


***TD 94/D55 - Income tax: where an 'infrastructure facility' is constructed or acquired by an unincorporated joint venture which is not a general law partnership, what is the nature of each joint venture participant's interest in that property as to 'ownership', 'use' and 'effective control of the use' thereof for the purposes of paragraph 159GZZZZB(1)(a) of the Income Tax Assessment Act 1936 ?***

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This document has been finalised by TD 94/81.

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## Draft Taxation Determination

**Income tax: where an 'infrastructure facility' is constructed or acquired by an unincorporated joint venture which is not a general law partnership, what is the nature of each joint venture participant's interest in that property as to 'ownership', 'use' and 'effective control of the use' thereof for the purposes of paragraph 159GZZZZB(1)(a) of the *Income Tax Assessment Act 1936*?**

1. In order that a borrowing may be a 'direct infrastructure borrowing' as defined in section 159GZZZW it is, inter alia, necessary that there be a borrower which satisfies the 'basic borrower' requirements of section 159GZZZZ and also the 'facility use' requirements of section 159GZZZZB. This Determination hypothesises that for present purposes the 'basic borrower requirements' would be, in fact, satisfied and accordingly it simply focuses upon the form of paragraph 159GZZZZB(1)(a), i.e. '....that at the time of the borrowing, the borrower intends that it will own, use and effectively control the use of the facilities on which the [borrowed] money will be spent (other than by leasing them) principally for assessable income purposes....'

2. If the legal ownership of an infrastructure facility (including a related facility) is held jointly by the participants in an unincorporated joint venture which is not a general law partnership, that property would be regarded as being owned by the participants as tenants in common. Accordingly, the ownership requirement of paragraph 159GZZZZB(1)(a) would be satisfied in respect of each participant's (fractional though undivided) interest in the property.

3. The 'use' and 'effective control of use' tests would consequently address each participant's interest in the relevant property. Those tests cause no difficulty where, to paraphrase the Explanatory Memorandum, the participants '....either operate the facility on a day-to-day basis through their employees or agents, or have such an immediate supervisory role that enables them to direct others in that day-to-day operation.' However, it is a commercial reality that a feature of many unincorporated joint ventures is the presence of an 'operator', be it one of the participants or a third party, which has day-to-day responsibility on behalf of the participants for the management of the joint venture activity. The operator would commonly be a general law agent of each participant severally. Where the existence of a such an agency relationship can be factually established, the presence of an operator would not of itself deny that each participant would 'use' and 'effectively control the use of' its particular interest in the infrastructure facility.

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Related Determinations:

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