


TD 2008/D1 - Income tax: can an Australian-formed unincorporated association of persons 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?

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This document has been finalised by [TD 2008/15](#).



Draft Taxation Determination

Income tax: can an Australian-formed unincorporated association of persons 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*?

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Ruling

1. No. An Australian-formed unincorporated association of persons 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 *Income Tax Assessment Act 1936* (ITAA 1936).
2. An association of persons cannot be a corporate limited partnership unless it is a limited partnership under paragraph (a) of the definition of 'limited partnership' in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).
3. One of the requirements of that paragraph is that the liability of at least one of the associated persons must be limited. For unincorporated associations formed in Australia, that can only happen by operation of the Australian State laws relating to limited partnerships. One of the requirements to be a limited partnership under such State laws is that the association is a partnership under the general law which, in itself, requires that the association be carrying on a business in common with a view to profit.

Example

4. Tom and QLDABC Pty Ltd are registered as a limited partnership in Queensland. QLDABC Pty Ltd is recorded as the general partner and Tom as the limited partner. Tom and QLDABC Pty Ltd are not carrying on a business in common with a view to profit. The activities of their association are limited to holding shares in an associated company, QLDXYZ Pty Ltd. Although their association is in receipt of dividend income jointly from the shares in QLDXYZ Pty Ltd, the liability of at least one of those persons (namely Tom) is not limited by virtue of the Queensland legislation relating to limited partnerships because their association does not carry on a business in common with a view to profit. (No other law might apply to limit the liability of either person in this case.)

5. Their association is not a 'limited partnership' as defined in paragraph (a) of the definition of 'limited partnership' in subsection 995-1(1) of the ITAA 1997 and so is not a 'corporate limited partnership' as defined in section 94D of the ITAA 1936.

Date of effect

6. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the final Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the final Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

13 February 2008

Appendix 1 – Explanation

① *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.*

Explanation

7. An association cannot be a ‘corporate limited partnership’ as defined in section 94D of the ITAA 1936 unless it is a ‘limited partnership’.¹
8. ‘Limited partnership’ is defined in subsection 6(1) of the ITAA 1936 to have the same meaning as in the ITAA 1997.
9. ‘Limited partnership’ is defined in subsection 995-1(1) of the ITAA 1997 to mean:
 - (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.
10. A limited partnership within the meaning of paragraph (b) cannot be a corporate limited partnership.²
11. A key requirement to satisfying paragraph (a) is that the liability of at least one of the persons in the association of persons is limited.

Meaning of limited liability in the context of paragraph (a)

12. The reference to the liability of at least one of the ‘partners’ being limited is a reference to a limitation of their liability to contribute to the debts, obligations or other liabilities of the ‘partnership’ by reason of the legal system under which the ‘partnership’ is formed. This is made clear by the Explanatory Memorandum to the Bill that introduced Division 5A of Part III of the ITAA 1936.³
13. The Australian State laws relating to limited partnerships are the only applicable laws under which a person’s liability as a ‘partner’ in an unincorporated association formed in Australia could be limited in the sense required by paragraph (a) of the definition of ‘limited partnership’ in subsection 995-1(1) of the ITAA 1997.

¹ See subsection 94D(1) of the ITAA 1936.

² Subsection 94D(2) of the ITAA 1936.

³ See the Explanatory Memorandum to Taxation Laws Amendment Bill (No. 6) 1992, ‘Background to the legislation’ and ‘What is a limited partnership?’ sections under ‘Taxation of limited partnerships as companies’.

Limited partnerships under State legislation are a special sub-class of partnership

14. In the jurisdiction of each of the Australian states, limited partnerships are constituted and governed as a special sub-class of partnership under the applicable Partnership Act or a special statute⁴ and are subject to the ordinary law of partnership except to the extent of the modified rules and registration requirements under the limited partnership provisions.⁵ Consistently with the way ordinary partnerships are treated, these statutes do not contain provisions that give such limited partnerships any separate legal personality.⁶

Limited partnerships under State law must carry on a business in common with a view to profit

15. One of the fundamental requirements to be a limited partnership under the law of the Australian States is the requirement to be a 'partnership', which each of the State partnership Acts defines⁷ based on a partnership being the relation which subsists between persons carrying on a business in common with a view to profit.

16. Therefore, an unincorporated association of persons formed in Australia cannot satisfy paragraph (a) of the definition of 'limited partnership' in subsection 995-1(1) of the ITAA 1997, and therefore cannot be a 'corporate limited partnership' as defined in section 94D of the ITAA 1936, unless that association of persons carries on a business in common with a view to profit.

17. At first blush it might be thought that this conclusion leaves no scope for the operation of the part of the definition of 'limited partnership' that refers to an association of persons (other than a company) in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited. However, the definition has a wider application than to limited partnerships under Australian State law. It is made clear by the Explanatory Memorandum to the Bill that introduced Division 5A of Part III of the ITAA 1936 that the intention was that the Division not be confined to limited partnerships formed in Australia. The definition of 'limited partnership' was therefore made 'sufficiently general to apply to limited partnerships as formed under many legal systems'.⁸ The part of the definition of 'limited partnership' referred to above may thus apply presently to an unincorporated association formed other than in Australia that does not carry on a business in common with a view to profit.

⁴ Part 3 of the *Partnership Act 1892* (NSW); Chapter 3 of the *Partnership Act 1891* (Qld); Part 3 of the *Partnership Act 1891* (SA); *Limited Partnerships Act 1908* (Tas); Part 3 of the *Partnership Act 1958* (Vic); *Limited Partnerships Act 1909* (WA). Limited partnership legislation has not been enacted in the ACT or NT. All references in this Taxation Determination to provisions of Australian state partnership legislation are to provisions of these Acts unless otherwise specified.

⁵ NSW, sections 49, 50 and 50A; Qld, sections 5A and 49; SA, sections 47 and 48; Tas, sections 4 and 7; Vic, sections 49 and 50; WA, sections 4 and 7.

⁶ Several Australian states, the Australian Capital Territory and the Northern Territory have created another special sub-class of partnership – incorporated limited partnerships – which are given separate legal personality. They are not the subject of this Taxation Determination because they are not unincorporated associations.

⁷ NSW, subsection 1(1); Qld, subsection 5(1); SA, subsection 1(1); *Partnership Act 1891* (Tas), subsection 6(1); Vic, subsection 5(1); *Partnership Act 1895* (WA), subsection 7(1). This definition is adopted from the common law.

⁸ See the Explanatory Memorandum to Taxation Laws Amendment Bill (No.6) 1992, 'What is a limited partnership?' section under 'Taxation of limited partnerships as companies'.

Conclusive evidence provisions under State law do not override that requirement

18. It has been suggested the construction of the registration and conclusive evidence provisions in certain Australian States override a requirement for an association of persons inter alia to carry on a business to be a limited partnership under the Australian State legislation.

19. In each Australian State a certificate must be issued on registration of a limited partnership. In New South Wales, Queensland, South Australia and Victoria such a certificate is conclusive evidence that the limited partnership was formed on the date of registration and the partnership to which it refers consisted at the relevant time of the general partners and limited partners named in the certificate.⁹

20. The Commissioner considers while a certificate is conclusive evidence of the time of formation of an association entitled to be registered as a limited partnership, it is not conclusive evidence of an entitlement to register in the first place. If the association is incapable of being a limited partnership, for example, because it is not a partnership (because the association of persons is not carrying on a business in common with a view to profit), then its registration and the relevant 'conclusive evidence' provision do not change that. That view is consistent with that taken in a line of authorities relating to the effect of 'conclusive evidence' provisions concerning the registration of trade unions.¹⁰

21. Registration as a limited partnership does not establish that there is at any particular time, or ever, any partner whose liability to contribute to the liabilities of the partnership actually is limited. In each Australian State while a supposed limited partner takes part in the management of the business of the limited partnership that partner has the same liability as a general partner in relation to liabilities of the partnership incurred during that period.¹¹ The liability of the supposed limited partner is then not limited during such a period. As a supposed limited partner may take part in the management of the business of the limited partnership from the commencement of that business and throughout the continuance of the limited partnership, each Australian State's legislation is consistent with the possibility of there being no partner actually enjoying any limitation of liability although the limited partnership is registered.

22. As registration in each Australian State does not conclusively establish that there is at any particular time, or ever, any partner enjoying limitation of liability, there is no reason to infer that the matters conclusively established by State registration in any way override the requirement that an association of persons carry on a business in order to be a limited partnership under the Australian State legislation.

⁹ NSW, subsection 58(4); Qld, subsection 51(4); SA, subsection 56(4); Vic, subsection 58(4).

¹⁰ See the High Court's decision in *Federated Engine-Drivers and Firemen's Association of Australasia v. The Broken Hill Proprietary Company Limited* (1911) 12 CLR 398, the New South Wales Court of Appeal's decision in *Australian Workers' Union v. Shop Distributive and Allied Employees' Association* [1978] 1 NSWLR 387, and the Federal Court's discussion and application of those decisions in *Sharpe v. Goodhew* (1990) 96 ALR 251, at 265-266.

¹¹ NSW, subsection 67(2); Qld, subsection 60(4); SA, subsection 65(2); Tas, subsection 6(3); Vic, subsection 67(2); WA, subsection 6(1).

Appendix 2 – Your comments

23. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

Due date: 14 March 2008
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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- corporate limited partnerships
- limited partnerships
- partnerships

Legislative references:

- ITAA 1936 Division 5A of Part III
- ITAA 1936 6(1)
- ITAA 1936 94D
- ITAA 1936 94D(1)
- ITAA 1936 94D(2)
- ITAA 1997 995-1(1)
- Partnership Act 1892 (NSW) Pt 3
- Partnership Act 1892 (NSW) 1(1)
- Partnership Act 1892 (NSW) 49
- Partnership Act 1892 (NSW) 50
- Partnership Act 1892 (NSW) 50A
- Partnership Act 1892 (NSW) 58(4)
- Partnership Act 1892 (NSW) 67(2)
- Partnership Act 1891 (Qld) Chap 3
- Partnership Act 1891 (Qld) 5(1)
- Partnership Act 1891 (Qld) 5A
- Partnership Act 1891 (Qld) 49
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- Partnership Act 1891 (Qld) 60(4)
- Partnership Act 1891 (SA) Pt 3
- Partnership Act 1891 (SA) 1(1)
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- Partnership Act 1891 (SA) 65(2)
- Partnership Act 1891 (Tas) 6(1)
- Limited Partnerships Act 1908 (Tas)
- Limited Partnerships Act 1908 (Tas) 4
- Limited Partnerships Act 1908 (Tas) 6(3)
- Limited Partnerships Act 1908 (Tas) 7
- Partnership Act 1958 (Vic) Pt 3
- Partnership Act 1958 (Vic) 5(1)
- Partnership Act 1958 (Vic) 49
- Partnership Act 1958 (Vic) 50
- Partnership Act 1958 (Vic) 58(4)
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- Partnership Act 1895 (WA) 7(1)
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- Limited Partnerships Act 1909 (WA) 4
- Limited Partnerships Act 1909 (WA) 6(1)
- Limited Partnerships Act 1909 (WA) 7

Case references:

- Australian Workers' Union v. Shop Distributive and Allied Employees' Association [1978] 1 NSWLR 387
- Federated Engine-Drivers and Firemen's Association of Australasia v. The Broken Hill Proprietary Company Limited (1911) 12 CLR 398
- Sharpe v. Goodhew (1990) 96 ALR 251

Other references:

- Explanatory Memorandum to Taxation Laws Amendment Bill (No. 6) 1992

ATO references

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