



# Foreign Investment Application Checklist

## Appendix – Tax Checklist

This Tax Checklist outlines information required by the Australian Taxation Office (ATO) during the review of foreign investment proposals. Applicants should ensure the following tax information is included in their foreign investment notifications to Treasury. This allows for a quicker assessment of the tax risks.

### If the applicant is unable to provide sufficient information

The ATO requires that all relevant information specified in the Foreign Investment Application Checklist and Tax Checklist be provided.

Where information is not provided as part of the initial application, it will routinely be requested through a request for information which will contribute to an extended review time for the application. In some cases, the ATO may require further additional information (not specified in either Checklist) to better understand the proposed transaction and the potential tax risk.

If information is not available at the time of providing a response, but is expected to become available later, provide:

- a timeframe within which the information will (or is expected to) become available, and
- the information when it becomes available.

If information is requested through a request for information and is unable to be supplied, the ATO may recommend that the decision-maker impose particular tax conditions requiring the applicant to provide the information later.

## Tax character

1. For **each entity** in the post-transaction structure diagram, provide the following details using the table format below:

	<Entity name>
Full legal name of the entity	
Country/Seat of Incorporation	
Tax residence	
Australian tax character e.g. <ul style="list-style-type: none"> <li>• Head entity of a tax consolidated group</li> <li>• Member of a tax consolidated group</li> <li>• Flow-through trust</li> <li>• Public trading trust</li> <li>• Managed investment trust</li> <li>• Complying superannuation fund</li> <li>• Foreign pension fund that is withholding tax exempt under subsection 128B(3) of the <i>Income Tax Assessment Act 1936</i> (Cth) (<b>ITAA 1936</b>)</li> <li>• Non-resident beneficiary that is assessed under section 98A of the ITAA 1936</li> </ul>	
Tax character of foreign entities in their jurisdiction of residence and incorporation. If the entity is not subject to tax on certain income or gains in its residence jurisdiction, please provide details.	
The key role of the entity (e.g. holding entity, finance entity, special purpose vehicle, operating entity)	
A description of their income producing assets	

2. Confirm which (if any) entities in the post-transaction structure will be members of a 'Tax Consolidated Group' or 'multiple entry consolidated group' (**MEC group**) in accordance with the consolidation rules contained in the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) and provide the name of the head entity / provisional head company for each tax consolidated group.

## Cross-border structuring, global organisational impacts and associated tax risks: Step plan

3. Provide the acquisition/restructure (the transaction) step plan including:
  - a. a diagram of the pre and post-transaction organisational structures of the Target, where relevant, identifying the members of a tax consolidated group/MEC group,
  - b. the flow of funds,
  - c. the debt or equity characterisation of funds used to finance the transaction,
  - d. the legal form and tax residency of the ultimate investor(s) or shareholder(s) ('the Investors') and all the entities interposed between them and the Target,
  - e. the Australian and foreign tax implications of the steps, and
  - f. indicate if any exemption or relief applies to each transaction step.
4. Where there is an expected change to the tax residency of an ultimate head company (UHC) of the Australian entity, provide details of:
  - a. jurisdiction of new tax residency of the UHC,
  - b. existing business presence and operations in the proposed new tax residency jurisdiction, and
  - c. alternative jurisdictions considered to locate the new UHC and why each alternative jurisdiction was not chosen/preferred.
5. Advise whether any restructuring was undertaken prior, or is expected to be undertaken following, the transaction. Include reason(s) for the restructure, a description of the restructuring steps, any known or anticipated Australian and foreign tax implications of each step, and a step plan (if available).

## Funding

This section applies to the proposed funding of the transaction.

### General

6. Provide details of the existing and proposed equity and debt instruments of Australian entities, including Australian Bid/Hold Co(s). To avoid doubt, this includes instruments that are not classified under Division 974 of the ITAA 1997.
7. State if the ultimate unitholders or shareholders (either directly or indirectly via a wholly owned subsidiary or associate) propose to borrow from a third party for the purpose of financing part or all the proposed acquisition. If yes, provide the following information for each third-party loan:
  - a. the lender's name,
  - b. the amount,
  - c. the currency used, and
  - d. the rate of interest (including AUD equivalent interest rate).
8. Using the below table, provide details of the existing and proposed debt and equity arrangements of Australian entities, including Australian Bid/Hold Co(s) used for the purpose of acquiring Target Co/Group.
  - a. Include details of existing and proposed debt and equity arrangements of any non-resident direct beneficiaries/unitholders of Division 6 trusts, to the extent that they are expected to give rise to deductible amounts against the distributions from Division 6 trusts.
  - b. Regarding debt instalments, attach any relevant registrations under the *Personal Property Securities Act 2009* (Cth).

Key terms
Legal characterisation (e.g. loan, note, ordinary shares, preference shares etc)
Tax Treatment
Tax Treatment for counterparty in foreign jurisdiction
Confirm whether treatment is different for income tax purposes and accounting purposes
Recipient of Funds (Borrower, Issuer)
Tax residency of Recipient
Provider of Funds (Lender, Holder) (Clearly state if the Provider/s are a related party or not)
Tax residency of Provider
Amount
Tenor
Ranking (i.e. senior, subordinate, mezzanine)
Currency
Interest rate ( <i>if currency is not AUD, also equivalent AUD rate</i> )
Credit rating of the Borrower
Other features (security including copies of <i>Personal Property Securities Act 2009</i> (Cth) registration, restrictive covenants, guarantees, guarantee fee, contingencies, payment in kind, convertibility, options, withholding tax gross-up clause etc.)

## Related Party Financing (RPF)

This section applies to RPF. Where no RPF is expected these questions do not need to be answered.

9. For any related party debt disclosed above, whether or not cross-border, having regard to Schedule 1 of the Practical Compliance Guideline 2017/4 (**PCG 2017/4**), advise for each:
  - a. the risk rating,
  - b. how each price and behavioural indicator was scored, and
  - c. which of the comparison options at paragraph 61 of Schedule 1 of PCG 2017/4 was used and the key terms of the debt (as set out in the table at question 8) and where the global cost of funds options is used, include the working papers created to calculate the cost.
10. Provide for each arrangement where a payment is expected to be made to the Investors or a non-resident associate of the Investors after the transaction's completion:
  - a. the name and residency of the recipient,
  - b. a description of the payment's characterisation for tax purposes in the hands of the recipient,
  - c. the proportion of the payment subject to withholding tax,
  - d. if the withholding tax rate is less than 10% or the payment is not subject to withholding tax, the reason(s) why,
  - e. confirmation of whether the arrangement was entered into on a back-to-back basis, and if so, details of the other loan or similar arrangement that provided the original funding, including the name and residency of the entities involved, a description of the tax and accounting characterisation of the arrangement and the associated payments in the relevant jurisdictions and the cumulative total tax rate the interest/distribution will be subject to,
  - f. the tax treatment of the receipt for the non-resident entity receiving the distribution, including the effective tax rate it will be subject to,
  - g. analysis of the application of Subdivision 832-C of the ITAA 1997 to the arrangement,
  - h. if the payment is in the nature of interest or an amount under a derivative financial arrangement and the payment is subject to a foreign tax rate of 10% or less, confirm if the integrity rule in Subdivision 832-J of the ITAA 1997 applies, and
  - i. if the payment is in the nature of interest or an amount under a derivative financial arrangement and deductions were not denied under Subdivision 832-J of the ITAA 1997, advise the reason for this and provide all the relevant details.

Reasons may include:

- i. Principal purpose test is not satisfied,
- ii. Same or lower rate of tax would have been paid by ultimate parent,
- iii. It is reasonable to conclude that the amount of the payment has been considered under the CFC provisions (Part X of the ITAA 1936) and the sum of the attribution percentages of each attributable taxpayer in relation to the interposed foreign entity is at least 100%, or the payment has been taken into account under the law of a foreign country with substantially the same effect as the CFC provisions in Part X,
- iv. The payment has given rise to a mismatch in an earlier Subdivision of 832.

### Interest withholding tax exemption – public offer test

This section applies to interest withholding tax exemption. Where the public offer test is not relied upon these questions do not need to be answered.

11. If the 'public offer test' exemption from interest withholding tax in section 128F of the ITAA 1936 is being relied upon, describe the process (and provide evidence of that process) by which the debt interests or debentures have been publicly offered, to meet the requirements of the 'public offer test'. Include:
  - a. details as to which 'public offer test' was satisfied under subsection 128F (3), (3A) or (4),
  - b. the list of parties to which an invitation was made in relation to the public offer (whether or not they ultimately took up the offer),
  - c. any publication, offering circular, brochure, prospectus, information memoranda or other similar marketing document related to the subscription,
  - d. any draft term sheet or equivalent that was provided, and
  - e. confirm whether any dealer, manager or underwriter was involved with your capital raising process. Provide names, descriptions, agreements, and any marketing documents produced by the dealer, manager, or underwriter.

### Thin capitalisation

12. For each entity mentioned in Question 1 under the Tax Character section, for the income year/s in which the transaction is to be undertaken (whether all or any part), advise whether the entity:
  - a. will be subject to the thin capitalisation rules in Division 820 of the ITAA 1997
  - b. anticipates satisfying the asset threshold test in section 820-37 of the ITAA 1997
  - c. anticipates claiming an exemption as a special purpose entity pursuant to section 820-39 of the ITAA 1997 (including any part of the entity's controlled member/s where the entity is the head entity of a Tax Consolidated Group or MEC group).
  - d. anticipates applying the fixed ratio test or group ratio test
  - e. anticipates applying the third party debt test and/or using the conduit financing conditions in sections 820-427B and 820-427C of the ITAA 1997.

### Debt Deduction Creation Rules (DDCR)

13. For each entity mentioned in Question 1 under the Tax Character section, for the income year/s in which the transaction is to be undertaken (whether all or any part) that commences on or after 1 July 2024, if the entity has debt deductions in the income year advise whether the entity:
  - a. will be subject to the DDCR in Subdivision 820-EAA of the ITAA 1997,
  - b. anticipates the DDCR applying to disallow debt deductions arising in relation to pre-existing arrangements (as relevant),
  - c. anticipates acquiring any CGT assets or legal or equitable obligation from an associate pair in connection with the transaction, and
  - d. anticipates using a financial arrangement to fund or facilitate the funding of a payment or distribution covered by subsection 820-423A(5A) of the ITAA 1997 in connection with the transaction.

## Private capital risk

This section applies to private equity, venture capital and private capital funds (including infrastructure funds). Where private equity, venture capital and private capital funds (including infrastructure funds) are not expected these questions do not need to be answered.

14. Provide a full and complete ownership structure that includes the details of all entities between the Fund and the Australian assets.
15. Provide complete descriptions of the functions, roles, responsibilities and commercial purpose of all interposed entities located between the Fund and the Australian assets.
16. Provide the means by which the interposed entities carry out (or will carry out) their functions, roles and responsibilities (i.e. via directors, salaried employees, contracted service providers etc.) and their locations.
17. Does the Fund / Firm have a presence or office in Australia? If yes, provide details.
18. Will a partner, director, employee, or other delegate of the Firm / Fund be appointed to the Board, management or other key role of any Australian entities in connection with the transaction? If yes, provide details.

## Intangibles Migration

This section applies to target entities with intangibles. Where a target entity does not have intangibles, these questions do not need to be answered.

19. Provide details of each planned, proposed or anticipated arrangement to transfer, create or assign rights, or otherwise make available any intangible assets from Australia to offshore related parties in connection with the Proposed Transaction, including:
  - a. details of the arrangement(s), including the names and tax residency of the entities involved and a step plan where applicable,
  - b. all commercial and non-tax reasons for the proposed arrangement(s), and
  - c. details of the anticipated Australian and foreign tax outcomes in connection with the arrangement(s).
20. Provide details of all planned, proposed or anticipated changes to the activities, assets and risks of the Australian Target (or the Australian economic group) relating to the development, enhancement, maintenance, protection or exploitation of intangible assets in connection with the Proposed Transaction.

## Non-concessional Managed Investment Trust (MIT) income

This section applies to stapled groups and other groups with an asset entity and an operating entity under some degree of common ownership (not including where those entities are both members of a tax consolidated group).

To the extent there are dealings (e.g., cross-staple lease, cross-staple loan) between the operating entity and the asset entity answer the following questions:

21. Identify and describe the key features of those dealings, including:
  - a. nature of the dealing,
  - b. how the dealing came about,
  - c. why the dealing is necessary,
  - d. if the dealing is already in existence and the date at which it was entered,
  - e. arm's length pricing mechanism used/to be used, and
  - f. forecast of income/pricing of the dealing (both quantum and methodology).
22. If there is a cross-staple loan between the asset holding side and the operating side of the stapled structure, advise whether the cross-staple loan is entered into or proposed to be entered into on back-to-back terms with the group's external loan arrangement(s). Otherwise explain how the terms of the cross-staple loan are determined and priced to be arm's length.
23. Review Taxpayer Alert 2017/1 Re-characterisation of income from trading businesses and advise:
  - a. if any of the dealings may be in the nature of, or similar to, any of the examples described in that Alert, and
  - b. your reasons for the above assessment.
24. Advise whether any entities in the holding structure will be in receipt of non-concessional MIT income, as defined in section 12-435 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA 1953**). Irrespective of the answer, provide an explanation with reference to the relevant section of Schedule 1 to the TAA 1953. For further assistance refer to Law Companion Ruling LCR 2020/2 Non-concessional MIT income.

## Hybrid mismatches

25. Confirm if any Australian entities of the acquiring group are (or will be post transaction) parties to a hybrid arrangement giving rise to a hybrid mismatch under Division 832 of the ITAA 1997 (including the imported mismatch rule).
  - a. Where you have identified a hybrid mismatch arrangement, provide details of the nature of the arrangement and outline how Division 832 of the ITAA 1997 has been applied.
  - b. If a hybrid mismatch exists but the rules have not denied a deduction or included an amount of income, provide reasoning for this.
26. For US-headquartered groups, provide details of the classification of the relevant US and non-US tax resident entities under the US check-the-box regulations. Alternatively, provide an organisational entity chart with applicable US check the box elections depicted.