


***TD 2016/D6 - Income tax: where an Australian corporate tax entity is a partner in a partnership, can the partnership 'hold' a direct control interest (within the meaning of section 350 of the Income Tax Assessment Act 1936 ) in a foreign company for the purpose of Subdivision 768-A of the Income Tax Assessment Act 1997 ?***

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This document has been finalised by TD 2017/21.



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## Draft Taxation Determination

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Income tax: where an Australian corporate tax entity is a partner in a partnership, can the partnership ‘hold’ a direct control interest (within the meaning of section 350 of the *Income Tax Assessment Act 1936*) in a foreign company for the purpose of Subdivision 768-A of the *Income Tax Assessment Act 1997*<sup>1</sup> ?

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### Ruling

1. Yes. Therefore a corporate tax entity that is a partner in a partnership can have a participation interest in a foreign company for the purpose of satisfying the participation test in section 768-15.

### Example 1

2. *Partner Company is an Australian corporate tax entity and is a partner in ABC Partnership. Partner Company is entitled to 60% of the net income of ABC Partnership under the Partnership Deed.*

3. *B Company is also a partner in ABC Partnership and is entitled to 40% of the net income of ABC Partnership.*

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<sup>1</sup> All legislative references in this Tax Determination are references to *Income Tax Assessment Act 1997* unless otherwise indicated.

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4. *B Company is the registered shareholder of 70% of the shares in Foreign Company on behalf of and for the benefit of ABC Partnership.*
5. *On 1 April 2015, foreign Company paid a dividend to B Company as the registered shareholder.*
6. *On 30 June 2015, the income of ABC Partnership was distributed to its partners.*
7. *On the basis that under the Partnership Deed as at 1 April 2015 Partner Company is entitled to 60% of the net income of ABC Partnership, Partner Company holds a direct control interest in ABC Partnership of 60%.*
8. *On the basis that as at 1 April 2015, B Company holds 70% of the shares in Foreign Company on behalf of and for the benefit of ABC Partnership, the partnership has a direct control interest of 70% in the foreign company.*
9. *Partner Company's direct participation interest in ABC Partnership (60%) multiplied by ABC partnership's direct participation interest in Foreign Company (held on behalf of ABC Partnership) (70%) is 42%.*
10. *Partner Company satisfied the participation test in section 768-15 at the time Foreign Company distributed the dividend to Partner Company because Partner Company's participation interest in Foreign Company at that time is greater than 10%.*

## **Date of effect**

11. *When the final Determination is issued, it will apply to foreign equity distributions made on or after 17 October 2014, being the date Subdivision 768-A commenced operation.*

## Appendix 1 – Explanation

**ⓘ** *This Appendix 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.*

12. Subdivision 768-A provides that in certain circumstances an equity distribution made by a foreign company to an Australian resident corporate tax entity is not assessable and not exempt income (NANE income).
13. A foreign equity distribution can be NANE income whether or not the Australian corporate tax entity receives the distribution from a foreign company 'directly or indirectly through one or more interposed trusts or partnerships'.<sup>2</sup>
14. For the distribution to be NANE income the Australian corporate tax entity must satisfy the participation test in relation to the foreign company at the time the distribution is made.<sup>3</sup>
15. The Australian corporate tax entity will satisfy the participation test if the sum of its direct and indirect participation interests in the foreign company is at least 10%.<sup>4</sup>
16. Where the Australian corporate tax entity holds its interest in the foreign company indirectly, section 960-185 states that its indirect participation interest is worked out by multiplying its direct participation interest in the intermediate entity by the intermediate entity's direct participation interest in the foreign company.
17. Where the Australian corporate tax entity has an interest in the foreign company indirectly through a partnership, the intermediate entity for the purpose of section 960-185 will be the partnership. A partnership is recognised as an entity.<sup>5</sup>
18. For the purpose of working out the direct control interest that the partnership 'holds' in foreign company, reference needs to be made with respect to the percentage of share capital, rights to distribution or rights to votes that the shareholder partner has in the foreign company which forms a part of the partnership assets.<sup>6</sup>
19. The 'particular time' when applying section 350 of the ITAA 1936 for the purpose of paragraph 768-5(2)(d) will be the time the foreign equity distribution is made.<sup>7</sup>
20. Finally, the direct participation interest that the Australian corporate tax entity (partner) holds in the partnership is worked out by determining the partner's direct control interest in the partnership under item 3 of subsection 960-190(1) and section 350 of the ITAA 1936 (as modified by subsection 960-190(3)).

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<sup>2</sup> Section 768-1.

<sup>3</sup> Paragraph 768-5(2)(d).

<sup>4</sup> Section 768-15.

<sup>5</sup> Section 960-100

<sup>6</sup> Section 350 of the *Income Tax Assessment Act 1936* (ITAA 1936). Where the shareholder partner's percentage share of these rights differ, the greater percentage is used (subsection 350(1) of the ITAA 1936). In calculating the percentage of rights to distributions, the percentage needs to be calculated at the end of the statutory accounting period (subsections 350(3) and 350(4) of the ITAA 1936).

<sup>7</sup> See reference to 'at the time the distribution is made' in paragraph 768-5(2)(d), 'at a time' in section 768-15 and 'at a particular time' in subsection 960-185(1) and section 350 of the ITAA 1936.

21. The direct control interest the partner ‘holds’ in the partnership ‘at a particular time’ is equal to the percentage share of contributed capital, distribution rights or decision making rights that the partner holds at that time.<sup>8</sup> The ‘particular time’ when applying section 350 of the ITAA 1936 will be the time the foreign equity distribution is made.<sup>9</sup>

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<sup>8</sup> Section 350 of the ITAA 1936 and subsection 960-190(3). Where the partner’s percentage share of these rights differ, the greater percentage is used (subsection 350(1) of the ITAA 1936).

<sup>9</sup> In calculating the percentage of rights to distributions, the percentage needs to be calculated at the end of the statutory accounting period (subsections 350(3) and 350(4) of the ITAA 1936).

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## **Appendix 2 – Your comments**

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22. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

23. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments, and
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

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

**Due date:** 20 January 2017  
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## References

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*Previous draft:*

Not previously issued as a draft

- ITAA 1997
- ITAA 1997 Subdiv 768-A
- ITAA 1997 768-1

*Related Rulings/Determinations:*

TD 2008/24; TR 2006/10; TR 2016/D2

- ITAA 1997 768-5(2)(d)
- ITAA 1997 768-15
- ITAA 1997 960-100

*Legislative references:*

- ITAA 1936
- ITAA 1936 350
- ITAA 1936 350(1)
- ITAA 1936 350(3)
- ITAA 1936 350(4)

- ITAA 1997 960-185
  - ITAA 1997 960-185(1)
  - ITAA 1997 960-190(1)
  - ITAA 1997 960-190(3)
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ATO references

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