Tax Insights

ATO issues final compliance approach for cross border related party debt funding

Snapshot

On 18 December 2017, the ATO released its final version of the Practical Compliance Guide PCG 2017/4 (the PCG). The PCG sets out the ATO's risk assessment framework for related party financing arrangements. The ATO's approach to the risk framework remains similar as that outlined in the draft version that the ATO released on 16 May 2017 (https://www2.deloitte.com/au/en/pages/tax/articles/ato-issues-risk-assessment-framework-tool-related-party-financing.html).

The PCG makes it clear that the risk rating exercise is a separate exercise to whether there has been a transfer pricing benefit obtained under the transfer pricing law and it is not a safe harbour in that it does not relieve taxpayers of the legal obligation to self-assess their compliance with the transfer pricing laws.

Key changes to risk factors

Whilst the underlying ATO risk indicators themselves remain similar to the draft PCG 2017/D4, one major change in approach is that the ATO has split the scoring table into 'Pricing' risk factors and 'Motivational' risk factors. The Pricing and Motivational risk factor scores combine to generate an overall risk rating, aligned with a colour zone, from 'low' to 'very high' risk. Some arrangements could be considered to be at least 'moderate risk', irrespective of the interest rate being applied. Although provided in the context of risk assessment, the deeming of certain indicators as being 'Motivational' risk factors could be seen to imply an unfair presumption by the ATO of a tax motive to an arrangement.

There have been some important changes to the scoring of the risk indicators, including:

- If certain features have <u>not</u> been factored into the interest rate, then taxpayers can score a '0' for that indicator. For example, if a loan is subordinated, but the subordination feature is not taken into account in pricing the instrument, a '0' can be scored
- The interest cover ratios used by the ATO have been reduced to what could be considered to be more realistic outcomes. For example, if interest coverage is 2.5x, this would score 3 points, while in the old PCG 2017/D4, this would have scored 10 points. Note, however that there is no carve-out for asset owning companies in development or construction phase (e.g. infrastructure, property) where interest coverage can commonly be very low or negative in the early years, although the ATO recognises that an interest cover ratio may not be indicative of the underlying risk of these types of investments, and an application may be made by such companies for a white zone assessment if interest cover is the only reason why they fall outside of green zone
- Funding from a global treasury operation can now yield a '0' score, irrespective as to whether it is in a low tax jurisdiction (provided there is sufficient substance, evidenced through sufficient senior employees and capital)
- Further definitional guidance on 'traceable third party debt', relevant third party debt and global group cost of funds. In addition, the definition of 'leverage' has been more closely aligned to that in the thin capitalisation rules (i.e., tax debt / total Australian assets).

It is noted that 'exotic features', which attract a high score of 10, include interest deferral clauses, promissory notes that do not provide rights to foreclose or accelerate payment, and differences between the borrowing currency and operating currency. Currency miss-matches appear in both the 'pricing risk scoring table' as well as the 'motivational risk scoring table', which seems punitive.

Intercompany Agreements

The final PCG confirms the ATO's expectations regarding intercompany agreements, and notes that such agreements are recommended and will be the starting point of the ATO's review. Furthermore the ATO notes (para 20): *"The agreements do not need to be as extensive as arrangements involving independent parties, but should include the key terms and conditions that borrowers and lenders would require to enter into the arrangements*."

Impact

Notwithstanding some favourable changes in the scoring tables, there will likely still be many taxpayers that fall in the high or very high risk zones. The ATO is putting such taxpayers on notice that it will seek to commence reviews as a matter of priority, and for red zone (very high risk), the case might proceed directly to audit, the taxpayer may be subject to formal powers for information gathering, and will not be eligible to access the APA program.

The ATO's 18-month 'amnesty' for transitioning existing arrangements into 'low risk' still applies, in that the Commissioner is willing to remit penalties and interest in the situation where taxpayers make a voluntary disclosure and adjust both the historic and prospective pricing into the green zone. The 18 month period commences on date of publication i.e., 18 December 2017.

The PCG applies from 1 July 2017, with additional schedules for related party derivative financial arrangements and interest-free loans between related parties expected to be released in draft form in March 2018.

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