

Global Tax Alert

News from Transfer Pricing

Australian Taxation Office's proposed compliance approach to use of arm's-length debt test: A detailed review

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Executive summary

On 28 August 2019, the Australian Taxation Office (ATO) released [draft PCG 2019/D3](#) (the draft PCG) which sets out the ATO's proposed compliance approach to the use of the Arm's-Length Debt Test (ALDT) for the purposes of Australia's thin capitalization regime.

The draft PCG outlines the increased analysis and documentation expected by the ATO for a taxpayer to apply the ALDT. The more stringent requirements reflect the ATO's overarching view that gearing (the ratio of a company's loan capital (debt) to the value of its ordinary shares (equity); leverage) in excess of the safe harbor debt amount should only be observed in limited circumstances.

The type of analysis and evidence that taxpayers are obligated to consider under the PCG approach may come as a surprise to many taxpayers given the generally accepted approaches that have been followed historically and accepted by the ATO in risk reviews or other ATO compliance products, and the fact that no legislative change has occurred with regard to the ALDT.

Like other PCGs, the draft PCG contains "risk zones" (white, low, and medium-high) guiding the level of expected ATO scrutiny. However, unlike other PCGs, these risk zone criteria provide very limited circumstances where a taxpayer can achieve a low risk rating when applying the ALDT. In particular, where other

PCG's encourage behavioral change to achieve low-risk status, the draft PCG contains a limited ability for taxpayers to change their risk rating, outside of abandoning the ALDT or having white-zone discussions with the ATO. Additionally, the draft PCG does not consider materiality that would allow taxpayers to vary the breadth and depth of the ALDT analysis commensurate with the quantum of debt involved. These departures from approaches taken in other PCGs reflects the ATO's overarching view that few taxpayers should apply the ALDT.

EY is involved in ongoing consultation with the ATO to address fundamental concerns with the practical application of the draft PCG. In this regard, the ATO continues to encourage taxpayers to proactively engage with them to address specific ALDT application issues. EY has worked closely with taxpayers in these discussions to increase the level of comfort that may be achieved.

Detailed discussion

Overview

Application of the Guideline

The draft PCG augments the draft Taxation Ruling TR 2019/D2 (the draft Ruling) released in April regarding the application of the ALDT (See EY Global Tax Alert, *Australian Tax Office issues draft ruling on thin capitalization arm's-length debt test*, dated 10 April 2019). ATO Taxation Ruling TR 2003/1 that contained the ATO's previous ALDT documentation methodology will be withdrawn once the draft Ruling is finalized.

The PCG will have effect from 1 July 2019 and will apply where the ALDT has been used to establish an entity's maximum allowable debt from this date.

However, the current wording as to the date of effect is unclear with regard to whether a risk to prior-year ALDT application is created by the increased requirements under the draft PCG. Based on our discussions with the ATO further guidance will be provided on the effective application date in the final PCG.

This is particularly relevant for taxpayers where the ATO has reviewed the application and conclusion under the ALDT for prior income years but has not formally "signed off" on the Arm's Length Debt Amount (ALDA) in a way that would satisfy the "white" risk zone criteria.

In practice, taxpayers will want to meet the rigorous analysis and documentation requirements for both the historical ALDT positions open to review, as well income years beyond 1 July 2019.

The draft PCG does not apply to entities considered authorized deposit-taking institutions (ADIs).

Overarching ALDT legislative framework

The ALDA of an entity is a notional amount applied to a hypothetical Australian business that would satisfy both of the following two tests:

- ▶ The notional debt capital the entity "would reasonably be expected to have throughout the income year" (the borrower's test).
- ▶ Arrangements that unrelated commercial lending institutions would "reasonably be expected to have entered into" (the lender's test).

The law requires the ALDA to satisfy both tests. Therefore, the ALDA is the lower of the amounts determined under each test.

The ATO views the "would reasonably be expected" tests as higher than a prediction of a mere possible level of debt; rather the amount must be probable. Further, the borrower test is not seeking to identify the highest debt amount that may be financially supportable. More specifically, an amount that a borrower "would" borrow must be distinguished from an amount the borrower "could" borrow. Under the new guidance taxpayers need to demonstrate that the notional debt levels, taking into account a reconstructed balance sheet, profit and loss statement, cash flows and credit rating, adequately address all of the quantitative and qualitative measures of an arm's-length capital structure by reference to comparable entities. In particular, the ATO has noted that it is imperative that the notional amount must allow for an appropriate "risk adjusted return on equity" (i.e., having regard to the relative level of gearing) to investors in a broader industry context.

The application of both tests is statutorily constrained to the generally narrower subset of the actual Australian borrower being a hypothetical stand-alone "notional Australian business" as defined by the "factual assumptions" and guided by the "relevant factors" contained within Division 820. These concepts are discussed in further detail below.

ATO compliance approach

The ATO asserts they have found limited circumstances of entities geared in excess of 60% of net assets and accordingly consider the safe harbor should produce a higher maximum allowable debt than the ALDT in most circumstances.

Limited low risk exceptions are provided to evidence where it is more common to operate with higher debt to equity ratios (such as for certain regulated infrastructure entities). Private equity does not get a specific mention in the PCG but private equity portfolio investments are potentially another example where a higher debt tolerance is appropriate.

On this basis, the ATO has only outlined the following limited circumstances to achieve a low-risk status:

- ▶ For inbound investors: borrowing being from non-associated and purely non-related parties, without any form of parental/associate credit support in situations involving a purely Australian domestic business. Taxpayers are cautioned that there will be significant scrutiny as to whether there is some form of credit support provided that underpins the third-party borrowings.
- ▶ For outbound investors: the taxpayers are widely held ASX-listed entities which are outward investing entities (and which are not also an inward investing entity) with a publicly issued credit rating for the entire global group, and where it can be shown that the same credit rating (based solely on third party debt) applies to the notional Australian business. Effectively, the ATO wants to ensure that the Australian balance sheet is not being disproportionately geared relative to the rest of world operations.
- ▶ For regulated utilities providers where 70% of its total assets comprise a regulated asset base (RAB), a specified set of financial ratios, including net debt to RAB leverage ratio equal to or less than 70%, and cash flow from operations interest cover ratio equal to, or greater than 2.7 times. In this regard, EY is seeking clarification on the application of this gearing ratio such that once the 70% of total asset threshold is met, the 70% leverage ratio is applied to total assets and not just the RAB to avoid potentially anomalous ALDT results which are lower than the safe harbor debt amount.

In all other cases however, entities relying on the ALDT, particularly those with related-party debt, will constitute medium-high risk ratings unless ATO "white zone" sign-off has been obtained.

Taxpayers meeting the low-risk criterion can expect a lower level of ATO scrutiny, generally limited to a review of their satisfaction of the low-risk criteria. Whereas, taxpayers which constitute medium-high risk are expected to invest significant time and resources to comply with the new documentation requirements outlined within the draft PCG and the draft TR.

Taxpayers with a medium-high risk rating should also expect the ATO will apply compliance resources to review the ALDT in detail. Therefore, it is critical that taxpayers consider their strategy to address the PCG and/or the relative merits of ATO white-zone discussions.

Reportable tax positions

The risk zone self-assessed under the draft PCG will need to be shown in the Reportable Tax Positions (RTP) Schedule, filed by some taxpayers with their corporate income tax returns.

This disclosure will further distinguish taxpayers that present a higher integrity risk from an ATO perspective and could conceivably hasten ATO compliance action for certain taxpayers.

Outward vs Inward

The ATO's general areas of focus differ depending on whether a taxpayer is characterized as outward or inward for thin capitalization purposes. In particular:

- ▶ In the context of inward investing entities, where third party senior debt is supplemented with related-party debt, the related-party debt significantly increases the risk profile of the entity with regard to the application of the ALDT.
- ▶ In the context of outward investing entities, the presence of significant relatively lowly geared foreign operations significantly increases the risk profile of the Australian entity with regard to application of the ALDT. This is because, as a starting point, the ATO will require taxpayers to demonstrate that the amount an independent lender "would" be willing to lend is solely with respect to the notional Australian business generally without the financial support from international operations.

Important PCG concepts

Important concepts for taxpayers to consider in relation to the PCG include:

- ▶ Arm's-length terms and conditions
- ▶ Consideration of all relevant factors and their respective weighting

Arm's-length terms and conditions

Comparables

The ATO clearly prefers Australian market comparables. However, to the extent it can be demonstrated that there are no Australian comparables, comparables from other markets may be used.

For regulated industries, the ATO specifies that overseas regulated markets are not considered to be comparable given the issues expected in quantifying adjustments.

However, given there are very few Australian comparables in the industry, in our view the ATO's concerns about adjustments can be mitigated by choosing suitable comparables from comparable markets in the same way that would occur in transfer pricing benchmarking studies. Choosing non-Australian comparables also reflects that capital markets are global, and that commercial lenders are not constrained by geographic borders in determining who they will lend to.

Terms and conditions

In arriving at an ALDA, the analysis must consider and give effect to the arm's-length terms and conditions for each debt interest on which the stand-alone notional Australian business would have borrowed.

The ATO has made it clear that taxpayers cannot simply rely on a transfer pricing analysis to demonstrate this. For example, a taxpayer could have their interest rates adjusted down for transfer pricing purposes, while for ALDT purposes the interest rate could be adjusted up, thereby limiting the entity's debt capacity.

Therefore, it is important to perform further analysis before relying on transfer pricing interest rate benchmarking in ALDT calculations. We are working with the ATO to limit these potential interest rate adjustments to extreme circumstances whereby unrealistically low interest rates are used to support excessive gearing levels and the adjustment is with respect to related-party borrowings (i.e., actual interest rates on third-party debt where there is no explicit credit support should be used for purposes of the ALDT).

Credit rating and credit worthiness

The ATO have made it clear that taxpayers cannot rely on the actual capital structure to determine the credit rating and then use this credit rating to identify the comparable companies to assess whether the gearing of the taxpayer is arm's length.

However, the ATO has acknowledged that the credit rating methodologies may be useful in some cases (e.g., identifying limits and ranges for certain financial ratios) and may help inform the weightings of the relevant factors.

Covenants

Covenants in third-party debt arrangements should be considered. When covenants are used to help determine the ALDA, the ATO expects the taxpayer to assume there is sufficient headroom built into the analysis (i.e., the taxpayer cannot adopt gearing that means the taxpayer breaches a covenant). We are working with the ATO to provide further guidance as to what constitutes "sufficient headroom" for purposes of this analysis.

In noting the above, it is important that the type of covenant and its intended restrictions are considered. For example, an entity may negotiate certain financial covenants in order to agree a desirable interest rate with a lender. Therefore, the covenants should not be read as a restriction on the level of total debt the notional Australian business would draw-down.

Consideration of the relevant factors

In determining an ALDA, the taxpayer must address certain relevant factors: both of a qualitative and quantitative nature.

The ATO specifies that all the factors listed must be considered, although the weight given to each factor in the analysis will vary depending upon the facts and circumstances of the case. However, it is expected that the analysis provides a detailed explanation and evidence as to how and to what degree each of the relevant factors are weighted.

Some factors will be more important for a borrower and some for the lender.

Quantitative factors

With respect to quantitative factors (that is, factors that can be used to directly determine an amount), it is granted that some may have more bearing than others and as such it would be appropriate to weight these quantitative factors accordingly.

If a specific ratio is outside an appropriate comparable range, it may be necessary to adjust the ALDA to account for this factor.

While the draft PCG does not rule out the use of a single financial ratio to support an ALDA (i.e., 100% weighting), the ATO expects to see evidence to demonstrate why the weightings are appropriate.

Qualitative factors

Taxpayers must consider whether each qualitative factor is adverse, neutral or supportive of the amount quantified above.

Return on equity capital

This corroborative exercise is designed to test the commerciality of returns attributable to hypothetical owners having regard to a revised capital structure reflecting the borrower's amount.

The ATO will adopt a capital asset pricing model (CAPM) to corroborate that the risk adjusted returns on equity (i.e., adjusted for relative levels of gearing) of the notional Australian business are consistent with the expected rates of returns for other comparable companies.

This approach requires several input parameters including market alphas and betas. This exercise can be particularly difficult for private companies or where there are few comparables in the market. Given the inherent difficulties and subjectivity in applying the CAPM, particularly to private companies, EY is working with the ATO to develop an alternative to provide assurance that the relative return earned by shareholders through their debt and equity interests is reasonable.

Gearing

The ATO expects to compare the gearing levels across a global multinational group to ensure that the relative gearing of the Australian operations is consistent with other group comparable entities. If the gearing of the Australian entity is an outlier against the global gearing profile this is a strong risk indicator for the ATO.

However, in what appears to be an inconsistent position, if a taxpayer cannot demonstrate that independent comparables have similar gearing levels, gearing consistent with the global multinational group will not be accepted by the ATO. EY is working with the ATO to clarify and address this potential inconsistency and to limit the level of analysis required in comparing capital structures across a global group including when such analysis may not be relevant.

Commercial rationale for related-party debt

The draft PCG notes that where specific commercial rationale for the debt cannot be identified and supported (i.e., the debt appears to have been introduced to achieve a tax outcome) this could make it difficult for the taxpayer to sustain that the amount of debt capital is reasonable.

We have some concerns that a "purpose" test encroaches on Part IVA concepts and often the origins and purpose of an entity's debts may not be clear to management.

Therefore, historic knowledge of why debt was used to capitalize the business and the precise tracing of debt to its purpose is not necessarily required. In many cases, refinancing of existing loans could be an acceptable commercial rational.

Between the draft Ruling and draft PCG, the ATO also states that the capital structure and leverage preferences and risk appetite of the shareholders and management are not relevant to determine what amount of debt would reasonably be expected to be borrowed.

It is accepted that the very nature of the ALDT is to objectively assess the gearing level, and therefore such leverage preferences may not be relevant. However, the view of management in other aspects cannot be completely disregarded in applying the test.

EY is working with the ATO to ensure that the scope of the application of the ALDT is appropriately limited and should not address questions of potential Part IVA concerns.

Documentation and analysis to support the application of the ALDT

The law requires that the relevant documentation is in place by the time the taxpayer files its tax return for a year, otherwise the taxpayer is exposed to administrative penalties.

However, the draft Ruling confirmed that a failure to prepare the appropriate documentation by the due date of the tax return does not preclude an entity's ability to rely on the ALDT.

On another positive note, the draft PCG is very detailed in terms of what the ATO expectations are for documentation and analysis to support the application of the ALDT and the resulting ALDA.

Annual documentation updates

The ATO specifies that prior year ALDT analyses can be taken into account in assessing the ALDT for a relevant income year to the extent that the analysis relates to the same debt capital on issue. In this instance, there is a need to demonstrate and document that there is no material change in the business.

To the extent there is material change or new debt capital has been issued, an updated analysis and documentation would be required.

Interaction with the "arm's-length principle" in transfer pricing and reclassification of debt to equity treatment in Division 974

Transfer pricing

The draft PCG also makes it clear that, although the ALDT involves some transfer pricing concepts, the ALDT itself is a distinct and separate analysis.

The application of the ALDT is statutorily constrained to the generally narrower subset of the actual Australian borrower being a hypothetical stand-alone "notional Australian business." This reduces the ability to rely on arm's-length transfer pricing analysis performed under Division 815, unless no adjustments are required to be made to distinguish the Australian borrower from the "notional Australian business."

In particular, the arm's-length terms and conditions of the debt for ALDT purposes might result in an interest rate that is higher than under a transfer pricing analysis.

Inbound taxpayers that have appropriately applied the ALDT, should also be able to rely on that capital structure for transfer pricing purposes in determining an arm's-length interest rate on related party debt. More specifically, for inbound taxpayers, it should be possible to have one "arm's-length debt amount." We have strongly recommended that the ATO grant this concession given that the significant analysis and more restrictive nature of the ALDT should result in a more conservative capital structure than allowable under Division 815.

Reclassification of debt to equity

A related matter is the position in ATO Tax Determination TD 2019/10 issued earlier this year that is contrary to a common view held by many taxpayers and practitioners that the Debt/Equity provisions in Division 974 should apply in priority to the more general transfer pricing provisions in Division 815.

This view flows from the long standing ATO approach captured in TR 2010/7 that the thin capitalization provisions attend to "excess" debt levels, while the transfer pricing provisions attend only to the pricing of the existing debt.

In this regard, a taxpayer satisfying the ALDT should not face the prospect of uncertainty that the ATO may assess a different capital structure by reclassifying debt to equity using the transfer pricing provisions, that would further

override Division 974. Once again, if an inbound taxpayer can demonstrate an arm's-length capital structure for thin capitalization purposes applying the ALDT, this should be sufficient for purposes of providing assurance that no debt recharacterization may occur.

The EY submission to the PCG will further advocate for this approach.

Implications

The key implications from the release of the draft PCG are:

1. Date of effect is 1 July 2019, however in practice, the analytical approaches and level of evidence outlined in the PCG will apply to prior years.
2. The ATO requires taxpayers relying on the ALDT to undertake analysis and documentation above and beyond previous established practice yet indicates such analysis would still not be expected to result in gearing levels above the safe harbor debt amount for most taxpayers.
3. The ATO expects limited circumstances in which taxpayers would gear in excess of 60%. The ATO has highlighted an exception for the regulated infrastructure industry, but there is no specific acknowledgement provided in relation to other industries that similarly adopt higher gearing levels.
4. The ATO's low-risk zone scenarios are very restrictive, and the vast majority of ALDT's will be subject to ATO compliance activity.
5. The ATO's guidance is now more detailed (which is welcomed) but still results in many practical application issues.

Considering the significant issues identified above and in the draft TR 2019/D2, taxpayers should carefully review capital structures and intra-group financing arrangements.

EY is working closely with the ATO to address a practical application of the ALDT which addresses ATO concerns and ensures that the ALDT remains a viable option for taxpayers.

In this regard, comments on the draft PCG can be submitted until 9 October 2019 and we welcome input from taxpayers to include in our submission.

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