Sebastian's share of the profits for the year to be \$200,000. Under the terms of the partnership agreement governing its right to do so, Loan Co LP elects to, and applies, part of Sebastian's share of the partnership's profits for the year to discharge the \$100,000 Sebastian owes it under the loan facility. Loan Co LP elects to retain the balance of Sebastian's share of the profits for the year for use in its business. Loan Co LP sends Sebastian an advice in writing that it has done so.

53. Loan Co LP records the transactions in its books of account, crediting \$100,000 to Sebastian's retained earnings account and applying the remaining \$100,000 of Sebastian's share of the profits to discharge the \$100,000 debt owed by Sebastian to it.

54. Loan Co LP has allocated and applied \$100,000 of its profits to confer an unconditional and legally enforceable benefit on Sebastian distinct from Sebastian's existing interest in Loan Co LP. Loan Co LP has credited Sebastian with the \$100,000 applied to discharge the loan for the purposes of section 94M.

Has there been, in substance, an application or appropriation by a corporate limited partnership of its resources to confer a legally enforceable benefit on a partner?

55. In considering whether a CLP has, in substance, applied or appropriated its resources to confer a legally enforceable benefit on a partner, relevant considerations include:

- the substantive result of the act or transaction, including whether a partner has directly or indirectly gained a benefit, either immediately or as a result of a series of steps²⁴
- the legal result of the act or transaction²⁵
- how the act or transaction was recorded in the CLP's accounts or what would have been recorded if the substance of the act or transaction was properly recorded²⁶, and
- either
 - acts or transactions that, while not actually occurring, would necessarily have to have occurred as a matter of fact and law in order for the legal result to be achieved²⁷, or
 - alternative acts or transactions by which the benefit in question could have been conferred on the partner.²⁸

56. The following involve an in-substance application by a CLP of its resources to confer a legally enforceable benefit on one or more of its partners:

- an act or transaction that creates an irrevocable and legally enforceable debt owing from the CLP to the partner²⁹

²⁴ See *Nicholas, Webb* 30 CLR 450 at [463] and *Lonsdale* 162 ALR 220 at [229].

²⁵ *Jolly* 50 CLR 131 at [142]; *Webb* 30 CLR 450 at [474].

²⁶ *Lonsdale* 162 ALR 220 at [228–229]; *Brookton* 147 CLR 441 at [453] and [456], per Mason J; *James*.

²⁷ See *Fuller*, per Fullagar J.

²⁸ *Lonsdale* 162 ALR 220 at [227] and [234].

²⁹ *Brookton* 147 CLR 441 at [456], per Mason J.

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- a legally enforceable forgiveness by the CLP of a debt owed to it by one of its partners³⁰
 - where permitted by the relevant partnership law, a limited partner giving up a right to receive a distribution of profits from the CLP
 - in return for a legally enforceable discharge of their unpaid obligation to contribute to the CLP's partnership liabilities, or
 - as a means of making an additional contribution of capital to and increasing their interest in the CLP's capital and profits³¹, and
 - the allocation of an amount to any partner in such a way as confers an increased relative entitlement to the future profits, capital, or voting rights of the CLP to that partner under the terms of the partnership agreement.
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Example 7 – application of partnership profits to discharge an obligation to contribute to the liabilities of the corporate limited partnership

57. Zachary is a limited partner in Foreign LP; an unincorporated CLP. Zachary has agreed to contribute \$100,000 to the partnership capital, of which \$40,000 remains unpaid.

58. The law under which Foreign LP is formed allows a limited partner's unpaid obligation to contribute to the partnership's capital to be satisfied by applying the partner's share of retained profits to discharge that obligation.

59. Under Foreign LP's partnership agreement, its general partner may, at any time, call on the limited partners to pay any unpaid obligations to contribute to the partnership's capital. It also provides that it may at its option apply a partner's share of retained profits to discharge a limited partner's unpaid obligation to contribute to its capital.

60. Under the law, the partnership is required to maintain a statutory record of the partnership with a government authority. This record includes the amount limited partners are liable to contribute to the partnership capital and how much of their obligation is unpaid. The discharge of a partner's obligation is only enforceable if recorded in the partnership's statutory record.

61. Zachary's share of Foreign LP's retained profits is \$40,000. Zachary does not have a right to receive any part of their share of Foreign LP's accumulated profits, unless the general partner exercises their discretion to make a distribution of profits.

62. The general partner exercises their discretion to apply Zachary's share of Foreign LP's accumulated retained profits to discharge Zachary's unpaid obligation to contribute \$40,000 to its capital. The general partner notifies Zachary in writing that they are doing so. Foreign LP records the discharge of Zachary's obligation in its accounts and notifies the relevant government authority, which records it in Foreign LP's statutory record.

63. Foreign LP has allocated and applied \$40,000 of its profits to discharge Zachary's obligation to contribute \$40,000 to the partnership's capital. The discharge of Zachary's obligation has conferred an unconditional and legally enforceable benefit that is separate and distinct from Zachary's existing interest in Foreign LP. Foreign LP has credited \$40,000 to Zachary.

³⁰ Lonsdale.

³¹ Nicholas 59 CLR 230 at [242–243]; James 34 CLR 404 at [417], per Isaacs J; Fuller, per Menzies J.

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The benefit conferred on the partner must be separate and distinct from the partner's existing interest in the corporate limited partnership

64. The benefit that is conferred on a partner must be separate and distinct from their existing interest in the partnership.³² For example, a new or expanded interest in the partnership or its profits³³ or the extinguishment of a debt owing.³⁴

65. In order to identify whether a benefit received by a partner is separate and distinct from their existing interest in a CLP, it is necessary to identify what the partner's interest in the CLP and the partnership property and profits was, immediately before the act or transaction.

Date of effect

66. This Ruling applies to years of income commencing both before and after the date of issue. 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 *Public Rulings*).

Commissioner of Taxation

21 February 2024

³² *Nicholas* 59 CLR 230 at [244], per Rich J; *Lonsdale* 162 ALR 220 at [229]. See also *Webb*, per Knox CJ, Gavan, Duffy and Starke JJ.

³³ *Nicholas* 59 CLR 230 at [244], per Rich J.

³⁴ *Lonsdale* 162 ALR 220 at [227] and [234].

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References

Previous draft:

TR 2017/D4

Related Rulings/Determinations:

TD 2015/20; TR 2006/10

Legislative references:

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Bluebottle UK Limited v Deputy Commissioner of Taxation [2007] HCA 54; 232 CLR 598; 2007 ATC 5302; (2007) 67 ATR 1; 240 ALR 597

Brookton Co-operative Society Ltd v Commissioner of Taxation (Cth) [1981] HCA 28; 147 CLR 441; 55 ALJR 479; 35 ALR 295; 11 ATR 880; 81 ATC 4346

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