

# ***TD 2021/D3 - Income tax: aggregated turnover - application of the 'connected with' concept to corporate limited partnerships***

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This document has been finalised by [TD 2022/5](#).

 There is a Compendium for this document: [TD 2022/5EC](#) .



Status: **draft only – for comment**

## Draft Taxation Determination

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

### **❶ Relying on this draft Determination**

This publication is a draft for public comment. It represents the Commissioner’s preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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## **Ruling**

1. As a ‘corporate limited partnership’<sup>1</sup> is treated as a company for income tax purposes<sup>2</sup>, the rules for determining an entity’s ‘aggregated turnover’<sup>3</sup> in Subdivision 328-C of the ITAA 1997<sup>4</sup> also apply to a corporate limited partnership as though it were a company, rather than a partnership.

2. Accordingly, for the purposes of determining whether an entity is ‘connected with’ 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’ test<sup>5</sup> or the ‘voting control’ test<sup>6</sup>, and

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

<sup>2</sup> Pursuant to Division 5A of the ITAA 1936.

<sup>3</sup> ‘Aggregated turnover’ is defined in section 328-115 of the *Income Tax Assessment Act 1997* (ITAA 1997).

<sup>4</sup> All legislative references in this draft Determination are to the ITAA 1997 unless otherwise indicated.

<sup>5</sup> The general control test (as is applicable to determining the direct control of a corporate limited partnership) is in subparagraphs 328-125(2)(a)(i) and (iii).

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

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- the specific test for determining whether an entity directly controls a partnership<sup>7</sup> does not apply to determining whether an entity directly controls a corporate limited partnership.

3. Further, by virtue of being treated as a company for income tax purposes, a corporate limited partnership is capable of being an ‘affiliate’ of another entity within the meaning of section 328-130.<sup>8</sup>

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

4. *ABC LP (ABC), a corporate limited partnership, needs to work out its aggregated turnover for the 2021 income year to determine its eligibility for temporary full expensing.*

5. *Pursuant to 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.*

6. *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). These limited partners are not affiliates of each other within the meaning of section 328-130.*

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

8. *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).*

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

10. *Therefore, ABC needs to include the annual turnover of EFG in its aggregated turnover for the 2021 income year.*

11. **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.*

**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 2021 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%.*

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

<sup>8</sup> 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.

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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 test 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 2021 income year.*

20. **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.*

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#### **Date of effect**

21. When the final Determination is issued, it is proposed to apply 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*).

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**Commissioner of Taxation**

13 October 2021

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## Appendix 1 – Explanation

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

### Background to Subdivision 328-C

22. Pursuant to Subdivision 328-C<sup>9</sup>, 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.<sup>10</sup> An entity’s aggregated turnover for an income year is comprised of its annual turnover<sup>11</sup>, together with the annual turnover of any entity (including foreign resident) that is connected with<sup>12</sup> it, or is an affiliate<sup>13</sup> of it, at any time during the income year.<sup>14</sup>

23. 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 back<sup>15</sup> and temporary full expensing<sup>16</sup> 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).<sup>17</sup> 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’

24. Subsection 995-1(1) defines a ‘limited partnership’ as<sup>18</sup>:

- (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.

25. Division 5A of the ITAA 1936 operates to treat certain limited partnerships as companies for income tax purposes; such partnerships are referred to as ‘corporate limited

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<sup>9</sup> Subdivision 328-C applies in relation to the 2008 income year and subsequent income years; refer to paragraphs 1.37 and 2.69 of the Explanatory Memorandum to the Tax Laws Amendment (Small Business) Bill 2007 (the EM).

<sup>10</sup> Section 328-110.

<sup>11</sup> ‘Annual turnover’ is defined in section 328-120.

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

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

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

<sup>15</sup> The temporary loss carry back provisions are contained in Division 160.

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

<sup>17</sup> For temporary loss 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 ITTP Act which amends the reference in Subdivision 328-C from \$10 million to \$5 billion.

<sup>18</sup> 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'.<sup>19</sup> 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.<sup>20</sup>

26. 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)<sup>21</sup>, and
- a limited partnership that is a foreign hybrid limited partnership within the meaning of section 830-10.<sup>22</sup>

27. 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.<sup>23</sup> 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.<sup>24</sup>

### **The treatment of corporate limited partnerships for income tax purposes**

28. 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 law<sup>25</sup> so as to treat the corporate limited partnership as a company by deeming, among other things, that<sup>26</sup>:

- a reference to a company (other than a reference to a private company)<sup>27</sup> or a body corporate includes a corporate limited partnership<sup>28</sup>
- a reference to a partnership does not include a corporate limited partnership (with the implication being that Division 5 of the ITAA 1936 does not apply to corporate limited partnerships)<sup>29</sup>
- 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 partnership<sup>30</sup>

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<sup>19</sup> Sections 94A and 94D of the ITAA 1936.

<sup>20</sup> 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.

<sup>21</sup> Subsection 94D(2) of the ITAA 1936.

<sup>22</sup> Subsection 94D(5) of the ITAA 1936.

<sup>23</sup> 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?*

<sup>24</sup> See TD 2008/15.

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

<sup>26</sup> Section 94H of the ITAA 1936.

<sup>27</sup> Section 94N of the ITAA 1936.

<sup>28</sup> Section 94J of the ITAA 1936. This does not include the definitions of 'dividend', 'resident' or 'resident of Australia' in subsection 6(1) of the ITAA 1936 or Division 355.

<sup>29</sup> Section 94K of the ITAA 1936.

<sup>30</sup> 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 partnership<sup>31</sup>, and
- a reference to a shareholder includes a reference to a partner in a corporate limited partnership.<sup>32</sup>

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

29. 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.<sup>33</sup>

30. Subsection 328-125(2) sets out the tests for determining whether an entity directly controls another entity other than a discretionary trust<sup>34</sup>, 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.

31. 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.

32. Paragraph 2.46 of the EM 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, then 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 test in subparagraphs 328-125(2)(a)(i) or (iii).

33. 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.

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<sup>31</sup> Section 94P of the ITAA 1936.

<sup>32</sup> Section 94Q of the ITAA 1936.

<sup>33</sup> Subsection 328-125(1).

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

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34. 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.

#### **Application of the ‘affiliate’ concept to corporate limited partnerships**

35. Pursuant to 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.<sup>35</sup>

36. 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.

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<sup>35</sup> Subsection 328-130(2).

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## **Appendix 2 – Your comments**

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

38. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au

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

**Due date:** 12 November 2021

**Contact officer:** Contact officer details have been removed following publication of the final determination.

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## References

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*Previous draft:*

Not previously issued as a draft

*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 1936 94K
- ITAA 1936 94L
- ITAA 1936 94M
- ITAA 1936 94N
- ITAA 1936 94P
- ITAA 1936 94Q
- ITAA 1936 94R
- ITAA 1936 94S
- ITAA 1936 94T
- ITAA 1936 94U

- ITAA 1936 94V
- ITAA 1936 94X
- ITAA 1997 Div 160
- ITAA 1997 160-20(b)(i)
- ITAA 1997 Subdiv 328-C
- ITAA 1997 328-110
- ITAA 1997 328-115
- ITAA 1997 328-115(3)
- ITAA 1997 328-115(3)(a)
- ITAA 1997 328-120
- ITAA 1997 328-125
- ITAA 1997 328-125(1)
- ITAA 1997 328-125(2)
- ITAA 1997 328-125(2)(a)(i)
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- 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)

*Other references:*

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

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ATO references

NO: 1-PW4VQY0  
 ISSN: 2205-6211  
 BSL: PGI  
 ATOLaw topic: Income tax ~~ Capital gains tax ~~ Small business relief ~~ Small business entity

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