



PCG 2017/D4 - ATO compliance approach to taxation issues associated with cross-border related party financing arrangements and related transactions

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Relying on this draft Guideline

This Practical Compliance Guideline is a draft for consultation purposes only.
When the final Guideline issues, it will have the following preamble:

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this guideline in good faith, the Commissioner will administer the law in accordance with this approach.

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What this draft Guideline is about

1. This draft Practical Compliance Guideline (draft Guideline) sets out the compliance approach of the Australian Taxation Office (ATO) to the taxation outcomes associated with a 'financing arrangement', as defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997), or a related transaction or contract, entered into with a cross-border related party. Such an arrangement, transaction or contract is referred to in this draft Guideline as a 'related party financing arrangement'.
2. The ATO uses the framework in this draft Guideline and the accompanying schedules to differentiate risk and tailor our engagement with you according to the features of your related party financing arrangement, the profile of the parties to the related party financing arrangement and the choices and behaviours of your group. The tax risk associated with your related party financing arrangement is assessed having regard to a combination of quantitative and qualitative indicators.
3. If your related party financing arrangement is rated as being low risk under this framework then you can expect the Commissioner will generally not apply compliance resources to review the taxation outcomes, in the relevant schedule, of your related party financing arrangement, other than to fact-check the appropriate risk rating. If your related party financing arrangement falls outside the low risk category, you can expect the Commissioner will monitor, test and/or verify the taxation outcomes of your related party financing arrangement. The higher the risk rating, the more likely your arrangements will be reviewed as a matter of priority.

4. You can use the framework set out in this draft Guideline to:
- (a) assess the tax risk of your related party financing arrangement in accordance with the ATO's risk framework
 - (b) understand the compliance approach the Commissioner is likely to adopt given the risk profile of your related party financing arrangement.

Structure of this draft Guideline

5. This Guideline is structured as follows:
- (a) the main body sets out general principles relevant to the ATO's framework for considering risk and applying compliance resources in relation to related party financing arrangements
 - (b) the attached schedule expands on these principles setting out
 - (i) the specific type of entity or financing arrangement to which the framework applies
 - (ii) the relevant provisions to which the framework applies
 - (iii) specific indicators relevant to considering the risk of compliance activity in relation to your related party financing arrangement
 - (iv) risk framework diagrams which will assist you in applying the principles to your particular circumstances.
6. You will need to read and apply the schedule in conjunction with the general principles set out in the draft Guideline.
7. This draft Guideline does not provide advice or guidance on the technical interpretation or application of Australia's transfer pricing rules or other taxation provisions.
8. Additional schedules may be included as part of this draft Guideline providing specific risk indicators for particular types of entities or other financing arrangements, for example financial guarantees, interest free loans and related party derivative arrangements.
9. Where more than one schedule applies to you or your financing arrangement, you should use the schedule which most specifically addresses your circumstances.

Date of effect

10. This draft Guideline will have effect from 1 July 2017 and will apply to existing and newly created financing arrangements / structures / functions.
11. Each schedule may have effect from a different date. Where this is the case the date of effect will be stated in the relevant schedule.
12. The use and application of this draft Guideline will be under continuous review over the next three years. Any revisions to improve its efficacy will be made at the end of the review period or on an 'as necessary' basis. We will consult with you in relation to proposed material changes.

Arrangements to which this draft Guideline applies

13. This draft Guideline applies to any financing arrangement entered into with a related party that is not a resident of Australia. The draft Guideline applies to both inbound and outbound related party financing arrangements.

14. Unless explicitly stated in a schedule, the draft Guideline does not apply to a financing arrangement that is:

- (a) entered into by a member of a wholly owned group containing an ADI (as defined in section 995-1 of the ITAA 1997)
- (b) entered into by a member of a wholly owned group containing an Australian resident securitisation vehicle (as defined in section 995-1 of the ITAA 1997)
- (c) entered into by a member of a wholly owned group that is (or contains) an Australian resident taxpayer eligible to apply the simplified transfer pricing record keeping options
- (d) a form of Islamic finance.

The role of the ATO

15. The Australian tax law (including but not limited to Australia's transfer pricing rules) generally places an onus on Australian taxpayers to self-assess their compliance with the law. In the context of transfer pricing this means taxpayers are expected to self-assess whether the arrangements in place represent a set of 'arm's length conditions' and do not result in the Australian taxpayer getting a transfer pricing benefit.

16. The role of the ATO, as the administrator, is to test the outcomes of taxpayers' arrangements to ensure compliance with a number of taxation provisions, including the transfer pricing rules. In relation to transfer pricing specifically, testing the results implied by a taxpayer's transfer pricing method through the use of different comparable arrangements is standard administrative practice when conducting risk analyses.

The ATO's compliance approach

17. The ATO intends to concentrate its efforts on international related party dealings that pose the highest risk of not complying with the transfer pricing rules or other relevant provisions which may be identified in a particular schedule.

18. We understand that many of you who have related party financing arrangements want to comply and want to be confident that how you have complied will not increase your exposure to costly compliance examination of your tax treatment. We are committed to assisting you to assess your risk exposure to compliance action and to work with you to mitigate any potential risk of not complying with Australian taxation laws.

19. This draft Guideline identifies and describes the features and attributes of related party financing arrangements considered by the ATO to indicate a risk of not complying with the Australian taxation laws.¹ Following this draft Guideline does not limit or waive the operation of the law², but if you choose to follow this Guideline and align your related party financing arrangement (or your related party financing arrangement already aligns) with the specific low risk category set out in the draft Guideline and schedule, we will generally not allocate compliance resources to examine the relevant tax outcomes of your related party financing arrangement.³

20. Importantly this draft Guideline does not constitute a 'safe harbour' and the information provided in this draft Guideline does not replace, alter or affect in any way the ATO's interpretation of the relevant law as discussed in various taxation rulings. It does not

¹ Guidance to ATO officers on the exercise of the Commissioner's powers of general administration is set out in Practice Statement PS LA 2009/4 *When a proposal requires an exercise of the Commissioner's general powers of administration*.

² Specifically, this document is not a public ruling for the purposes of Division 358 of Schedule 1 to the *Tax Administration Act 1953*.

³ Guidance to ATO officers on the exercise of the Commissioner's powers of general administration is set out in PS LA 2009/4.

relieve you of your legal obligation to self-assess your compliance with all relevant taxation laws. It is designed to give you confidence, that if your circumstances align with the low risk category set out in this draft Guideline, we will generally not allocate compliance resources to test the relevant tax outcomes of your related party financing arrangement.

21. The ATO reviews both inbound and outbound financing arrangements. Particularly in the context of transfer pricing, Australia's transfer pricing rules, set out in domestic law (subdivisions 815-B, C, D of the ITAA 1997), do not differentiate between inbound and outbound dealings. It is, therefore, important to emphasise the ATO's interpretation and application of the provisions does not (because it cannot) differentiate between scenarios involving inbound or outbound arrangements and transactions.

THE RISK ASSESSMENT FRAMEWORK

22. The Commissioner's compliance approach will vary depending on the risk rating of your related party financing arrangement. The following principles will assist you to understand how the Commissioner assesses risk in relation to related party financing arrangements and generally allow you to assess your compliance risk.

23. If the ATO conducts a review of your related party financing arrangement, we might take account of factors beyond those set out in this draft Guideline. This is because we will need to consider in greater detail, among other things, the evidence which supports the commerciality of your related party financing arrangement.

24. The ATO's related party financing arrangement risk framework is made up of six risk zones:

- (a) White zone – arrangements already reviewed and concluded by the ATO
- (b) Green zone – low risk
- (c) Blue zone – low to moderate risk
- (d) Yellow zone – moderate risk
- (e) Amber zone – high risk
- (f) Red zone – very high risk.

25. The different zones reflect a cumulative assessment of the presence of various qualitative and quantitative risk indicators.

What and when to test

26. You will need to test each financing arrangement you enter into with a related party that is not a resident of Australia at the start of each income year and, where a financing arrangement is entered into during an income year, when it is entered into.

27. While it is necessary to test each financing arrangement you enter into with related parties, your risk zone for an income year will reflect that of your highest risk financing arrangement. For example, if you have entered into three related party financing arrangements, two of which you assess as being in the yellow zone and one you assess as being in the amber zone, your overall risk zone will be amber.

How to work out the risk rating for related party financing arrangements

28. To determine the risk rating for your related party financing arrangement, you will need to test your arrangements using the method set out in the schedule and compare the outcomes against the risk zones provided in that schedule.

29. It is important to note that, although the schedule sets out a method to test the existence of certain factors and conditions in respect of your related party financing

arrangement, the use of this method does not imply the ATO is concluding you have complied or failed to comply with the Australian tax law. Rather, it is used as a way for the Commissioner (and for you if you choose) to risk assess your related party financing arrangement.

30. Your 'risk zone' will reflect a number calculated according to the method set out in the schedule. For example, 'Green zone – low risk' includes a number of between 0 and 4; 'Red zone – very high risk' includes a number of 25 or higher.

31. The method involves comparing the conditions that actually exist in relation to your related party financing arrangement (or that have been taken to exist by you for the purposes of pricing your related party financing arrangement), with the indicators in the schedule. Each indicator carries a particular score and the aggregate scores for all relevant indicators will be your 'risk zone' number.

32. Each indicator is expressed either:

- (a) as a closed (yes/no) question, the answer to which carries a particular score for that indicator
- (b) a qualitative or quantitative range, with the score for that indicator depending on where your actual conditions sit within that range.

33. The indicators and their relative weightings reflect features the ATO has observed:

- (a) independent parties acting at arm's length consider relevant in pricing financing arrangements
- (b) through its interaction with taxpayers, to be indicative of tax risk.

34. You may not adjust your arrangements so you sit higher within a particular range (as set out in the schedule) merely because it does not affect your assessment of your risk zone. The ATO will monitor outcomes for related party financing arrangements to ensure there is no such 'drift' within a range for an indicator. For example in the case of a loan with a related party, if your gearing level (ratio of debt to book capitalisation) is historically 40%, the ATO will monitor instances where your level of debt drifts to 50% but you remain within the same risk score.

35. If the outcome of the testing process is that you fall within 'Green zone – low risk' you will be taken to be in that zone for the year unless you subsequently enter into additional related party financing arrangements which need to be tested in that year. As noted above, while you are required to test each financing arrangement you enter into with a related party that is not a resident of Australia; your risk zone will reflect that of your highest risk financing arrangement.

36. If you fall outside 'Green zone – low risk' there is no presumption your related party financing arrangement is uncommercial or otherwise fails to comply with the Australian tax law. What it means is that we consider your related party financing arrangement, or your treatment of that arrangement, is at risk of giving rise to an inappropriate tax outcome. Therefore, we will generally conduct some form of compliance activity to further test the taxation outcomes of your arrangement.

Reporting your risk assessment

37. You might be required to disclose whether you have self-assessed the risk rating of your related party financing arrangement. If you are notified by us to complete a Reportable Tax Position (RTP) Schedule it will contain a question asking if you have tested the extent to which the risk indicators outlined in this draft Guideline are present in the actual conditions of your related party financing arrangement. Where you have done so, you will be asked to disclose your self-assessed risk zone. It is not a requirement for you to self-assess your risk rating, but if you are unable to (or choose not to) you will also need to disclose this on the RTP Schedule.

38. In certain circumstances it will not be necessary to self-assess and therefore report the risk rating of your related party financing arrangement. Generally, you will not need to risk assess your arrangement where:

- (a) you have any of the following applying to a related party financing arrangement for the current year
 - an advance pricing agreement (APA)
 - a settlement agreement between you and the ATO
 - a court decision
 - the ATO has conducted a review of your related party financing arrangement in the last three years and provided you with a risk rating⁴

AND

- (b) there has not been a material change in the conditions of the related party financing arrangement including the terms, pricing, global group funding arrangements, comparability factors and/or risks since the time of the agreement, decision or review.

39. In the circumstances described in paragraph 38 of this draft Guideline you will be deemed to be in the 'White zone'.

What you can expect if you are in the 'Green zone – low risk'

40. If you are in 'Green zone – low risk', we will treat your arrangement as being at lower risk of not complying with transfer pricing rules or other taxation provisions addressed in the relevant schedule. This means we will generally not apply compliance resources to the arrangement (other than to confirm certain facts and to check your eligibility), minimising your compliance costs and providing practical certainty for your arrangement.

Limited compliance activity

41. If your arrangement is in 'Green zone – low risk', the Commissioner will generally not apply compliance resources to examine the relevant tax outcomes of your related party financing arrangement. However, as per paragraph 20 of this draft Guideline, this will not waive the operation of the statutory test and will not constitute a safe harbour. It is important to note that falling within 'Green zone – low risk' does not relieve you of your obligation to comply with the Australian taxation laws. Your self-assessment responsibilities under the Australian tax law require you to consider whether or not you get an inappropriate tax outcome from your related party financing arrangement.

42. The Commissioner will generally only apply resources to related party financing arrangements in 'Green zone – low risk' to:

- (a) confirm you have performed all calculations in accordance with our guidance
- (b) verify your eligibility, including factually confirm the accuracy of your scores for relevant indicators.

43. It would only be in exceptional circumstances that the Commissioner would apply compliance resources to review your related party financing arrangement beyond the factual checks outlined above. Examples of exceptional circumstances would be where:

⁴ Note: this will be relevant for reviews that occur after publication of this draft Guideline.

- (a) the ATO is not satisfied that your assessment of your risk zone has been adequately supported with evidence
- (b) the ATO becomes concerned, from its own data and analysis, that the conclusions you have drawn in relation to certain indicators are inaccurate⁵
- (c) the ATO becomes concerned, from its own data and analysis, that there is 'drift' within a range for an indicator
- (d) your related party financing arrangement relates to a broader set of circumstances being reviewed by the ATO in relation to provisions not addressed in the relevant schedule
- (e) any other circumstances identified in the relevant schedule.

What you can expect if you are outside the 'Green zone – low risk'

- 44. If you are in 'White zone':
 - (a) as your arrangements have already been reviewed and concluded by either the ATO or a court and there have been no changes outlined in paragraph 38(b) of this draft Guideline, no further review would be conducted.
- 45. If you are in 'Blue zone – low to moderate risk':
 - (a) the ATO will actively monitor your arrangements using available data and will review arrangements by exception
 - (b) alternative dispute resolution (ADR) might be effective in resolving any areas of difference.
- 46. If you are in 'Yellow zone – moderate risk':
 - (a) the ATO will work with you to understand and resolve areas of difference
 - (b) ADR might be effective in resolving any areas of difference.
- 47. If you are in 'Amber zone – high risk':
 - (a) reviews are likely to be commenced as a matter of priority
 - (b) the ATO will work with you to understand and resolve areas of difference
 - (c) ADR might be effective in resolving any areas of difference.
- 48. If you are in 'Red zone – very high risk':
 - (a) reviews are likely to be commenced as a matter of priority
 - (b) cases might proceed directly to audit
 - (c) you will not be eligible for access to the APA program⁶
 - (d) the ATO is likely to use formal powers for information gathering
 - (e) practically, it will be more difficult to resolve disputes through settlement or ADR
 - (f) you might face an increased prospect of litigation.

⁵ Examples where this might arise in relation to loans with a related party might be the residency of the related party, the existence of related party derivatives associated with your related party debt, or whether there has been an adjustment for sovereign risk.

⁶ The Commissioner does not consider this to be an efficient use of ATO resources as the ATO would need to expend considerable additional effort to properly understand the conditions which exist and other relevant facts and circumstances, without which there is a low likelihood of agreement being reached.

Review and audit activity – what you can expect from our compliance activities

49. The ATO will prioritise its compliance resources to deal with related party financing arrangements which are assessed as having the highest risk of obtaining a transfer pricing benefit or other inappropriate tax outcome. The ATO uses a variety of products to review and assess the risk associated with related party financing arrangements. Compliance approaches might include monitoring, risk reviews and audits.

50. We will monitor the outcomes of your arrangements each year, as well as the trend over time. This monitoring will take into account situations where a group has multiple Australian tax entities that have related party financing arrangements. The likelihood of compliance activity may increase if we see your tax impact increasing over time.

51. Generally, we will conduct a risk review to test and further assess the level of risk associated with your related party financing arrangement before a decision is made to proceed to audit or not. If your related party financing arrangement is in the 'Red zone – very high risk' we may proceed directly to audit, but our preference is to work co-operatively with taxpayers to optimise compliance outcomes.

52. Risk reviews and audits have separate review processes and considerations to the risk framework set out in this draft Guideline, which provides the initial risk assessment. When the ATO reviews your related party financing arrangement, the review is not limited by the principles or methodologies set out in this draft Guideline or the accompanying schedules.

53. During a risk review we will assess the tax risk associated with your related party financing arrangement and the level of risk it presents. When reviewing your related party financing arrangement we will look to get an understanding of relevant facts, including your:

- (a) business context and environment
- (b) global and domestic funding profile, currency profile, policies and procedures
- (c) transfer pricing position.

54. As part of this exercise the ATO will examine all relevant information starting with primary information in the form of executed legal agreements, evidence of cash flows, other financial and commercial considerations and other relevant supporting information such as analysis set out in your transfer pricing documentation including details of potentially comparable transactions that have been rejected under your transfer pricing analysis. You will also have the opportunity to discuss your arrangement with the ATO and, where necessary, our transfer pricing specialists. It should be noted the higher the risk zone you fall within, the greater the expectation by the ATO that you will have high quality transfer pricing documentation in place to support your transfer pricing outcomes.

55. At the end of review, we will decide if the risk that you have obtained a transfer pricing benefit or other inappropriate tax outcome is sufficient to require closer examination through an audit. Broadly, audits involve a more intense scrutiny of the facts and evidence. During our audits you can expect that we will obtain more detailed information about the related party financing arrangement and the context in which it arose. If we decide to proceed to audit, we will explain the reasons to you.

56. During reviews and audits, we might obtain information from third parties such as banks. If you are in the 'Yellow zone – moderate risk' or 'Amber zone – high risk', in the first instance, we will generally attempt to get information from you on an informal basis rather than using our formal information gathering powers, although in some circumstances this may not be possible. If you are in the 'Red zone – very high risk' or are not dealing with us in a co-operative, constructive and transparent manner it is likely we will use our formal information gathering powers to obtain information and will not take an informal approach. The ATO may seek to engage external experts when developing its position.

57. At the audit stage, once the ATO has developed a position that may result in an amended assessment, it will be communicated to you via an audit position paper. Generally, you are given the opportunity to respond to this position before the ATO provides you with a Statement of Audit Position. If you disagree with some, or all, of the Statement of Audit Position you might be eligible to request an independent review. Further information about independent review, including eligibility criteria, can be found on ato.gov.au

58. If you disagree with the ATO decision you have the right to object. An independent officer from our Review and Dispute Resolution area will determine your objection. If you are dissatisfied with the outcome you might be able to seek a review in the Administrative Appeals Tribunal or Federal Court of Australia. Further information can be found on ato.gov.au

Options for resolving disputes

Resolving related party financing arrangement issues outside of litigation

59. The ATO is committed to working with you to resolve issues associated with your related party financing arrangement as early and cooperatively as possible. We will take a principle based approach to settling disputes in relation to related party financing arrangements to ensure we have consistency of treatment across the market.

60. The ATO has an obligation to administer the taxation system in an efficient and effective way balancing competing considerations and applying discretion and good judgement. Settlement is an important element of the administration of the tax system and it is our preference to resolve disputes as quickly as possible at minimal cost to all parties. Settlement is one way this might be achieved.

61. Every settlement is based on the particular facts and circumstances of your related party financing arrangement. Any contemplated settlement will need to be evidence based, fair, efficient, sustainable and able to contribute to justified trust in your tax affairs going forward.

62. If settlement cannot be achieved through direct negotiation, ADR might also be used to help resolve or settle your dispute. The type of ADR will depend on the circumstances of your case. Generally though, the process would involve engaging a facilitator or mediator to help the parties identify and assess options to resolve the dispute.

63. Where appropriate, the Commissioner might also consider the use of advisory or determinative ADR processes in an attempt to resolve the matter before proceeding to litigation or as an alternative to litigation. Early neutral evaluation⁷ and expert determination⁸ are two methods that might be considered and depending on the circumstances, might be binding or non-binding on both parties. It should be noted these types of processes are often difficult where there is disagreement about the facts and they can also be expensive and lengthy. The Commissioner will need to consider whether these processes represent the simplest and most cost-effective way to resolve the dispute taking into account the merits and risks associated with the particular facts of the case.

64. Settlement negotiations and ADR are able to be proposed by either you or the ATO at any time during the dispute, including before the issue of amended assessments. However, generally, the ATO will only be able to agree to a settlement or ADR process once we understand the facts of your related party financing arrangement and the issues have crystallised.

⁷ Early neutral evaluation is where an ADR practitioner assists the parties by providing a non-binding opinion in relation to the dispute.

⁸ Expert determination is where both parties agree to have an independent expert determine the pricing outcome and are bound by the determination.

65. The risk rating for your related party financing arrangement might influence our approach to settlement or the choice of ADR process that is appropriate to your specific circumstances. Practically speaking, the lower the risk rating the more the flexible options that might be available. Conversely, if there has been poor cooperation, or a higher risk rating, there are additional challenges in resolving a dispute, and there might be fewer ADR options that are appropriate.

66. If you are interested in settling your dispute or engaging in ADR, you should discuss this with your case manager. You should also consider Practice Statement PSLA 2015/1 *Code of settlement practice* and PSLA 2013/3 *Alternative Dispute Resolution (ADR) in ATO disputes*, as we will follow these principles when negotiating a settlement with you or when engaging in ADR.

Litigation

67. Generally, the ATO endeavours to resolve disputes as early as possible. However, where early resolution of disputes is not possible and the dispute has become intractable, the ATO might seek to litigate the matter.⁹ We might also seek to litigate in circumstances where:

- a) there is a contentious or uncertain point of law requiring clarification and it is in the public interest to seek law clarification through litigation
- b) the behaviour is such that we need to send a strong message to the community that we won't sit idly by¹⁰
- c) the dispute is intractable, alternative means of resolving the dispute have been attempted but have not produced an acceptable outcome.¹¹

68. Related party financing arrangements with a higher risk rating might practically pose greater challenges for reaching early resolution, and thus there might be more risk of issues ultimately leading to litigation. It is easier for the ATO and a taxpayer to work to achieve early resolution in a fair and appropriate way where there has been a transparent approach to information sharing and a cooperative approach to any interactions.

Transitioning existing arrangements to 'Green zone – low risk'

69. The Commissioner recognises the publication of this draft Guideline might cause taxpayers to review their related party financing arrangements, with the effect that some taxpayers might modify their related party financing arrangements to come within 'Green zone – low risk' prospectively.

70. To encourage willing and co-operative future compliance, for a limited period, the Commissioner is willing to remit penalties and interest if certain pre-conditions are met. Specifically, the Commissioner undertakes that if you make a voluntary disclosure¹² in relation to the back years and adjust your pricing or level of debt to come within 'Green zone – low risk', the Commissioner will exercise his discretion to remit:

- a) penalties arising under Division 284 of Schedule 1 of the *Tax Administration Act* (TAA) to nil¹³

⁹ Practice Statement PS LA 2009/9 *Conduct of ATO Litigation and engagement of Legal Services Branch* sets out the guiding principles as to how the ATO will conduct litigation.

¹⁰ See for example: Chris Jordan, AO, *Commissioner's speech to the Tax Institute's 30th national convention*, Thursday, 19 March 2015, Royal Pines Resort, Gold Coast.

¹¹ Ibid.

¹² See Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* for further information in relation to what may be considered a voluntary disclosure.

¹³ See Practice Statement PS LA 2014/2 *Administration of transfer pricing penalties for income years commencing on or after 29 June 2013*, Practice Statement PS LA 2012/5 *Administration of penalties for*

- b) shortfall interest charges arising under Division 280 of Schedule 1 of the TAA to base rate.¹⁴

71. This undertaking is conditional on you making a full and true disclosure. It is also conditional on you not having tax losses carried forward to later income years at the time you make a voluntary disclosure.

72. In recognition of the complexity of these arrangements, the Commissioner's undertaking will remain in place for 18 months from either the date of publication of this draft Guideline or the effective date for any schedule to this draft Guideline.

73. If you do nothing about your back years, you might be subject to the usual compliance approach for those years, that is, the approach outlined in this draft Guideline for related party financing arrangements outside of 'Green zone – low risk'.

Who to contact

74. The ATO has a dedicated team responsible for the oversight and management of related party financing arrangement risks. If you wish to discuss your related party financing arrangement with the ATO you may contact Shahzeb Panhwar, Assistant Commissioner, Senior Technical Resolution Leader – Financing at PGIFinancing@ato.gov.au

75. Alternatively, if you have a dedicated relationship manager you may approach them directly for assistance with your case.

Commissioner of Taxation

16 May 2017

making false or misleading statements that result in shortfall amounts, Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard* and Taxation Ruling TR 2014/8 *Income tax: transfer pricing documentation and Subdivision 284-E*.

¹⁴ See Practice Statement PS LA 2006/8 *Remission of shortfall interest charge and general interest charge for shortfall periods* for further information.

SCHEDULE 1 – Related party debt funding

Scope of this Schedule

76. This Schedule sets out the risk indicators and framework for ‘financing arrangements’, as defined in section 995-1 of the ITAA 1997, which involve cross-border related party debt funding (related party debt).

77. Generally, the ATO expects any pricing of a related party debt to be in line with the commercial incentive of achieving the lowest possible ‘all-in’ cost to the borrower. The ATO expects, in most cases, the cost of the financing to align with the costs that could be achieved, on an arm’s length basis, by the parent of the global group to which the borrower and lender both belong. The indicators, and the weighting of the indicators, have been developed with this expectation in mind.

78. This Schedule is limited to risks relating to the application of the transfer pricing rules in Division 815 of the ITAA 1997 or an international tax agreement, as defined in section 995-1 of the ITAA 1997. It does not set out the approach of the ATO to reviewing other taxation issues that might arise in relation to related party debt including, but not limited to:

- the application of the debt/equity rules in Division 974 of the ITAA 1997
- the substantive deductibility of interest payments or other losses (for example under subsection 230-15(2) of the ITAA 1997)
- the application of the thin capitalisation rules in Division 820 of the ITAA 1997
- the existence or otherwise of liability for interest withholding tax
- the application of Pt IVA of the *Income Tax Assessment Act 1936* (ITAA 1936).

Relevance of documenting your arrangements (legal agreements)

79. Australia’s tax rules do not require legal agreements to be in place for international related party arrangements.

80. Australia’s transfer pricing rules only operate where a transfer pricing benefit exists because the actual conditions in connection with a taxpayer’s commercial and financial relations do not align with arm’s length conditions. To the extent your debt arrangements are priced in line with arm’s length conditions, the transfer pricing rules will have no operation.

81. Where the ATO does undertake a review of your financing arrangements, the starting point of the review will be the legal agreement. Therefore, for arrangements which are at higher risk of ATO review it is recommended that agreements be put in place reflecting the relative rights, responsibilities and undertakings of each party that directly reflect the substance of the financing arrangement. The agreements do not need to be as extensive as arrangements involving independent parties but it should include the key terms and conditions that borrowers and lenders would require in order to enter into the arrangements.

Related party financing risk indicator guide

82. The following *Related party financing risk indicator guide* shows how to calculate your risk rating.

	Outbound			Outbound & Inbound	Inbound			
Score	10	3	1	0	1	3	10	15
Price relative to: <ul style="list-style-type: none">- global group cost of debt- traceable third party debt- relevant third party debt of borrowing tax entity	No interest charged	Less than the cost of refinerrable debt		Inbound: 50 bps over cost of refinerrable debt (or less) Outbound: Cost of refinerrable debt or higher	51 to 100 bps over cost of refinerrable debt	101 to 150 bps over cost of refinerrable debt	150 to 200 bps over cost of refinerrable of debt	More than 201 bps over cost refinerrable of debt
Leverage of borrower				Consistent with global consolidated leverage	Greater than global leverage but less than 60% leverage		More than 60% leverage	
Interest coverage ratio				Consistent with global consolidated group	Lower than global consolidated group ratio but equal to or greater than 10	3.3 to 9.9	Below 3.3	
Appropriate collateral				Yes		No		
Subordinated or mezzanine debt				No		Yes		
Headline tax rate of lender entity jurisdiction				Over 30%, or lender entity is global parent	21% to 29%	16% to 20%	1% to 15%	0%
Currency of debt is different to operating currency	Yes			No			Yes	
Involves an arrangement covered by a taxpayer alert	Yes			No			Yes	
At least one party is a hybrid entity	Yes			No				Yes
Presence of exotic features on loan				No			Yes	
Sovereign risk of borrower entity	B, CCC	BB	A, BBB	AAA, AA				
Base risk								
Green	0 to 4							
Blue	5 to 10							
Yellow	11 to 18							
Amber	19 to 24							
Red	25 or more							

Determining your 'risk zone' – risk indicators present in your cross-border related party funding

83. Determining your 'risk zone' essentially involves assessing the extent to which the ATO considers the conditions that exist for your related party debt (or you have taken to exist for the purposes of pricing the related party debt according to arm's length conditions) might give rise to a transfer pricing benefit. It does so using indicators the ATO considers relevant to determining the existence of arm's length conditions.

84. Determining your 'risk zone' does not necessarily mean you have obtained a transfer pricing benefit and the ATO does not view this step as such. If, as a result of this step, you do not fall within 'Green zone – low risk', there is no presumption that your related party debt has been mispriced. The ATO does, however, regard these indicators as being reliable flags for the risk that related party debt might be mispriced.

How to use the table

85. Your risk zone reflects a number calculated by reference to the 'Related party financing risk indicator guide' set out above. It requires you to:

- a) identify the indicators, listed on the left hand column of the table, which are relevant to your circumstances
- b) select the appropriate criteria based on whether your financing arrangement is an outbound loan (that is, an Australian taxpayer lending to a related party) or an inbound loan (that is, an Australian taxpayer borrowing from a related party)
- c) determine your score, set out in the first row of the table, for each indicator based on the actual conditions existing applying to your related party debt (or you have taken to exist for the purposes of pricing the related party debt according to arm's length conditions).

86. Your aggregate score for all relevant indicators will determine your risk zone for your financing arrangement, that is:

Risk zone	Aggregate score of
Green zone – low risk	between 0 and 4
Blue zone – low to moderate risk	between 5 and 10
Yellow zone – moderate risk	between 11 and 18
Amber zone – high risk	between 19 and 24
Red zone – very high risk	25 or more

87. Where the indicator is expressed as a closed (yes/no) question, your score for that indicator will be determined by reference to your answer to the question. The relative weighting for these indicators largely reflects the ATO's experience, through its compliance activity, of features that tend to indicate tax risk.

88. Where the indicator is expressed as a range, your score for that indicator will be determined by reference to where you sit within that range. The relative weighting for these indicators has been determined by reference to:

- (a) market data, relating to transactions between independent parties, obtained from a variety of sources widely used by companies (for example, to price financial instruments)
- (b) the ATO's experience, through its compliance activity, of features that tend to indicate tax risk.

89. An explanation of each indicator (including how to calculate, where relevant) is set out in the Definition of risk indicators at paragraph 104 of this draft Guideline.

90. It should be noted that a response of 'yes' to certain indicators are individually capable of resulting in a risk zone outside 'Green zone – low risk'. These include:

- (a) currency of the related party debt is not the same as the operating currency of the borrowing tax entity
- (b) use of related party derivative instruments
- (c) hybrid entity
- (d) exotic features

91. Where you have multiple financing arrangements your risk zone rating will be equal to that of your highest scoring individual financing arrangement.

92. Generally, the risk scoring is to be based on the most relevant finalised financial accounts available. However, there may be circumstances where a multi-year average or point in time approach is more appropriate. Where you feel that a point in time or multi-year average of a certain metric is more appropriate you may email PGIFinancing@ato.gov.au with your rationale to request an exception to the general rule.

Evidencing your self-assessment of your risk zone

93. The ATO might, in the course of its ordinary compliance activities, or any specific assurance activity relating to this draft Guideline, fact-check your assessment of your risk zone under the framework. If you are unable to provide adequate evidence to support your assessment, the ATO might undertake further compliance activity.

94. In circumstances where you have concluded that the actual conditions of your related party debt do not reflect arm's length conditions and you have, instead, substituted what you consider to be arm's length conditions for the purposes of pricing your related party debt, you should prepare and retain comprehensive analysis and supporting data as to why the substituted conditions reflect arm's length conditions.

95. The following are examples of the kind of evidence it would be prudent to have easily accessible, if needed, to minimise the burden of any such fact-checking:

- (a) For indicators which relate to profit and loss or balance sheet data, the audited financial accounts of the Australian group or the audited consolidated financial accounts of the group's parent entity (or the equivalent to such accounts where such accounts, or a single set of such accounts, are not prepared) – this will be relevant for:
 - (i) calculating the interest coverage ratio
 - (ii) calculating the global group's cost of funds
 - (iii) calculating the leverage of the Australian group or global group.
- (b) For indicators relating to the terms of your related party debt (including the amount of your related party debt), the relevant executed legal agreements setting out these terms – this will be relevant for:
 - (i) pricing of your related party debt
 - (ii) the size of your related party debt
 - (iii) tenor
 - (iv) subordination
 - (v) exotic features
 - (vi) currency.

- (c) If your related party debt is traced to a particular loan entered into with a party outside the global group, the relevant executed legal agreement setting out the terms of that external loan, as well as other contemporaneous records (for example Board minutes) indicating the funds drawn down under the external loan were on-lent via the related party debt.
- (d) For the indicator relating to the existence of guarantees or security, the relevant executed legal agreement.
- (e) For the indicator relating to the operating currency of the Australian group, bank statements, industry data (supported by financial statements) or major sales contracts indicating the currency used.
- (f) For the indicator relating to the residency of the lender, evidence of the jurisdiction of incorporation or registration or other evidence of central management and control.
- (g) For the indicator relating to hybrid entities, evidence of registration under the relevant legislation in the jurisdiction of incorporation, or the constitutions (or equivalent legal agreements), of the parties to the related party debt.

Example: Australian subsidiary of a US oil and gas company

96. ForCo Inc. is a company incorporated in the United States. Relevant aspects of ForCo Inc.'s profile, as the parent of the global group, are that it has:

- an accounting year ending 31 December
- an interest coverage ratio of 16
- an average cost of debt of 2.54%
- leverage of 33%.¹⁵

97. AusCo Pty Ltd is an Australia subsidiary of ForCo Inc.

98. AusCo Pty Ltd is in the oil and gas industry, primarily undertaking exploration for, and extraction of, gas. It has an accounting and tax functional currency of U.S. dollars (USD). On 1 January 2016 AusCo Pty Ltd receives a loan from a related party. The relevant terms of the loan, as set out in the executed legal agreement, are:

- interest rate of 3.16%
- currency is USD
- no subordination
- no security.

99. The loan is not a hybrid instrument, nor does it involve hybrid entities. The lender is in Hong Kong that has a headline tax rate of 16.5%, it does not have exotic features nor are there associated related party derivatives.

100. Other relevant aspects of AusCo Pty Ltd.'s profile are that it has:

- both a tax and accounting year ending 31 December
- an interest coverage ratio of 13
- leverage of 35%.¹⁶

¹⁵ Interest coverage ratio, average cost of debt and leverage are calculated in accordance with this draft Guideline, and using data from ForCo Inc.'s financial accounts for the year ended 31 December 2015.

¹⁶ Leverage is calculated in accordance with this draft Guideline, using data from AusCo Pty Ltd.'s tax filings for the year ended 31 December 2015. Interest coverage ratio is calculated in accordance with this draft Guideline using data from AusCo Pty Ltd.'s financial accounts for the year ended 31 December 2015.

Calculating AusCo's risk zone

101. The risk indicator guide is applied to the circumstances of AusCo Pty Ltd as follows.

Indicator	AusCo Pty Ltd's circumstances	Score
Priced consistently with global group cost of debt	3.16% is 62 basis points higher than the group average cost of 2.54%	1
Leverage	Consistent with parent	0
Interest coverage ratio	13	1
Security	None	3
Subordination	None	0
Headline tax rate of lender entity jurisdiction	16.5%	3
Currency of debt is different to operating currency	No	0
Involves an arrangement covered by a taxpayer alert	No	0
Hybrid entities	No	0
Exotic features	No	0

102. AusCo Pty Ltd has scored 8, which places it in 'Blue zone – low to moderate risk'.

103. AusCo Pty Ltd would likely be in 'Green zone – low risk' if it:

- offered security as part of the terms of the loan
- priced the related party debt at no more than 50 basis points above the global group cost of debt (with flow on effects on AusCo Pty Ltd.'s interest coverage ratio).

Definition of risk indicators

104. The relevant calculation under the risk framework, using the indicators defined in the following paragraphs, will be by reference to the actual conditions which exist in relation to that indicator (if that was what was used in pricing the related party debt), or alternatively the leverage which would exist under the arm's length conditions (if that is what was used to price the related party debt).

Sovereign risk

105. Sovereign rating of the jurisdiction of the borrower is determined as per Moody's, Standard and Poor's or Fitch. The equivalent ratings of these agencies are set out below. If no sovereign rating is provided by either of the agencies then assume a CC rating or equivalent.

106.

Investment grade

Moody's	Aaa	Aa1	Aa2	Aa3	A1	A2	A3	Baa1	Baa2	Baa3
S&P	AAA	AA+	AA	AA-	A+	A	A-	BBB+	BBB	BBB-
Fitch	AAA	AA+	AA	AA-	A+	A	A-	BBB+	BBB	BBB-

Non-investment grade

Moody's	Ba1	Ba2	Ba3	B1	B2	B3	Caa1	Caa2	Caa3	Ca
S&P	BB+	BB	BB-	B+	B	B-	CCC+	CCC	CCC-	CC
Fitch	BB+	BB	BB-	B+	B	B-	CCC+	CCC	CCC-	CC

107. If your pricing arrangements have made reliable adjustments for the sovereign risk of the borrower entity relative to Australian sovereign risk, then assume the sovereign risk is AAA.

108. For example, a loan is made between an Australian entity (AAA rated sovereign risk) and an entity in a jurisdiction where the sovereign risk is BB. An analysis is done calculating the difference in rate between AAA and BB as equivalent to 125 bps; this 125 bps is then added to the lending rate to compensate for the sovereign risk.

109. Where a jurisdiction is rated higher than Australia then no adjustment for sovereign risk is required.

Interest coverage ratio

110. Interest coverage ratio = EBITDA / interest

111. EBITDA = pre-tax income + interest + non-recurring expenses/(gains) + depreciation expenses + amortisation of intangibles

112. Interest = gross interest expense plus other borrowing expenses (for example, fees, swap costs) per the Income Statement. Note that interest income is not included.

113. Gross interest expense = interest paid or credited, including amounts accrued, accumulated or capitalised.

114. 'Consistent with global consolidated group' means an interest coverage ratio calculated in accordance with the paragraphs 110 to 113, which is either equal to, or higher than, the ratio of the global group.

Priced consistently with global group cost of funds, traceable global third party debt or relevant third party debt of the borrowing tax entity

115. The first indicator requires a comparison of the cost of debt under the related party financing arrangement to the cost of debt issued to an unrelated third party. Three options for comparison are available; however, the comparison only needs to be in respect of one of these. The most relevant of these three options will be the referable cost of debt for the purposes of this Schedule.

116. Global cost of funds is defined as:

Group Interest / average of opening debt and closing debt balances

- Interest = gross interest expense plus other borrowing expenses (for example, fees, swap costs) per the Income Statement, of the consolidated global group accounts, in Australian dollar (AUD) equivalent
- Debt = short-term debt + current portion of long-term debt + long-term debt, net of current portion + liability for capital leases (if not already included in debt) per the Balance Sheet or Asset Statement of audited financial reports, in AUD equivalent. Note debt does not include other types of liabilities
- Closing = balance as at the end of the accounting period that most closely matches the income tax year of the taxpayer
- Opening = balance as at the end of the previous accounting period, relative to the closing period

OR

For a newly issued debt instrument, where the taxpayer can provide evidence as to what the group's cost of debt would be for that particular instrument at the time the instrument was entered, then that will be the global cost of funds for that instrument.

117. Traceable global third party debt at the level of the global group – related party debt is considered to be traceable to a third party debt when:

- (a) the key terms, conditions and events (including start date of the arrangement, principal drawdown, repayments and the interest rates) of the related party debt provided to or by the taxpayer mirror those of the third party debt obtained by the group
- (b) the group's accounting systems can demonstrate the appropriate amount of cash being provided by the third party to an offshore group member(s) and that this entity then provided the same amount of cash to the taxpayer.

118. Relevant third party debt of the borrowing tax entity – relevance exists where the nature of the third party borrowing and the related party borrowing are consistent. For example, medium or long term bonds issued by the borrowing entity would be relevant third party debt for long-term debt provided by a related party. By way of contrast, working capital or overdraft facilities with banks would not be considered relevant.

119. AUD equivalent or AUD equivalent rate is to be calculated by one of two means; take the average:

- (a) spread over the relevant currency base rate and apply that spread to a relevant AUD base rate. For example, if the group records borrowings in USD and has an average cost of debt of USD Libor + 80 bps, the AUD equivalent rate can be taken to be AUD BBSW + 80bps.
- (b) interest rate in the relevant group's currency and convert the rate to AUD equivalent using a cross currency interest rate swap conversion tool.

Leverage

120. This indicator requires the calculation of the leverage of the Australian taxpayer and a comparison to the leverage of the global group or other leverage ranges listed in the table.

121. Leverage is defined as:

- $\text{Leverage of taxpayer} = \text{tax debt} / (\text{tax debt} + \text{tax equity})$
- $\text{Leverage of group} = \text{debt} / (\text{debt} + \text{equity})$ as contained in group's consolidated accounts
- Tax debt = debt for Division 974 purposes, in AUD equivalent
- Tax equity = equity for Division 974 purposes, in AUD equivalent
- Debt = see paragraph 115 of this draft Guideline
- Equity = net equity per accounts

122. Consistent means the leverage ratio is within a factor of 0.9 to 1.1. For example if the Leverage of group = 50%, the leverage of the taxpayer should be within 45% to 55%.

123. Where your leverage rate is consistent with your global group's consolidated leverage there is no need to consider if it meets any of the other leverage criteria.

Appropriate collateral

124. Appropriate security refers to the appropriate levels of protection that would be expected to be provided by the borrower to the lender in independent dealings. This could include:

- (a) provision of security – where the borrower (with a perfected security interest) pledges assets as collateral for the debt, which can be

repossessed if the borrower stops making loan payments. The market value of the security provided as collateral must be at least 50% of the value of the loan, otherwise answer no.

- (b) a guarantee – defined as a legal obligation for a third party guarantor to assume the liabilities of the borrower to the lender, in the event the borrower is unable to meet its interest or principal repayments.
- (c) covenants (including representations, warranties and events of default) – promises that certain activities or events will or will not occur or that the borrower will stay above or below determined ratios. Common financial covenants include:
 - a prohibition from issuing debt which ranks higher (Parri Passu)
 - a restriction on the amount of debt raised, often expressed by way of a debt/equity ratio
 - minimum working capital requirements
 - interest cover or debt service cover ratios.

Subordinated debt (including mezzanine debt)

125. Subordinated debt is defined as a loan or security that ranks below other loans and securities with regard to claims on a company's assets or earnings in the event of a default. Subordination may arise from the terms of the debt itself or through structural subordination.

Headline tax rate of lender entity

126. The headline tax rate corresponds to the rate contained in Table II.1 of the OECD Tax Database for the jurisdiction of which the lending entity is a tax resident.

127. If the lending entity is not a tax resident of any jurisdiction, assume the rate is 0%.

Currency of loan consistent with operating currency

128. The operating currency of the borrower is the currency in which it earns the majority of its revenues.

Arrangement covered by a taxpayer alert

129. Answer yes if you have an arrangement which can reasonably be described as being covered by a taxpayer alert.

Hybrid entity

130. Answer yes if the income/gain or expenditure/loss from your financial arrangements (including derivatives or spot transactions) is not subject to consistent or symmetrical tax treatment under the laws of the relevant overseas tax jurisdiction(s), including due to tax deferral or the treatment of the entity or other ownership arrangement in connection with holding or issuing of the financial arrangement. Note tax treatment does not refer to differences in tax rates between jurisdictions.

Exotic features or instruments

131. Exotic features or instruments include:

- (a) payment-in-kind or other forms of interest payment deferral
- (b) promissory notes or other instruments which do not provide rights to foreclose/accelerate repayment etcetera
- (c) options which give rise to premiums on interest rates (for example, early repayment by borrower or loan calls to lender)
- (d) convertibility to equity or other exchange
- (e) contingencies (for example, interest only repaid under certain conditions)
- (f) legal currency (or borrowing currency, that is, as reflected in the terms of the loan) and operating currency are different. Operating currency being the currency actually transferred or effectively provided by the lender to the borrower.

Your comments

132. You are invited to comment on this Draft Practical Compliance Guideline including the proposed date of effect. Please forward your comments to the contact officer by the due date.

Due date: 30 June 2017
Contact officer: Shahzeb Panhwar
Email address: PGIFinancing@ato.gov.au
Telephone: (03) 86019494
Address: Australian Taxation Office
GPO Box 9977
Melbourne VIC 3001

References

ATOlaw topic(s)	International issues ~~ Cross border financing ~~ Other
Legislative references	ITAA 1936 ITAA 1936 Pt IVA ITAA 1997 ITAA 1997 230-15(2) ITAA 1997 Div 815 ITAA 1997 Subdiv 815-B ITAA 1997 Subdiv 815-C ITAA 1997 Subdiv 815-D ITAA 1997 Div 820 ITAA 1997 Div 974 ITAA 1997 995-1 TAA 1953 TAA 1953 Sch 1 Div 280 TAA 1953 Sch 1 Div 284 TAA 1953 Sch 1 Div 358
Related Rulings/Determinations	MT 2008/1 MT 2012/3 TR 2014/8
Other references	PS LA 2006/8 PS LA 2009/4 PS LA 2009/9 PS LA 2012/1 PS LA 2013/3 PS LA 2014/2 PS LA 2015/1 <u>Dispute or object to an ATO decision</u> <u>Independent review of the Statement of Audit Position for groups with a turnover greater than \$250m</u> <u>Taxpayer alerts</u>
ATO references	1-BAPMBWJ
BSL	PGI

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