

# **Special Topic**

## **TaxBanter Special Topic Materials**

**Grouping for aggregated turnover  
purposes**

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# Table of Contents

<b>PREFACE .....</b>	<b>1</b>
<b>Learning objectives.....</b>	<b>1</b>
<b>Acronyms and abbreviations .....</b>	<b>1</b>
<b>Technical materials.....</b>	<b>2</b>
<b>KEY IDEAS .....</b>	<b>3</b>
<b>INTRODUCTION .....</b>	<b>4</b>
<b>CASE STUDY 1.....</b>	<b>6</b>
<b>Facts.....</b>	<b>6</b>
<b>Scenario 1 — Small business CGT concessions .....</b>	<b>6</b>
<b>Group structure .....</b>	<b>6</b>
<b>Analysis — Scenario 1 .....</b>	<b>7</b>
Penny .....	7
Quentin .....	7
Rachel .....	7
X Partnership .....	7
<b>Alternative scenario 1a — Penny's unit holding is owned by Davis F/T.....</b>	<b>8</b>
<b>Alternative scenario 1b — Quentin departs, property 2 sold .....</b>	<b>9</b>
<b>Alternative scenario 1c — control in the year of change of director.....</b>	<b>10</b>
<b>Alternative scenario 1d — control in a year subsequent to change of director .....</b>	<b>11</b>
<b>Scenario 2 — Sale of passively held trust asset .....</b>	<b>11</b>
<b>Alternative scenario 2a .....</b>	<b>11</b>
Whether Quentin is connected with the Trust.....	12
Whether Queenie is connected with, or an affiliate of, the Trust .....	13
<b>Alternative scenario 2b — business carried on through wholly owned company.....</b>	<b>14</b>
Whether Q2 Pty Ltd is connected with the Trust .....	14
<b>Alternative scenario 2c — three equal shareholders .....</b>	<b>15</b>
Whether Q2 Pty Ltd is connected with the Trust .....	15
<b>Alternative scenario 2d — four equal shareholders, one minor .....</b>	<b>16</b>
<b>Alternative scenario 2e — Patrick turns 18.....</b>	<b>16</b>

## CASE STUDY 2 ..... 17

<b>Facts</b> .....	17
<b>Group structure</b> .....	18
<b>Analysis — 2022–23</b> .....	19
The Brown Family Trust .....	19
Mr Brown .....	19
Mrs Brown .....	19
Diego Pty Ltd.....	19
Alternative scenario 1 — Sale of Diego shares during 2023 .....	20
Grant Pty Ltd.....	20
Alternative scenario 2 — Mr Jackman is minority shareholder in Grant Pty Ltd ...	20
Mr Jackman .....	21
Alternative scenario 3 — Mr Jackman and management team are minority shareholders in Grant Pty Ltd.....	21
Aggregated turnover calculation — 2022–23.....	22
<b>Analysis — 2023–24</b> .....	23
Partial sale of AgriCo — amended group structure .....	23
The Brown Family Trust .....	24
Mr Brown .....	24
Mrs Brown .....	24
Diego Pty Ltd.....	24
Grant Pty Ltd.....	24
Mr Jackman .....	24
Keystone Co .....	24
K Head Co .....	25
Mr and Mrs King .....	25
Alternative scenario 4 — Mr and Mrs King both own 50 per cent of K Head Co ...	25
N Co, O Co, P Co .....	25
Non-entity joint venture .....	25
Aggregated turnover calculation — 2023–24.....	26
<b>Analysis — 2024–25</b> .....	27
The Brown Family Trust group .....	27
The K Head Co group.....	27
Aggregated turnover calculation — 2024–25.....	27

## CASE STUDY 3 ..... 28

<b>Facts</b>	<b>28</b>
<b>Group structure</b>	<b>28</b>
<b>Analysis — 2022–23</b>	<b>29</b>
Smith Family Trust	29
Mrs Smith	29
Mr Smith	30
Smith Co	30
Tran Family Trust	30
Mr Tran — sole trustee	30
Individual beneficiaries	30
Tina — the daughter	31
Tran Co — corporate beneficiary	31
Alternative 1 — Discretionary trust as beneficiary	32
Aggregated turnover calculation 2022–23	32
<b>Analysis — 2023–24</b>	<b>33</b>
Mr Smith's retirement	33
Aggregated turnover calculation 2023–24	34

## THE AGGREGATED TURNOVER GROUPING RULES .....35

<b>Concessions for which aggregated turnover is relevant</b>	<b>35</b>
Concessions available under each aggregated turnover threshold	36
<b>Aggregated turnover</b>	<b>39</b>
Exclusions from calculation of aggregated turnover	39
Special rule for passively held CGT assets	40
Background — basic conditions for passively held assets	40
Calculating aggregated turnover to determine whether entity is a CGT SBE	41
<b>Annual turnover</b>	<b>41</b>
The general rule	41
The exclusions	41
The modifications	42
Dealings with associates	42
Business carried on for part of the year	42
Modification by regulation	43
<b>When an entity is 'connected with' another entity</b>	<b>43</b>
The meaning of direct control	44
Direct control of an entity other than a discretionary trust	44

Direct control of a discretionary trust .....	45
Commissioner's discretion to determine that an entity does not control another entity — s. 328-125(6).....	48
<b>The meaning of indirect control .....</b>	<b>51</b>
Commissioner's guidance on the public entity exception .....	52
<b>Application of the 'connected with' rules to partnerships etc.....</b>	<b>52</b>
Partnerships, foreign hybrids and non-entity JVs .....	52
Corporate limited partnerships.....	55
<b>Assumption for small business CGT concessions — shares and trust interests .....</b>	<b>56</b>
An illustration .....	57
<b>When an entity is an 'affiliate' of another entity .....</b>	<b>58</b>
Deemed affiliate rule for Div 152 purposes — spouses and minor children — passively held assets .....	60
The application of s. 152-47 — two different views .....	61
<b>APPENDIX.....</b>	<b>62</b>
<b>Summary of tax concessions.....</b>	<b>62</b>
Concessions with a \$2 million aggregated turnover threshold .....	62
Concession with a \$5 million aggregated turnover threshold .....	62
Concessions with a \$10 million aggregated turnover threshold .....	63
Income tax .....	63
GST.....	63
Tax administration.....	64
Concessions with a \$20 million aggregated turnover threshold .....	64
Concessions with a \$50 million aggregated turnover threshold .....	65
Income tax .....	65
FBT .....	66
Tax administration.....	66
Concession with a \$100 million aggregated turnover threshold.....	67
Concessions with a \$5 billion aggregated turnover threshold .....	67
<b>Definition of 'aggregated turnover' .....</b>	<b>68</b>
<b>Definition of 'annual turnover' .....</b>	<b>69</b>
<b>Definition of 'connected with an entity' .....</b>	<b>70</b>
<b>Associates of an entity.....</b>	<b>71</b>
Associates of an individual .....	71
Associates of a company .....	72
Associates of a trustee .....	73

<b>Associates of a partnership .....</b>	<b>73</b>
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# Preface

This paper will use a number of case studies to illustrate how the aggregated turnover grouping rules apply for the purposes of working out eligibility for certain tax concessions. A background section detailing the legislative rules follows the case studies.

## Learning objectives

This paper is designed to demonstrate the practical application of the ‘connected with’ and ‘affiliate’ rules in the aggregated turnover provisions.

At the conclusion of this training session, participants should be able to explain:

- why the connected entity and affiliate tests are relevant in determining eligibility for concessions
- when one entity directly and indirectly controls another entity for the purposes of the connected entity rules
- when the Commissioner may exercise his discretion that an entity does not control another entity
- when an individual’s spouse or child is an affiliate of the individual.

## Currency

This paper is current as at 15 January 2024 and takes into account all relevant developments known to the author at that date.

## Acronyms and abbreviations

ATO	Australian Taxation Office
CGT	Capital gains tax
CGT SBE	CGT small business entity
Commissioner	Commissioner of Taxation
Div	Division
NANE	Non-assessable non-exempt
Para.	Paragraph
R&D	Research and development
s.	Section or subsection
SBE	Small business entity
Subdiv	Subdivision

# Technical materials

1. Commonwealth Acts of Parliament and Regulations — the following abbreviations are used throughout this paper:

<i>Income Tax Assessment Act 1936</i>	<i>ITAA 1936</i>
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<i>Income Tax Assessment Act 1997</i>	<i>ITAA 1997</i>
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2. ATO Taxation Rulings and Determinations

- TR 2002/6W — Income tax: Simplified Tax System: eligibility — grouping rules (\*STS affiliate, control of non fixed trusts)
- TR 2019/1 — Income tax: when does a company carry on a business?
- TD 2022/5 — Income tax: aggregated turnover — Application of the ‘connected with’ concept to corporate limited partnerships
- TD 2022/6 — Aggregated turnover — Application of the public entity exception to the indirect control test
- TD 2022/7 — Aggregated turnover — Application of the ‘connected with’ concept to partnerships, foreign hybrids and non-entity JVs
- TD 2023/5 — Income tax: aggregated turnover and connected entities — Commissioner’s discretion that an entity does not ‘control’ another entity

3. Various ATO Interpretative Decisions — references are included throughout the paper

4. Case law — references are included throughout the paper

5. ATO fact sheets — references are included throughout the paper

All legislative references are to the *ITAA 1997* unless otherwise specified.

# Key ideas

Key ideas in this paper
<ul style="list-style-type: none"><li>■ A taxpayer's 'aggregated turnover' for an income year is essential for determining its eligibility for a large number of tax concessions, including simplified depreciation for small business entities, small business CGT concessions, the refundability of R&amp;D tax offsets, and the temporary skills and training boost and technology investment boost.</li><li>■ To work out a taxpayer's aggregated turnover for an income year, one must:<ol style="list-style-type: none"><li>(i) establish which (if any) entities are 'connected with' the taxpayer or 'affiliates' of the taxpayer for the income year</li><li>(ii) calculate the annual turnover of each of the taxpayer, entities connected with it and its affiliates for the income year</li><li>(iii) determine the sum of these annual turnovers to arrive at the aggregated turnover.</li></ol></li><li>■ This paper largely focuses on step (i), i.e. how to work out whether a particular entity is connected with the taxpayer or an affiliate of the taxpayer.</li><li>■ Whether two entities are connected with each other is premised on the concept of 'control' — upstream and downstream (with limited exceptions).<ul style="list-style-type: none"><li>■ There are some bright line tests for control mostly based on rights to distributions or votes — this is not as straightforward as the percentage of capital held.</li><li>■ In the case of a discretionary trust, the taxpayer must look back as far as four years to test the pattern of distribution.</li><li>■ In some circumstances the Commissioner has the power to make a determination that even where an entity passes a bright line control test, it does not in fact control the other entity because a third entity does control it.</li><li>■ An entity is connected to the taxpayer even in the case of indirect control — and all that needs to be determined is that direct control exists at each link; there is no de minimis percentage interest required.</li></ul></li><li>■ The existence of an affiliate relationship in most cases relies on one entity having influence over the taxpayer's decision-making in relation to the taxpayer's business.<ul style="list-style-type: none"><li>■ It cannot be assumed that the mere existence of a particular legal or personal relationship between the entities results in this influence — it depends on the facts and circumstances.</li><li>■ However, in the case where a taxpayer is seeking to utilise small business CGT concessions in relation to a capital gain arising from a passively held asset, a spouse and minor child of an individual are automatically treated as affiliates of the individual.</li></ul></li></ul>

# Introduction

Business taxpayers and their tax advisers are familiar with the concept of ‘aggregated turnover’. A taxpayer’s aggregated turnover is the total of the ‘annual turnovers’ of the taxpayer, any entities connected with the taxpayer and the taxpayer’s affiliates.

In order to access many of the tax concessions available under the various tax law regimes, the taxpayer must have an aggregated turnover for the income year that is less than the prescribed turnover threshold. For most ‘small business entity’ (SBE) concessions this threshold is \$10 million. In fact, the very legislative definition of an SBE requires that the taxpayer — who must be carrying on a business — has an aggregated turnover of less than \$10 million.

However, not all of the concessions adhere to the \$10 million limit. While the suite of tax concessions has long been considered to be for the benefit of smaller businesses with fewer resources to reduce tax payable or simplify compliance, a number of concessions are now available to larger businesses — most commonly with an aggregated turnover threshold of less than \$50 million.

On the other hand, when the SBE turnover threshold increased to \$10 million from 1 July 2016, the threshold for the small business CGT concessions remained at only \$2 million. This means that a business may be able to access a number of tax concessions, for example the small business capital allowances regime in Subdiv 328-D of the *ITAA 1997*, but may not be able utilise the small business CGT concessions upon the sale of a capital asset.

There are several key steps in calculating an entity’s aggregated turnover:

1. working out which entities (if any) are **connected with** the taxpayer
2. working out which entities (if any) are **affiliates** of the taxpayer for the income year
3. calculating the **annual turnover** of the taxpayer, each connected entity and each affiliate
4. adding up each of the annual turnovers to arrive at the **aggregated turnover** of the taxpayer.

The third and fourth steps may require certain adjustments, including the exclusion of dealings between members of the ‘group’ and annualising turnovers of businesses carried on for part of a year.

This paper focuses on the grouping rules — i.e. the first two steps.

An entity is not automatically connected with a taxpayer merely because it holds the largest (but not majority) holding in the capital of the entity, or is a director of the company, or trustee of the trust, or spouse of the individual. The relationship between the taxpayer and each other entity must be analysed in accordance with the legislative rules and Commissioner’s guidance.

The connected entity rules start with the assumption that a 40 per cent direct interest equals direct control. For interests of between 40 and 50 per cent, the Commissioner has the power to determine (on application by the taxpayer) that the taxpayer does not control the other entity — if satisfied that the other entity is in fact controlled by one or more other entities.

An entity is considered to indirectly control another entity down a chain of interposed entities with direct control relationships at every link — there is no de minimis indirect control percentage. So an entity could be included in a taxpayer’s aggregated turnover even if the indirect control percentage is less than 40 per cent (excluding certain entity types).

The affiliate rules do not consider the entities' legal or personal relationship, with some exceptions. An individual or company is an affiliate of the taxpayer if it acts in accordance with the taxpayer's directions or wishes, or acts in concert with the taxpayer, in respect of their business. While it may be of some relief that a director, trustee, majority shareholder, spouse, business partner etc is not automatically included in the aggregated turnover net, the test also means that being 'unrelated' by legal structure will not prevent a shadow director or other entity 'pulling the strings' from behind the stage being included.

Taxpayers must maintain good records, such as minutes of directors' and trustee meetings and other records showing decision making processes, to substantiate a contention that an entity does not control another entity or is not an affiliate of the other entity.

It is also imperative that the grouping rules are retested every year or whenever there is any change in the group's legal structure, the decision making of the group or individuals' significant life events. For example, changes to the entities included in the aggregated turnover calculation may be necessary where an interest in an entity — even a minority interest — is bought or sold, an individual starts or stops carrying on a business, there is a new marriage or marriage breakdown, a child turns 18, a death, or an individual is appointed to or retires from a key position.

In planning for acquisitions and disposals of interests in entities, and the commencement and cessation of businesses, the impact on various entities' aggregated turnovers must also be considered. If an entity is connected or an affiliate for only part of the year, only the turnover attributable to that part of that year is included. On the other hand, where a connected entity or an affiliate carries on a business for only part of the year the turnover must be annualised.

# Case study 1

## Facts

Individuals Penny, Quentin and Rachel carry on a business through the X Partnership. The X Partnership rents a commercial property that is owned by the Century Unit Trust (Century U/T).<sup>1</sup>

Penny, Quentin and Rachel are unit holders of the Century U/T and also the shareholders and directors of the corporate trustee.

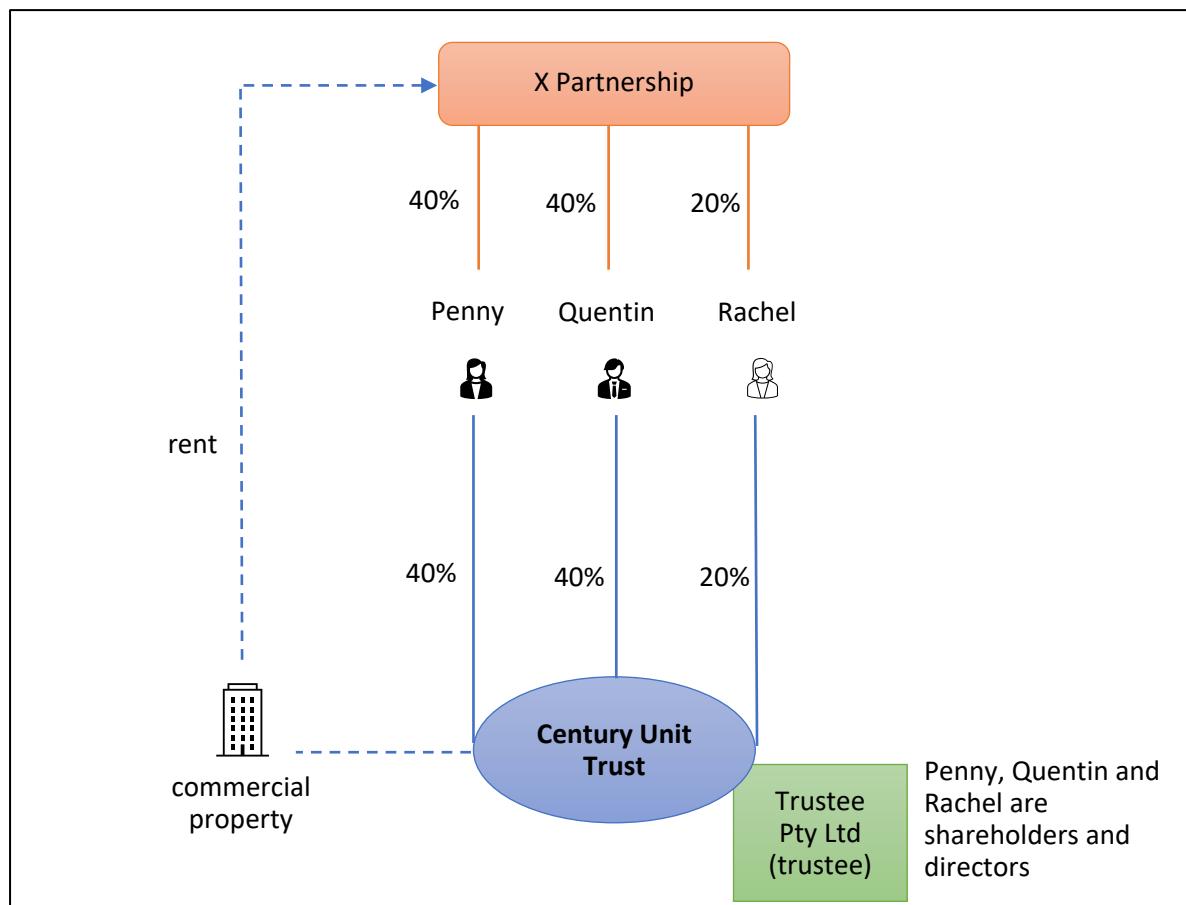
Apart from the partnership, Penny, Quentin and Rachel also each carry on a business as sole traders.

In 2022–23 the Century U/T sells the business premises and makes a capital gain. It will be able to access the small business CGT concessions if its aggregated turnover for the year is less than \$2 million (assuming that it satisfies all other eligibility criteria).

Therefore the trustee needs to ascertain which entities are connected with the trust or affiliates of the trust.

## Scenario 1 – Small business CGT concessions

### Group structure



<sup>1</sup> Assume that this property satisfies the active asset test.

## Analysis — Scenario 1

### Penny

Penny owns interests in the U/T that carries a control percentage of 40 per cent of the distribution of income by the trust (see [page 44](#)).

Penny directly controls the U/T. Therefore, Penny is connected with the U/T.

However, this would not be the case if the Commissioner determines that one or more other entities in fact control the trust and therefore Penny does not control the trust despite her 40 percent interest (see [page 48](#)).

Although Quentin also controls the trust under the 40 per cent distribution test (see below), he does not do so to the exclusion of Penny, i.e. he does not in fact control the trust.

In this scenario there are no other entities that control the trust.

Penny's annual turnover is included in the calculation of Century U/T's aggregated turnover for 2022–23.

### Quentin

Quentin owns interests in the U/T that carries a control percentage of 40 per cent of the distribution of income by the trust.

Quentin directly controls the U/T. Therefore, Quentin is connected with the U/T.

However, this would not be the case if the Commissioner determines that one or more other entities in fact control the trust and therefore Quentin does not control the trust despite his 40 percent interest.

Although Penny also controls the trust under the 40 per cent distribution test, she does not do so to the exclusion of Quentin, i.e. she does not in fact control the trust.

Quentin's annual turnover is included in the calculation of Century U/T's aggregated turnover for 2022–23.

### Rachel

Rachel does not satisfy the 40 per cent control test as she only owns 20 per cent of the interests in the trust. Further, Rachel does not in fact control the trust and the Commissioner does not make a determination to that effect.

Rachel's annual turnover is not included in the calculation of Century U/T's aggregated turnover for 2022–23.

### X Partnership

Both Penny and Quentin directly control the X Partnership as they each have the right to at least 40 per cent of the net income of the partnership (see [page 44](#)).

This would not be the case if the Commissioner determines that one or more other entities in fact control the partnership. In this scenario there are no other entities that control the partnership.

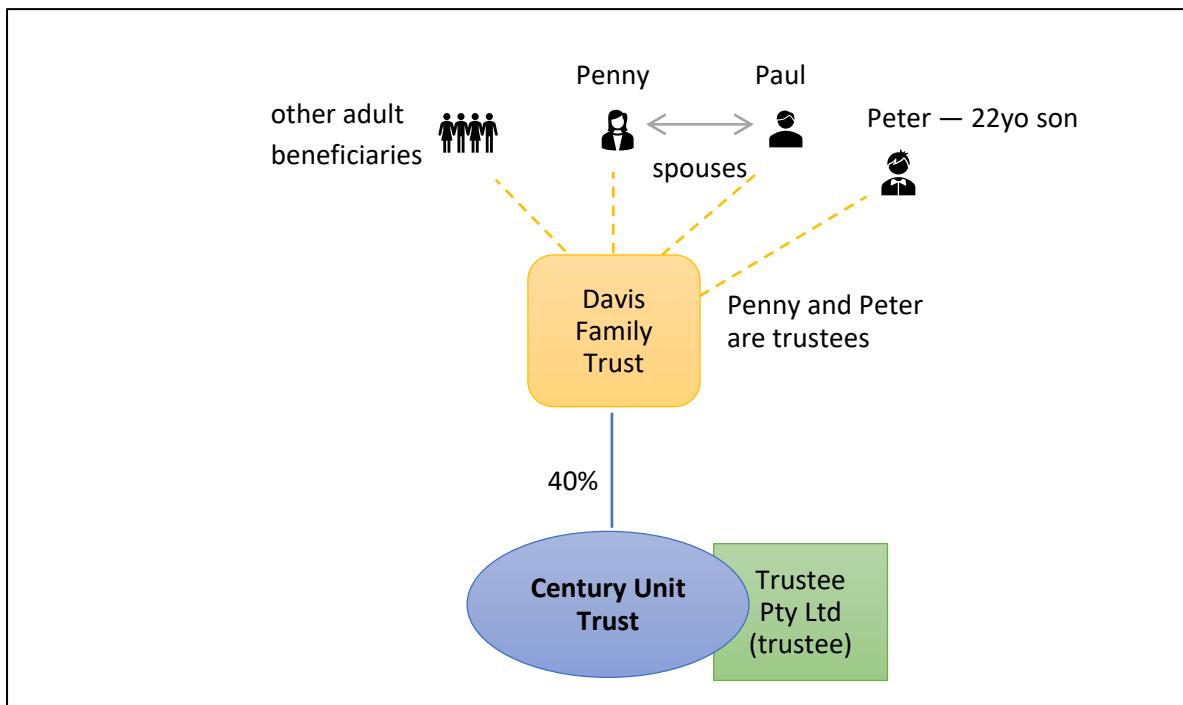
Because Penny and Quentin both directly control the X Partnership as well as the Century U/T, the X Partnership is an entity connected with the Century U/T.

The X Partnership's annual turnover is included in the calculation of Century U/T's aggregated turnover for 2022–23.

## Alternative scenario 1a — Penny's unit holding is owned by Davis F/T

\* *Each of the following alternative scenarios is an alternative to all other scenarios and is not consequential unless otherwise stated.*

Instead of Penny directly owning the units in the unit trust, what if the units were owned by Penny's family trust, the Davis Family Trust (Davis F/T)?



The Davis F/T directly controls the Century U/T pursuant to the 40 per cent interest test.

None of the beneficiaries have individually received at least 40 per cent of the distributions from the Davis F/T in any of the preceding four income years. Therefore, they do not satisfy the control by beneficiaries test and do not control the Davis F/T (see [page 47](#)).

While Penny and Peter are both trustees, in practice Penny makes all of the decisions in relation to the Davis F/T. Peter, who is in university studying business and accounting and does not yet have much practical experience, is accustomed to acting in accordance with Penny's directions or wishes.

The ATO's position is that a sole individual trustee can be considered to control the trust because the individual is the entity referred to in s. 328-125(3) and the trustee could reasonably be expected to act in accordance with the directions or wishes of that entity (see [page 45](#)). On this basis it is arguable that Penny controls the trust under the control of trustee test (see [page 45](#)) as both she and Peter could reasonably be expected to act in accordance with her own directions or wishes.<sup>2</sup>

<sup>2</sup> The ATO in private binding rulings has clarified its position that a sole individual trustee can be considered to control the trust because the individual is the entity referred to in s. 328-125(3) and the trustee could reasonably be expected to act in accordance with the directions or wishes of that entity. See for example PBR nos. 1052117739258 and 1052163288379.

Consequently, Penny also indirectly controls the Century U/T.



### Query

Is the son Peter also taken to control the Davis F/T under the control of trustee test? Arguably no — the ATO's position that an individual trustee can be considered to control a trust under the control of trustee test is predicated on the individual trustee being reasonably expected to act in accordance with their own directions or wishes. This is not the case for Peter who acts in accordance with Penny's directions or wishes.

The Davis F/T and Penny are both connected with the Century U/T.

The Century U/T will need to include the annual turnovers of the Davis F/T and Penny in the calculation of its aggregated turnover for 2022–23. As per the earlier Scenario 1 analysis, the annual turnovers of Quentin and the X Partnership are also included in Century U/T's aggregated turnover (see [page 7](#)).

### Alternative scenario 1b — Quentin departs, property 2 sold

Assume that the Century U/T owns another commercial property and after the sale of the first one, the X Partnership rents that property and carries on its business from there.<sup>3</sup>

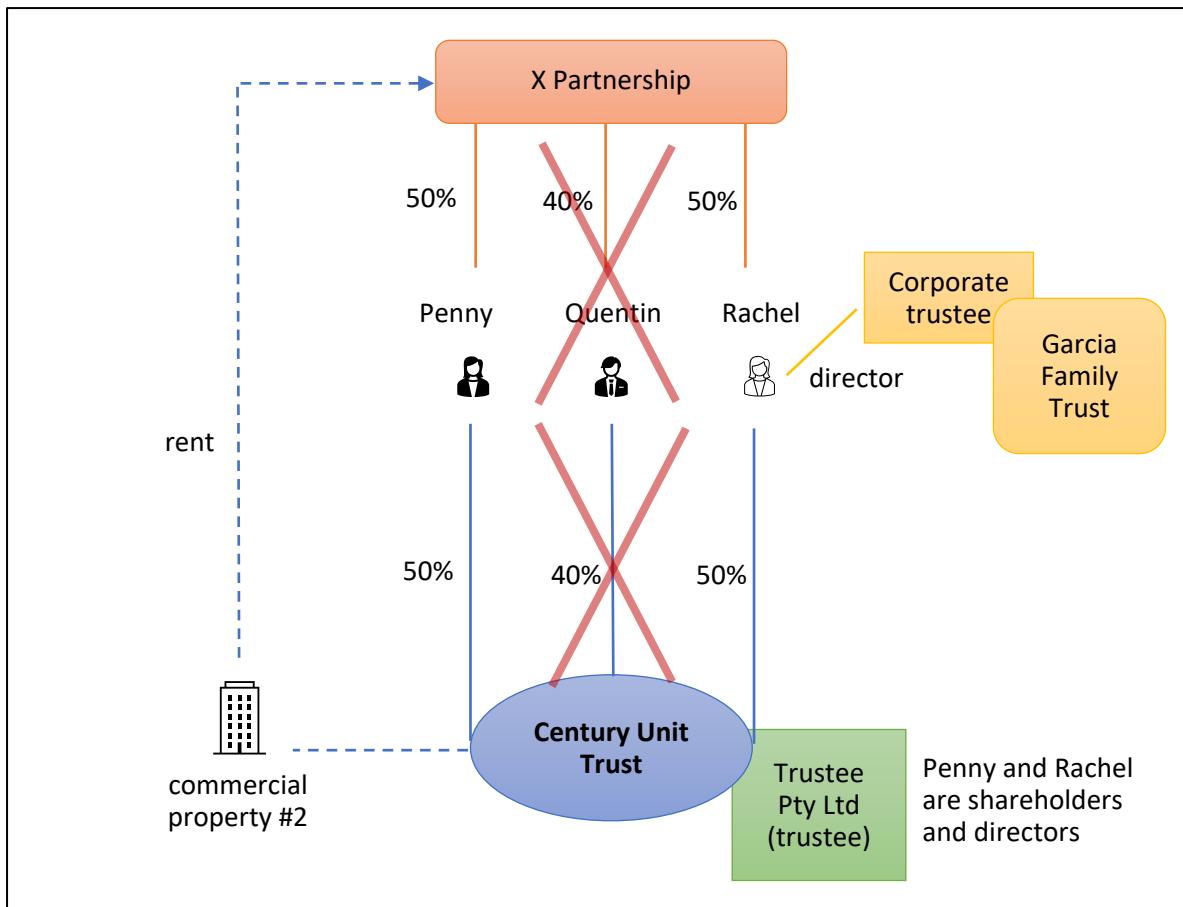
The Century U/T sells the property in 2024–25.

During 2023–24, Quentin decides to leave the business. Rachel is ready to take on a larger role in the business. Quentin exits the partnership and the unit trust and sells his interests in both to Penny and Rachel. Therefore Quentin has no interests in the partnership and the unit trust at any time during 2024–25.

Rachel is also the sole director of the corporate trustee of her family trust which carries on a business.

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<sup>3</sup> Assume that this property satisfies the active asset test.



With each holding 50 per cent interests, Penny and Rachel both directly control the Century U/T and the X Partnership (see [page 44](#)). They are equally involved the management and control of both entities. Neither of them apply for the Commissioner to determine that they do not in fact control the U/T or the partnership.

As the X Partnership and the Century U/T are under the common control of Penny and Rachel, the X Partnership is connected with the Century U/T for 2024–25.

Rachel directly controls the Garcia Family Trust (Garcia F/T) because the corporate trustee acts in accordance with her wishes (see [page 45](#)).

As the Century U/T and Garcia F/T are both under the common control of Rachel, the Garcia F/T is connected with the Century U/T for 2024–25.

The annual turnovers of Penny, Rachel, the X Partnership and the Garcia F/T are included in the calculation of the Century U/T's aggregated turnover for 2024–25.

### Alternative scenario 1c – control in the year of change of director

*\* The facts are the same as for alternative scenario 1b with the exception of the following.*

What if partway through the 2024–25 year Rachel resigned her directorship of the corporate trustee of the Garcia F/T and her brother Raymond, who is an experienced lawyer, was appointed as sole director? Assume Rachel has not received a distribution of at least 40 per cent of the income of the trust in any of the preceding four income years. Also assume that Rachel, busy with her expanded role in the X Partnership business, is no longer intimately involved in the affairs of the trust, does not give directions to Raymond nor oblige him to act according to her wishes in relation to the affairs of the trust, although she does take an interest and gives advice or an opinion on specific matters when asked.

Where an entity is connected with the Century U/T **at any time during the income year** the entity's annual turnover for that part of the year is included in the calculation for the Century U/T (see [page 39](#)). Because the Garcia F/T was connected with the Century U/T for the part of the 2024–25 year when Rachel was director of the corporate trustee and directly controlled the trust, the annual turnover of the Century F/T for that part of the year is included.

Assuming that all other facts remain the same as for alternative scenario 1b, the annual turnovers of Penny, Rachel and the X Partnership are included in the calculation of the Century U/T's aggregated turnover for 2024–25.

## Alternative scenario 1d – control in a year subsequent to change of director

*\* This scenario is an alternative to alternative scenario 1c.*

Alternatively, what if the Century U/T does not sell the commercial property and make the capital gain until a future income year, say 2026–27, when Raymond is sole director of the corporate trustee for the entire year?

Assuming that Rachel does not receive at least 40 per cent of trust distributions in any of the preceding four years, and that the corporate trustee does not act, or can be reasonably expected to act, in accordance with Rachel's directions or wishes during that year, then Rachel does not control the Garcia F/T during 2026–27 (see [page 45](#)). Accordingly the annual turnover of the Garcia F/T does not have to be included in the calculation of the Century U/T's aggregated turnover for 2026–27.

Assuming that all other facts remain the same as for alternative scenario 1b, the annual turnovers of Penny, Rachel and the X Partnership are included in the calculation of the Century U/T's aggregated turnover for 2026–27.

## Scenario 2 – Sale of passively held trust asset

Scenario 2 concerns the application of the aggregated turnover grouping rules in the context of eligibility for the small business CGT concessions in the case of passively held CGT assets.

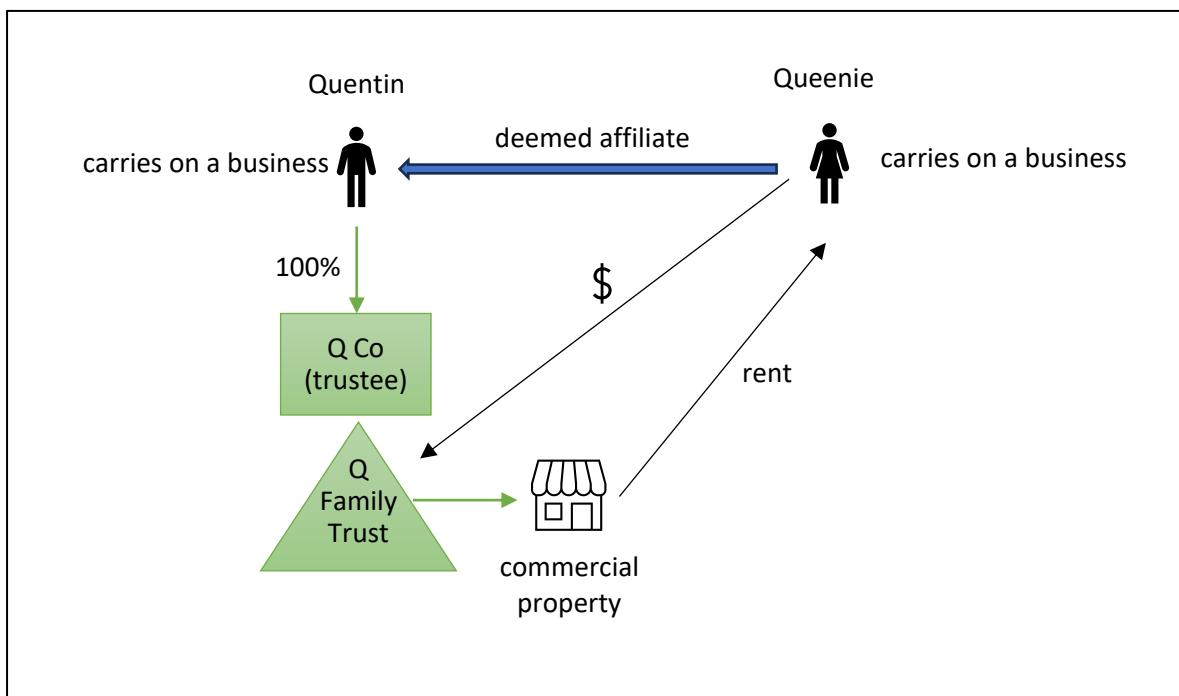
*\* This scenario is an alternative to all of the scenarios under Scenario 1 and it is not consequential.*

### Alternative scenario 2a

Quentin is the sole owner and director of Q Co, the corporate trustee of the Q Family Trust. The Trust **does not carry on a business**. Amongst its other assets the Trust owns a small commercial property.

Quentin's wife Queenie carries on her own sole trading business. She rents the property from the Trust and runs her business from the premises. Quentin also carries on an unrelated business as a sole trader.

Quentin and Queenie are not involved in the running or decision-making of each other's businesses.



The Trust does not make distributions to Queenie. It was set up during Quentin's first marriage for the benefit of his minor children from that first marriage, his elderly parents and other family members.

The Trust sells the commercial property. The Trust needs to determine whether it satisfies any of the basic condition in s. 152-10(1)(c)(i):

- it cannot be a CGT SBE for the year (s. 152-10(1)(c)(i)) — it is not carrying on a business
- maximum net asset value test (s. 152-10(1)(c)(ii)) — outside the scope of this paper but note that the Trust would need to determine whether either Quentin and Queenie is connected with it or its affiliate (if so, the net value of their CGT assets is included in the calculation)
- partner in a partnership (s. 152-10(1)(c)(iii)) — not relevant
- the condition in s. 152-10(1A) — Queenie — the entity carrying on a business in relation to the CGT asset — must be both (see below):
  - an entity connected with, or an affiliate of, the Trust
  - a CGT SBE for the income year.

## Whether Quentin is connected with the Trust

Quentin is connected with the Trust on the basis that the corporate trustee acts in accordance with his directions or wishes — that is, Quentin directly controls the Trust under the control of trustee test (see [page 45](#)).

Therefore Quentin is connected with the Trust. This is relevant if the Trust seeks to satisfy the maximum net asset value test. It may also be relevant in considering the application of the deemed affiliate rule in relation to determining whether Queenie is connected with the Trust (see below).

If the Trust was carrying on a business, then Quentin's annual turnover is included in the calculation of the Trust's aggregated turnover for the income year for the purposes of determining whether the Trust is a CGT SBE for the income year (s. 152-10(1)(c)(i)).

## **Whether Queenie is connected with, or an affiliate of, the Trust**

Queenie does not directly control the Trust under either limb — the control of trustee or control of beneficiary test.

Under the deemed affiliate rule in s. 152-47 (see [page 60](#)), Queenie is treated as an affiliate of Quentin because:

- the Trust owns the CGT asset
- the CGT asset is used, or held ready for use, in the course of carrying on a business in the income year by Queenie
- Queenie is not otherwise an affiliate of, or connected with, the Trust.

The deemed affiliate rule does not extend to treat Queenie as an affiliate of the Trust (it only operates to deem a spouse or child to be the affiliate of an individual).

Further, under the Commissioner's preferred view of s. 152-47 outlined in PBR no. 1052103982176, Quentin is not a deemed affiliate of Queenie and therefore she is not connected to the Trust by virtue of her relationship with Quentin (see below for an explanation).

Queenie is not connected with, or an affiliate of, the Trust. Therefore the Trust cannot satisfy s. 152-10(1A) as Queenie — carrying on the business in relation to the asset — is not an affiliate or an entity connected with the Trust.

If the Trust instead sought to satisfy the maximum net asset value test (outside the scope of this paper) — her net assets would not be included in the calculation.

Note that if the Trust was carrying on a business and seeking to satisfy the CGT SBE condition — Queenie's annual turnover would not be included in the calculation of the Trust's aggregated turnover for the income year for the purposes of determining whether the Trust is a CGT SBE for the income year (s. 152-10(1)(c)(i)).

## **The alternative view — s. 152-47 applies such that Queenie is connected with the Trust**

There is an alternative view that s. 152-47 operates such that if one spouse is a deemed affiliate of the other spouse, then the provision automatically also applies in the other direction, i.e. both spouses are a deemed affiliate of the other.

The Commissioner has stated in PBR no. 1052103982176 that this is not his preferred view. However there is no binding guidance available, and it is unclear whether another PBR applies the alternative view (see [page 60](#)).

If the alternative view was applied, then Quentin is a deemed affiliate of Queenie (only for the purposes of the small business CGT concessions in relation to the passively held commercial property).

Queenie's deemed affiliate Quentin controls the Trust on the basis that the corporate trustee acts in accordance with his directions or wishes. Therefore Queenie is taken to control the trust under s. 328-125(3). She is connected with the Trust.

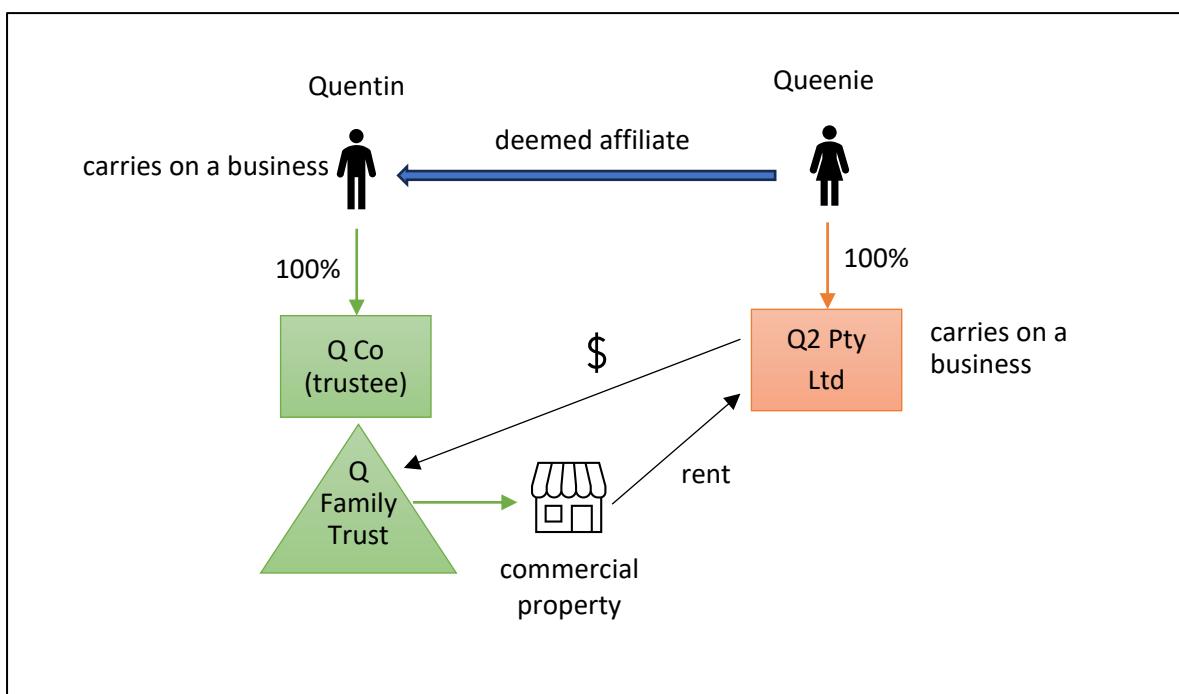
Therefore the Trust satisfies part of the alternative condition in s. 152-10(1A), because Queenie who carries on the business in relation to the CGT asset is an entity connected with the Trust.

To satisfy the basic condition Queenie needs to be a CGT SBE for the income year. Therefore Queenie's aggregated turnover (only for s. 152-10(1A) purposes) includes the annual turnovers of herself, the Trust (connected entity) and Quentin (affiliate).

In calculating Queenie's aggregated turnover, the deeming rule in s. 152-48 treats the entities connected with, and affiliates of, the Trust as entities connected with, and affiliates of, Queenie (see [page 41](#)). This rule would be relevant for consideration if there were more entities in the group structure which were not otherwise connected with or an affiliate of Queenie.

## Alternative scenario 2b — business carried on through wholly owned company

What if Queenie is not carrying on her business as a sole trader, but rather, the business is carried on through a company — Q2 Pty Ltd — of which Queenie is sole shareholder and director?



### Whether Q2 Pty Ltd is connected with the Trust

Queenie directly controls Q2 because she owns at least 40 per cent of the shares in the company (see [page 44](#)) — she has the right to at least 40 per cent of the distribution of income or capital or of the voting power.

As discussed above in scenario 1a, Queenie is treated as Quentin's affiliate under the s. 152-47 deemed affiliate rule.

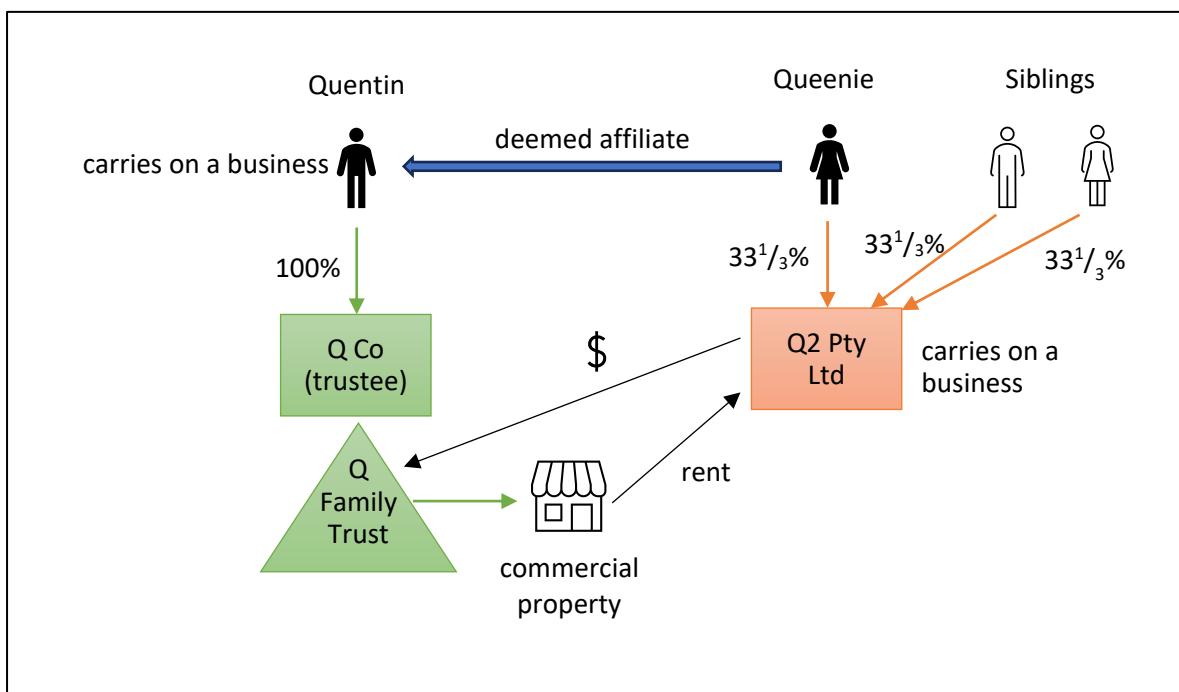
Quentin directly controls Q2 on the basis that his deemed affiliate, his spouse Queenie, controls the company (see [page 44](#)). The Trust and Q2 are under Quentin's common control. Therefore, Q2 is an entity connected with the Trust. If Q2 is a CGT SBE for the income year, then s. 152-10(1A) will be satisfied. The annual turnovers of Q2, the Trust, Quentin and Queenie are included in Q2's aggregated turnover calculation.

If the Trust was carrying on a business — the annual turnover of Q2 is included in the calculation of the Trust's aggregated turnover for the purposes of determining whether it satisfies the CGT SBE condition.<sup>4</sup>

The annual turnover of Q2 is not included in the calculation of the Trust's aggregated turnover for any other purpose, e.g. eligibility for Subdiv 328-D capital allowances concessions.

## Alternative scenario 2c – three equal shareholders

What if Q2 is instead owned by Queenie and her two siblings, each with one-third of the ordinary shares with equal voting rights?



### Whether Q2 Pty Ltd is connected with the Trust

Queenie does not directly control Q2 under the 40 per cent interest test as she does not have the right to at least 40 per cent of the distribution of income or capital or of the voting power (see [page 44](#)).

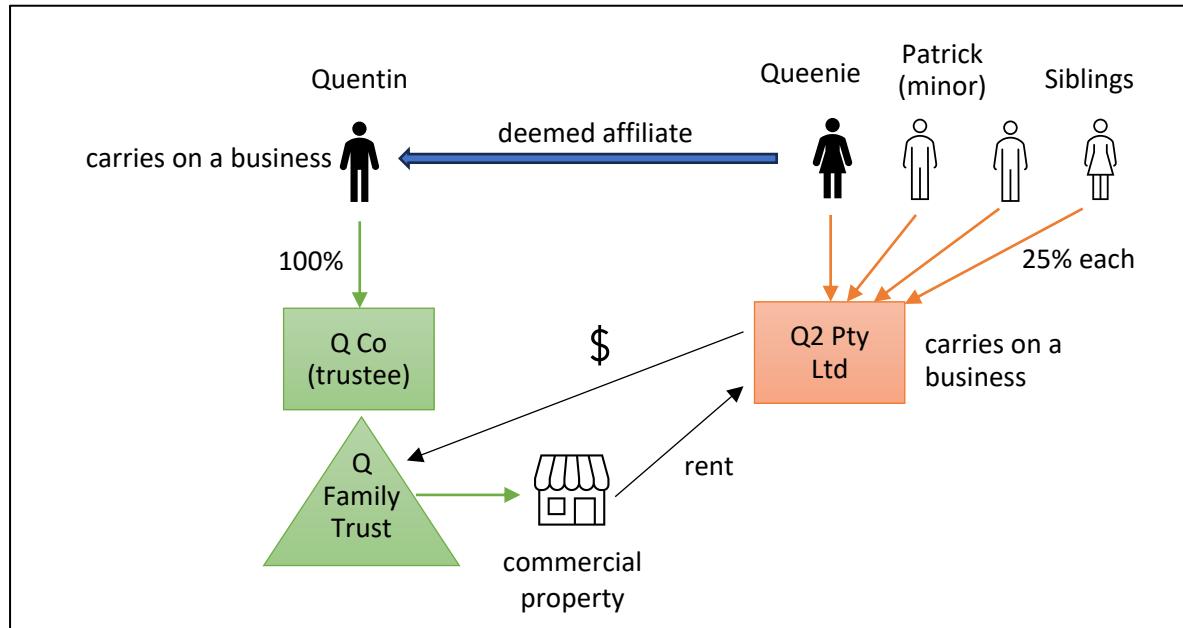
Neither of Queenie's siblings is an affiliate of hers and therefore their interests in the company are not taken into account in determining whether Queenie controls the company.

As Q2 is not controlled by Queenie, it is also not controlled by Quentin by application of the deemed affiliate rule. Accordingly Q2 is not connected with the Trust as the two entities are not under common control.

<sup>4</sup> While outside the scope of this paper, it is worth noting that the CGT asset is an active asset in the hands of the Trust because it is used in the course of carrying on a business by Q2, which is connected with the Trust (s. 152-40(1)(a)). This is the result of the application of the deemed affiliate rule. The CGT asset must satisfy the active asset requirement (s. 152-10(1)(d)) in order for the Trust to access the Div 152 concessions.

## Alternative scenario 2d — four equal shareholders, one minor

What if Q2 is owned by Queenie, Quentin and Queenie's son Patrick, and Queenie's two siblings at 25 per cent each? Patrick is 17 years old at 30 June.



Under the deemed affiliate rule, both Queenie (spouse) and Patrick (minor child) are deemed affiliates of Quentin (see [page 60](#)).

Quentin's two deemed affiliates — Queenie and Patrick — together hold an interest of 50 per cent in Q2. On this basis Quentin controls Q2 because his affiliates hold a collective interest of at least 40 per cent.

Quentin controls both the Trust and Q2. Therefore, Q2 is an entity connected with the Trust.

## Alternative scenario 2e — Patrick turns 18

Same as scenario 2d above, but assume that Patrick turned 18 years old on 1 April 2023. Patrick ceased to be a deemed affiliate when he turned 18 years old (see [page 60](#)).

If the Trust was **carrying on a business**, the implications for the calculation of the Trust's 2022–23 aggregated turnover are as follows:

- Patrick is a deemed affiliate of Quentin from 1 July 2022 to 31 March 2023
- Quentin controls Q2 from 1 July 2022 to 31 March 2023 on the basis that his deemed affiliates, Queenie and Patrick, together hold 50 per cent of the interests in Q2 from 1 July 2022 to 31 March 2023
- Quentin does not control Q2 from 1 April to 30 June 2023 on the basis that his only deemed affiliate, Queenie, holds only 25 per cent of the interests in Q2 (i.e. less than 40 per cent)
- Q2 and the Trust are both under the common control of Quentin from 1 July 2022 to 31 March 2023
- Q2 is connected with the Trust from 1 July 2022 to 31 March 2023 and its annual turnover for that part of the year is included in the calculation of the Trust's aggregated turnover if the Trust was carrying on a business and seeking to satisfy the CGT SBE condition
- From 1 April 2023, Queenie remains a deemed affiliate of Quentin, but as Queenie does not control Q2, no implications arise.

# Case study 2

## Facts

AgriCo Pty Ltd (AgriCo) is part of a family group involved in the primary production industry.

AgriCo is conducting research relating to farming technologies. It incurred expenditure that is eligible for the research and development (R&D) tax offset during 2022–23.<sup>5</sup> The question on hand is whether AgriCo is eligible for the refundable tax offset or the non-refundable tax offset — the answer depends on its aggregated turnover for the year.

The R&D tax offset rates are as follows:

Type of offset	Offset rate	Aggregated turnover
Refundable	Entity's company tax rate + 18.5% of notional deductions	< \$20m p.a. (if not controlled by income tax-exempt entities)
Non-refundable	For R&D expenditure up to 2% of total expenses — entity's company tax rate + 8.5% For remaining R&D expenditure — entity's company tax rate + 16.5%	All other eligible entities

AgriCo's annual turnover for 2022–23 is \$3 million.

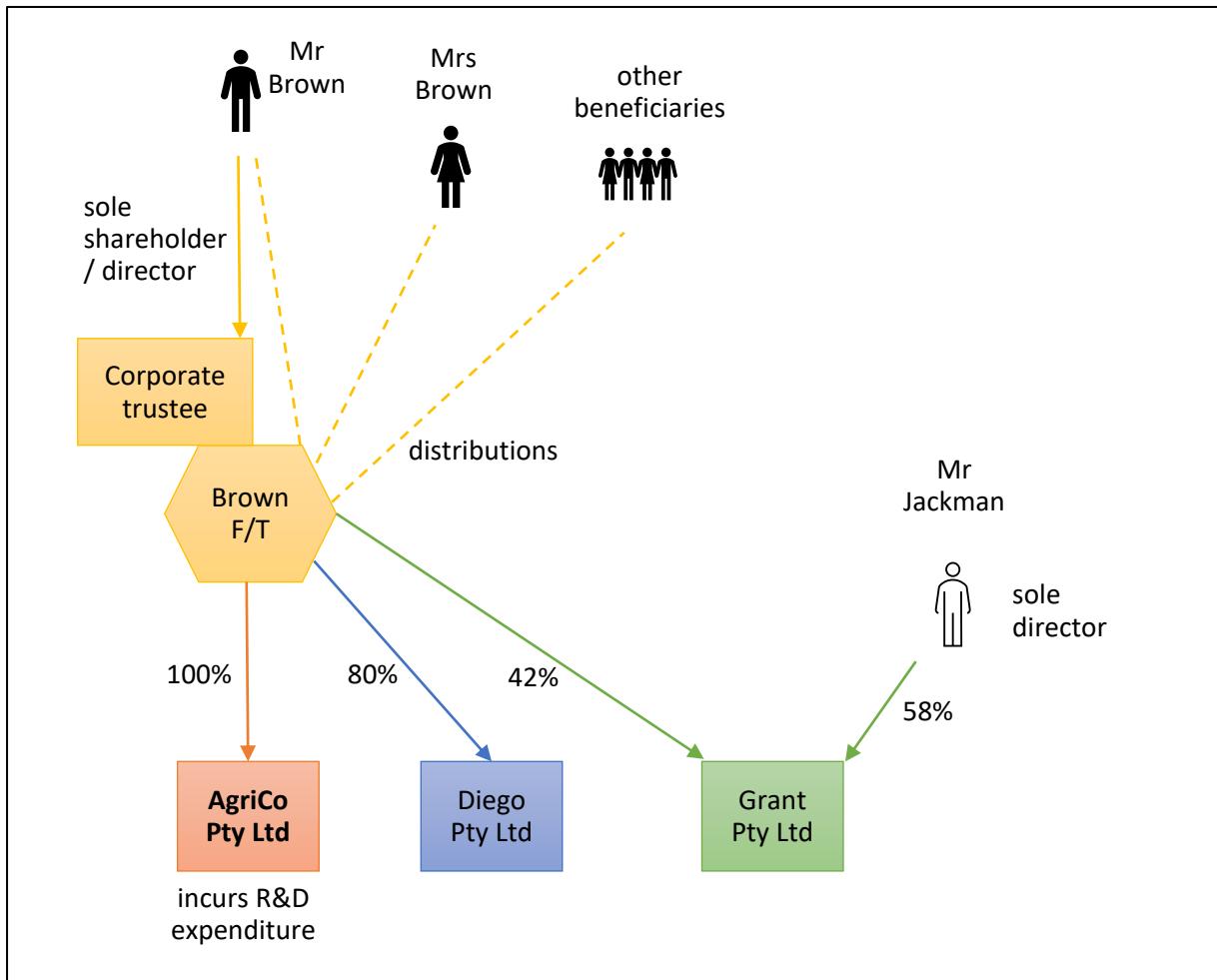
AgriCo's tax adviser needs to work out whether the annual turnover of any of the group entities needs to be included in AgriCo's aggregated turnover calculation, in order to determine the relevant R&D tax offset entitlement.<sup>6</sup>

In this case study assume that all entities carry on a business unless otherwise stated.

<sup>5</sup> Assume that AgriCo has registered its R&D activities with AusIndustry within the relevant timeframe and met all other eligibility requirements.

<sup>6</sup> This case study focuses on the application of the grouping rules. Therefore the detailed calculations of each entity's annual turnovers will not be considered.

# Group structure



\* All taxpayers carry on a business unless otherwise stated.

Distributions of the Brown Family Trust:

Year	Mr Brown	Mrs Brown	Other beneficiaries
2022	15%	35%	50%
2021 — TAX LOSS	—	—	—
2020	10%	30%	60%
2019	20%	30%	50%

None of the 'other beneficiaries' are affiliates of each other or of Mr Brown or Mrs Brown.

# Analysis – 2022–23

## The Brown Family Trust

The Brown F/T has interests in AgriCo that carry the right to receive 100 per cent of the distribution of its income and capital. As this control percentage is at least 40 per cent, Brown F/T **directly controls** AgriCo (see [page 44](#)).

Therefore, the Brown F/T is **connected with** AgriCo. The annual turnover of the Brown F/T must be included in the calculation of AgriCo's aggregated annual turnover.

## Mr Brown

The corporate trustee of the Brown F/T acts in accordance with the directions or wishes of Mr Brown. On this basis Mr Brown **directly controls** the Brown F/T — the control of trustee test (see [page 45](#)).

As the Brown F/T directly controls AgriCo, Mr Brown **indirectly controls** the Brown F/T (see [page 51](#)). Therefore, Mr Brown is connected with AgriCo. The annual turnover of Mr Brown's business must be included in the calculation of AgriCo's aggregated annual turnover.

## Mrs Brown

Mrs Brown has not received at least 40 per cent of the distribution of income from the Brown F/T in any of the previous four income years. Further, the corporate trustee does not act, or could not reasonably be expected to act, in accordance with the directions or wishes of Mrs Brown (see [page 45](#)).

Mrs Brown has no affiliates as there is no individual or company that acts, or could reasonably be expected to act, in accordance with her directions or wishes or in concert with her in relation to the individual or company's business (see [page 58](#)).

Therefore, she does not control the Brown F/T and she is not connected with AgriCo.



### Note

Under s. 152-78 the trustee of the Brown F/T may nominate up to four beneficiaries as being controllers of the trust for 2020–21 when the trust had a tax loss — but this is only applicable for the purposes of the small business CGT concessions in Div 152. The trustee does not have this discretion in the present circumstances. However, this outcome is beneficial for the purposes of the aggregated turnover rules, as the nomination of one or more beneficiaries as a controller would mean that their annual turnover (if they are carrying on a business) would be included in the calculation of aggregated turnover.

## Diego Pty Ltd

Brown F/T has interests in Diego that carry the right to receive 80 per cent of the distribution of its income or capital, and also of the voting power. As this control percentage is at least 40 per cent, Brown F/T **directly controls** Diego (see [page 44](#)).

AgriCo and Diego are under the common control of Brown F/T. Therefore, Diego is **connected with** AgriCo.

## **Alternative scenario 1 — Sale of Diego shares during 2023**

What if the Brown F/T sells its shares in Diego to an unrelated third party on 31 October 2022?

In that scenario Brown F/T only owns the shares in Diego for 123 days of the 2023 income year and does not hold any shares at year end. Nevertheless, the portion of Diego's annual turnover attributable to those 123 days is included in the calculation of AgriCo's aggregated turnover for the year. This is because AgriCo's aggregated turnover includes the annual turnover for the income year of any entity that is connected with it **at any time during the income year** for the period of time that the entity is connected, even if it is not connected at year end (see [page 39](#)).

\* This alternative scenario stands alone and it is irrelevant to the rest of the case study.

## **Grant Pty Ltd**

The Brown F/T has interests in Grant that carry the right to receive 42 per cent of the distribution of its income or capital, and also of the voting power. While the Brown F/T passes the 40 per cent control test, the control percentage is less than 50 per cent and therefore the Commissioner may make a determination that Brown F/T does not control Grant (see [page 48](#)).

The Commissioner will only make this determination if he thinks that Grant is controlled by one or more entities other than Brown F/T.

In this case, Mr Jackman in fact controls Grant, given his majority 58 per cent shareholding and that as sole director he makes all of the significant business decisions. Mr Jackman is not influenced by Mrs Brown or any member of her family.

AgriCo makes a request for the Commissioner to exercise his discretion on this basis.

Assuming that the Commissioner exercises his discretion, Brown F/T does not control Grant.

Therefore, Grant is not connected with AgriCo. Grant's annual turnover is not included in AgriCo's aggregated turnover.

## **Alternative scenario 2 — Mr Jackman is minority shareholder in Grant Pty Ltd**

Mr Jackman owns 29 per cent instead of 58 per cent. The other 29 per cent is owned by Ms A. Mrs Brown (as representative of the Brown F/T), Mr Jackman and Ms A are the three directors.

Mr Jackman and Ms A are unrelated and independent of each other. They have a history of acting cooperatively and agreeing on key decisions. When they disagree with Mrs Brown, they are able to outvote her as directors and shareholders. There are no formal arrangements in place which bind Mr Jackman and Ms A to act jointly or proxy arrangements that put voting power in the hands of one or the other.

AgriCo requests that the Commissioner makes a determination that the Brown F/T does not control Grant on the basis that Mr Jackman and Ms A together control Grant, such that the annual turnover of Grant would not need to be included in AgriCo's aggregated turnover (see [page 48](#)).

In line with the guidance in TD 2023/5 (see [page 48](#)), the Commissioner is unlikely to make a determination that Mr Jackman and Ms A act as a single controlling mind. Although Mr Jackman and Ms A have a history of agreement, they are not bound to act jointly, and each would require the support of Mrs Brown (as representative of the Brown F/T) to prevail in decision making if they do not agree.

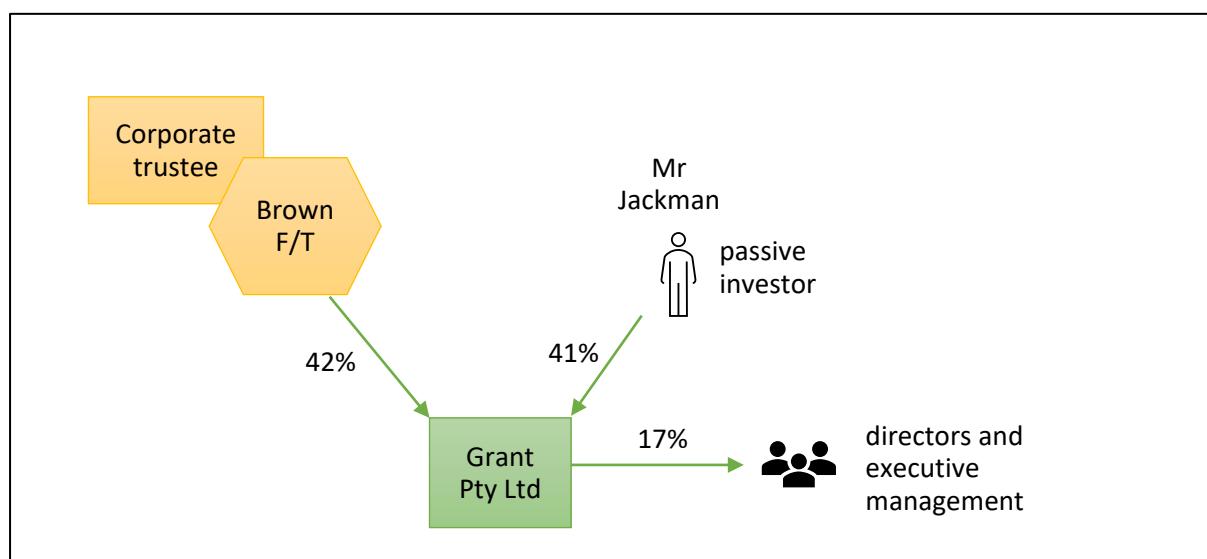
In this case the Brown F/T is taken to control Grant. As the Brown F/T controls both Grant and AgriCo, Grant is connected with AgriCo. Its annual turnover is included in the aggregated turnover of AgriCo.

\* This alternative scenario stands alone and it is irrelevant to the rest of the case study.

## Mr Jackman

Mr Jackman is not connected with AgriCo as he does not directly or indirectly control it, AgriCo does not directly or indirectly control Mr Jackman, and AgriCo and Mr Jackman are not under common control.

### Alternative scenario 3 – Mr Jackman and management team are minority shareholders in Grant Pty Ltd



As the Brown F/T holds at least 40 per cent of the interests in Grant, it will be considered to have direct control of Grant unless the Commissioner determines that one or more other entities in fact has control of the company (see [page 44](#)).

Mr Jackman holds 41 per cent but he is not involved in the management of the business and he does not have majority shareholding or voting power.

The directors and members of senior management collectively hold only 17 per cent. While they have responsibility for the day-to-day conduct of Grant's business and also have considerable autonomy in making significant business decisions, in the Commissioner's view this of itself is not considered 'control' of Grant — see TD 2023/5 (see [page 48](#)). They do not have controlling stakes in the income, capital or voting. They are also accountable to the shareholders, of which the Brown F/T is the most significant individual shareholder, in performing the management function.

Therefore, under this scenario the Brown F/T is considered to be directly controlling Grant. As AgriCo and Grant are under the common control of the Brown F/T, Grant is an entity connected with AgriCo. Accordingly, the annual turnover of Grant is included in the calculation of AgriCo's aggregated turnover.

\* This alternative scenario stands alone and it is irrelevant to the rest of the case study.

## Aggregated turnover calculation – 2022–23

Entity	Relationship	Annual turnover 2022–23
AgriCo Pty Ltd	Taxpayer	\$4m
The Brown Family Trust	Connected	\$6m
Mr Brown	Connected	\$1m
Mrs Brown	Not connected or an affiliate	–
Diego Pty Ltd	Connected	\$5m
Grant Pty Ltd	Not connected or an affiliate	–
Mr Jackman	Not connected or an affiliate	–
<b>Aggregated turnover</b>		<b>\$16m</b>

\* Excludes the implications of alternative scenarios 1, 2 and 3.



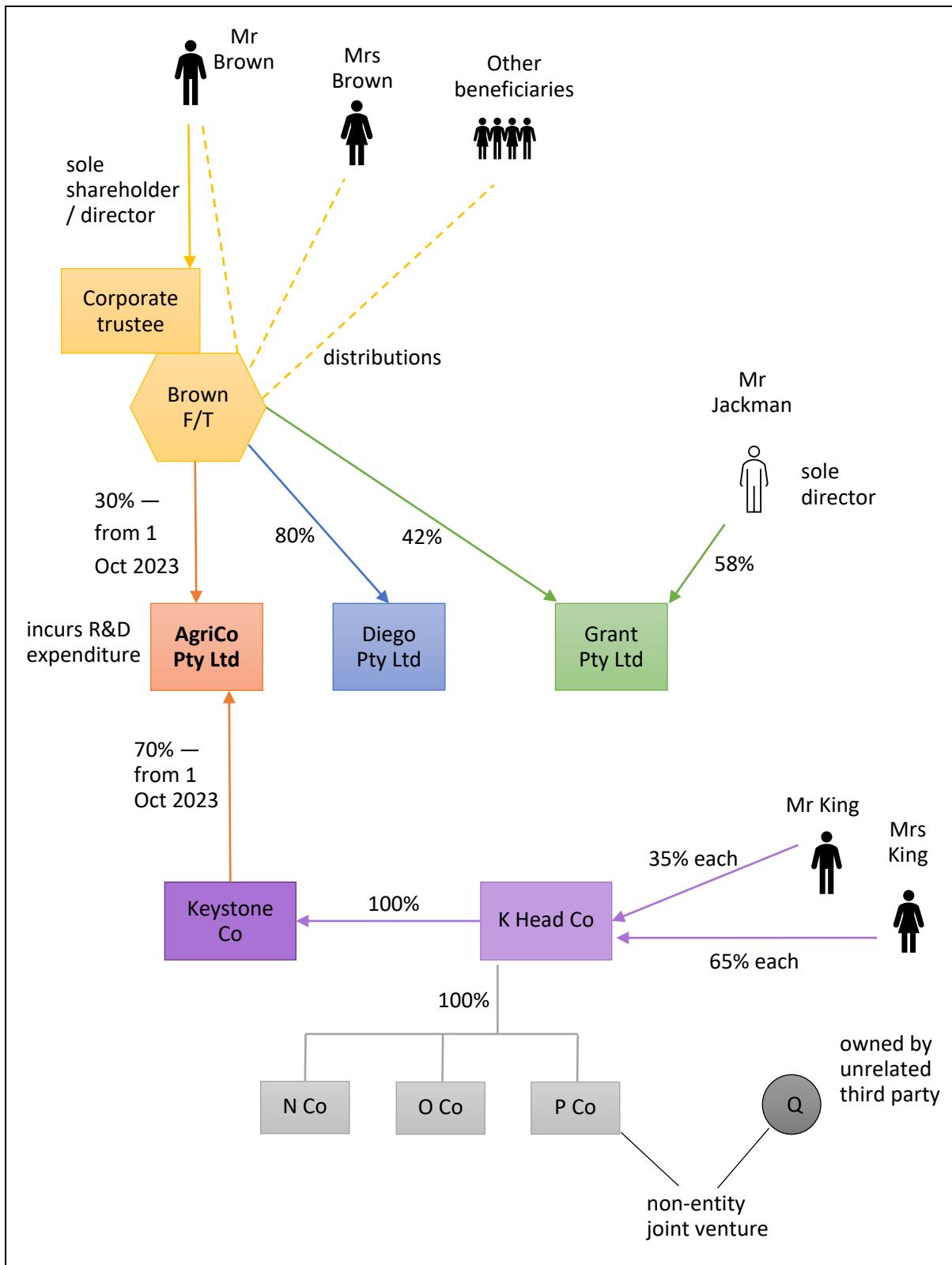
### Implications

AgriCo's aggregated turnover for 2022–23 is **\$16 million**. As this is less than \$20 million, AgriCo satisfies the aggregated turnover criterion for eligibility for the **refundable R&D tax offset** for the year.

## Analysis – 2023–24

### Partial sale of AgriCo – amended group structure

On 1 October 2023 the Brown F/T sells 70 per cent of its shares in AgriCo to Keystone Co. Keystone forms part of a larger group.



## The Brown Family Trust

The Brown F/T directly controls, and is therefore connected with, AgriCo for the first 92 days of the 2023–24 year as it wholly owned AgriCo during the days from 1 July to 30 September 2023.

If an entity is connected with the taxpayer at any time during the income year, the annual turnover of the entity for the period for which it is connected is included in the calculation of the taxpayer's aggregated turnover for that year (see [page 39](#)).

## Mr Brown

The corporate trustee of the Brown F/T acts in accordance with the directions or wishes of Mr Brown. On this basis Mr Brown **directly controls** the Brown F/T — the control of trustee test (see [page 45](#)).

As the Brown F/T directly controls AgriCo from 1 July to 30 September 2023, Mr Brown **indirectly controls** the Brown F/T for those 92 days of the year (see [page 51](#)). Therefore, Mr Brown is connected with AgriCo for those days. The annual turnover of Mr Brown's business attributable to those days must be included in the calculation of AgriCo's aggregated annual turnover.

## Mrs Brown

As per the 2022–23 analysis, Mrs Brown is not connected with AgriCo (see [page 19](#)).

## Diego Pty Ltd

Brown F/T has interests in Diego that carry the right to receive 80 per cent of the distribution of its income or capital, and also of the voting power. As this control percentage is at least 40 per cent, Brown F/T **directly controls** Diego (see [page 44](#)).

AgriCo and Diego are under the common control of Brown F/T from 1 July to 30 September 2023. Therefore, Diego is **connected with** AgriCo for 92 days of the year.

## Grant Pty Ltd

As per the 2022–23 analysis, Grant is not connected with AgriCo for any part of the 2023–24 income year (see [page 20](#)).

## Mr Jackman

As per the 2022–23 analysis, Mr Jackman is not connected with AgriCo for any part of the 2023–24 income year (see [page 21](#)).

## Keystone Co

Keystone Co holds 70 per cent interest in AgriCo. On this basis Keystone Co directly controls AgriCo and is connected with AgriCo (see [page 44](#)).

## K Head Co

K Head Co wholly owns Keystone Co and therefore directly controls it (see [page 44](#)). Therefore, K Head Co indirectly controls AgriCo (70 per cent) and is connected with AgriCo (see [page 51](#)).

## Mr and Mrs King

Mrs King directly controls K Head Co due to her 65 per cent interest. Mr King does not control K Head Co as his interest is only 35 per cent (see [page 44](#)).

Mrs King indirectly controls AgriCo, via the direct control of K Head Co and the indirect control of Keystone Co (see [page 51](#)). Mrs King is connected with AgriCo. Her annual turnover is included in AgriCo's aggregated turnover.

## Alternative scenario 4 – Mr and Mrs King both own 50 per cent of K Head Co

Mr and Mrs King both own 50 per cent of the shares in K Head Co. They contribute equally to the decision making as well as voting. In this case the Commissioner is unlikely to determine that either shareholder does not control the company on the basis that the other shareholder in fact controls the company (see [page 48](#)).

In such a case Mr and Mrs King both indirectly control AgriCo and are both connected with AgriCo (see [page 51](#)). The annual turnover of both are included in AgriCo's aggregated turnover.

\* This alternative scenario stands alone and it is irrelevant to the rest of the case study.

## N Co, O Co, P Co

N Co, O Co and P Co are wholly owned by K Head Co. As they, and AgriCo, are all under the common control of K Head Co, these three companies are connected with AgriCo (see [page 43](#)).

## Non-entity joint venture

The non-entity joint venture is not an entity in its own right for the purposes of Subdiv 328-C according to the Commissioner's views in TD 2022/7 (see [page 53](#)).

The other joint venturer Q is not connected with or an affiliate of AgriCo.

## Aggregated turnover calculation – 2023–24

Entity	Relationship	Annual turnover 2023–24
AgriCo Pty Ltd	Taxpayer	\$3m
The Brown Family Trust	Connected (92/366 days)	Approx \$6m × 92/366 = \$1.5m <sup>7</sup>
Mr Brown	Connected (92/366 days)	Approx \$1m × 92/366 = \$0.25m <sup>8</sup>
Mrs Brown	Not connected or an affiliate	–
Diego Pty Ltd	Connected (92/366 days)	Approx \$4m × 92/366 = \$1m <sup>9</sup>
Grant Pty Ltd	Not connected or an affiliate	–
Mr Jackman	Not connected or an affiliate	–
Keystone Co	Connected (274/366 days)	\$6m <sup>10</sup>
K Head Co	Connected (274/366 days)	\$5m <sup>11</sup>
Mr King	Not connected or an affiliate	–
Mrs King <sup>12</sup>	Connected (274/366 days)	\$0.25m <sup>13</sup>
N Co, O Co, P Co	Connected (274/366 days)	\$6m
Non-entity joint venture	Not connected or an affiliate	–
<b>Aggregated turnover</b>		<b>\$23m</b>



### Implications

AgriCo's aggregated turnover for 2023–24 is **\$23 million**. As this is not less than \$20 million, AgriCo does not satisfy the aggregated turnover criterion for eligibility for the **refundable R&D tax offset**. Accordingly it will be eligible for a **non-refundable tax offset** for the year (subject to other criteria). If AgriCo makes a tax loss or if its tax payable is less than the total of its tax offsets and rebates, it may permanently lose some of the R&D tax offset.

<sup>7</sup> Figures have been rounded for simplicity.

<sup>8</sup> Figures have been rounded for simplicity.

<sup>9</sup> Figures have been rounded for simplicity.

<sup>10</sup> Section 328-115(3)(c) has been applied — amounts derived before it was a connected entity have been excluded.

<sup>11</sup> Section 328-115(3)(c) has been applied — amounts derived before it was a connected entity have been excluded.

<sup>12</sup> Ignoring the alternative scenario for Mr and Mrs King.

<sup>13</sup> Section 328-115(3)(c) has been applied — amounts derived before she was a connected entity have been excluded.

# Analysis – 2024–25

## The Brown Family Trust group

The Brown F/T, holding a 30 per cent interest in AgriCo, does not control AgriCo at any time during 2024–25 and is not connected with AgriCo for the year (see [page 44](#)).

Consequently, Mr Brown and Diego Pty Ltd are also no longer connected with AgriCo.

## The K Head Co group

K Head Co, Keystone Co, N Co, O Co, P Co and Mrs King continue to be connected with AgriCo (see the analysis for 2023–24).

## Aggregated turnover calculation – 2024–25

Entity	Relationship	Annual turnover 2024–25
AgriCo Pty Ltd	Taxpayer	\$2.5m
The Brown Family Trust	Not connected or an affiliate	–
Mr Brown	Not connected or an affiliate	–
Mrs Brown	Not connected or an affiliate	–
Diego Pty Ltd	Not connected or an affiliate	–
Grant Pty Ltd	Not connected or an affiliate	–
Mr Jackman	Not connected or an affiliate	–
Keystone Co	Connected	\$4m
K Head Co	Connected	\$4m
Mr King	Not connected or an affiliate	–
Mrs King	Connected	\$0.5m
N Co, O Co, P Co	Connected	\$6m
Non-entity joint venture	Not connected or an affiliate	–
Aggregated turnover		<b>\$17m</b>



## Implications

AgriCo's aggregated turnover for 2024–25 is **\$17 million**. As this is less than \$20 million, AgriCo once again satisfies the aggregated turnover criterion for eligibility for the **refundable R&D tax offset** for the year.

If part of the offset in 2023–24 was non-refundable, that part is lost and cannot be added to the available offset in 2024–25.

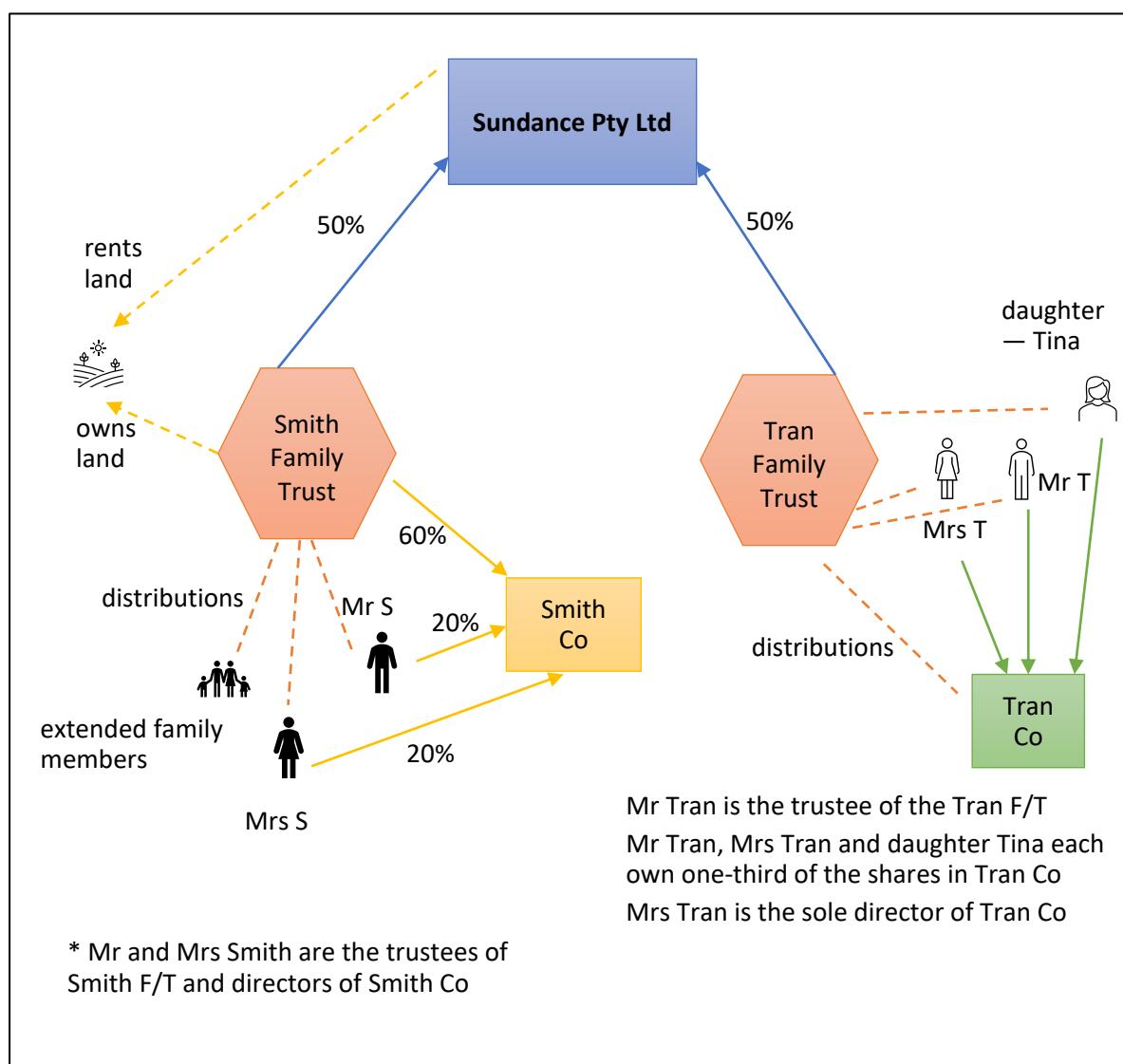
# Case study 3

## Facts

Sundance Pty Ltd (Sundance) commenced a primary production business on 1 October 2022. It had acquired a number of depreciating assets for use in the business. Sundance is part of a larger group. Sundance's tax adviser needs to work out which other entities are connected with it or are affiliates of it in order to calculate Sundance's aggregated turnover for the 2022–23 year.

If Sundance's aggregated turnover is less than \$10 million then it would be entitled to use the small business concessions in Subdiv 328-D, including the uncapped instant asset write-off for the 2022–23 year.

## Group structure



### Smith Family Trust distributions

Year	Mr S	Mrs S	Other beneficiaries
2022	35%	45%	20%
2021	20%	45%	35%
2020	30%	40%	30%
2019	20%	30%	50%

### Tran Family Trust distributions

Year	Mr T	Mrs T	Daughter	Tran Co
2022	10%	10%	20%	60%
2021	10%	10%	20%	60%
2020	10%	10%	20%	60%
2019	10%	10%	20%	60%

## Analysis — 2022–23

### Smith Family Trust

The Smith F/T has interests in the company that carry the right to receive 50 per cent of the distribution of its income and capital. As this control percentage is at least 40 per cent, the Smith F/T **directly controls** Sundance (see page 44).

Therefore, the Smith F/T is **connected with** Sundance. The annual turnover of the Smith F/T must be included in the calculation of the company's aggregated annual turnover.

Assume that the Smith F/T and the Tran F/T equally control Sundance and the Commissioner does not make a determination that the Smith F/T does not control Sundance on the basis that another entity, i.e. the Tran F/T, in fact controls Sundance (see page 48).

### Mrs Smith

Mrs Smith satisfies the **control by beneficiaries** test in relation to the Smith F/T as she has received a distribution equal to at least 40 per cent of the trust income in at least one of the four preceding income years (see page 47).

Mrs Smith directly controls the Smith F/T. As the Smith F/T directly controls Sundance, this means that Mrs Smith indirectly controls the Smith F/T. Therefore, Mrs Smith is **connected with** Sundance.

However, as Mrs Smith does not carry on a business, there is no annual turnover to include in the calculation of Sundance's aggregated turnover (see page 41).

## Mr Smith

Mr Smith does not satisfy the **control by beneficiaries** test in relation to the Smith F/T as he has not received a distribution of at least 40 per cent of trust income or capital in any of the four preceding income years (see [page 47](#)). Mrs Smith is not an affiliate of Mr Smith — despite being spouses — and therefore her distributions are not aggregated with his for the purposes of this test.

Mrs Smith does not have much financial, business or legal understanding. In practice, Mr Smith makes the decisions in relation to the activities of the Smith F/T and the distributions of income each year. Mrs Smith is accustomed to acting in accordance with the directions or wishes of Mr Smith in relation to the affairs of the trust.

Accordingly, despite not satisfying the 40 per cent distribution test, Mr Smith is treated as controlling the trust under the **control of trustee test** (see [page 45](#)).

Mr Smith directly controls the Smith F/T. As the Smith F/T directly controls Sundance, this means that Mr Smith indirectly controls Sundance. Therefore, Mr Smith is **connected with** Sundance.

## Smith Co

Smith F/T has interests in Smith Co that carry the right to receive 60 per cent of the distribution of income (and capital) of the company. As this control percentage is at least 40 per cent, Smith F/T **directly controls** Smith Co (see [page 44](#)).

Sundance and Smith Co are under the **common control** of Smith F/T.

Therefore, Smith Co is **connected with** Sundance. The annual turnover of Smith Co must be included in the calculation of Sundance's aggregated annual turnover.

## Tran Family Trust

Tran F/T has interests in the company that carry the right to receive 50 per cent of the distribution of its income or capital. As this control percentage is at least 40 per cent, Tran F/T **directly controls** Sundance (see [page 44](#)).

Therefore, Tran F/T is **connected with** Sundance. The annual turnover of the Tran F/T must be included in the calculation of the company's aggregated annual turnover.

Assume that the Smith F/T and the Tran F/T equally control Sundance and the Commissioner does not make a determination that the Tran F/T does not control Sundance on the basis that another entity, i.e. the Smith F/T, in fact controls Sundance (see [page 48](#)).

## Mr Tran — sole trustee

Mr Tran is the sole individual trustee of the Tran F/T. He makes all the decisions in relation to the trust. He satisfies the control of trustee test on the basis that he acts in accordance with his own wishes.

Mr Tran **indirectly controls** Sundance and therefore is **connected with** Sundance.

## Individual beneficiaries

Mrs Tran has not received distributions of at least 40 per cent of trust income or capital in any of the four preceding income years. She does not control the trust under the control by beneficiaries test (see [page 47](#)).

Similarly, none of the other individual beneficiaries have received a distribution of at least 40 per cent in any of the four preceding income years and none of them individually control the trust.

However, one of the beneficiaries would satisfy the test if they did receive a total of at least 40 per cent **together with their affiliates**. Therefore, the question is whether any of the beneficiaries is an affiliate of any of the other beneficiaries.

An individual or company is an affiliate of the taxpayer if the individual or company acts, or could reasonably be expected to act:

- in accordance with the taxpayer's directions or wishes, or
- in concert with the taxpayer,

in relation to the affairs of the individual's or company's business (see [page 58](#)).

**Mr Tran** does not act in accordance with the directions or wishes of any other beneficiary in relation to the affairs of his business. Therefore, he is not an affiliate of any other taxpayer.

**Mrs Tran** does not act in accordance with the directions or wishes of any other beneficiary in relation to the affairs of her business. Therefore, she is not an affiliate of any other taxpayer.

Tina does not carry on a business. Therefore, she cannot be an affiliate of any other taxpayer.

**Tran Co** is not automatically an affiliate of Mrs Tran merely because she is its director.

What needs consideration is whether Tran Co in fact acts, or could reasonably be expected to act, in accordance with Mrs Tran's directions or wishes.

In this case Mrs Tran makes the strategic and financial decisions in relation to Tran Co's affairs. While she takes advice from others from time to time, she makes the decisions and ultimately Tran Co acts in accordance with her wishes.

Accordingly, Tran Co is an affiliate of Mrs Tran as it acts in accordance with their directions or wishes.

Mrs Tran, together with her affiliate Tran Co, has received a total of at least 40 per cent of the distribution of income (i.e. 10 per cent + 60 per cent = 70 per cent) in at least one of the past four income years. Accordingly, **Mrs Tran directly controls the Tran F/T**.

As the Tran F/T directly controls Sundance, this means that Mrs Tran indirectly controls Sundance. Therefore, Mrs Tran is **connected with** Sundance.

## Tina — the daughter

Tina, the **daughter**, has not received distributions of at least 40 per cent of trust income or capital in any of the four preceding income years — the control by beneficiaries test (see [page 47](#)). She does not control the Tran F/T and does not indirectly control Sundance.

In any case, Tina does not carry on a business. Even if she was connected with Sundance she has no annual turnover to include in the calculation of Sundance's aggregated turnover.

## Tran Co — corporate beneficiary

Tran Co has received at least 40 per cent of the distribution of income in at least one of the preceding four income years. Under the control by beneficiaries test it directly controls the Tran F/T (see [page 47](#)).

As Tran Co directly controls the Tran F/T it **indirectly controls** Sundance. Tran Co is **connected with** Sundance.

If Tran Co is carrying on a business, its annual turnover would be included in the calculation of Sundance's aggregated turnover.

The Commissioner's view in TR 2019/1 is that most corporate beneficiaries of family discretionary trusts would be considered to be carrying on a business of profit in connection with the trust. This is so even if the company's activities consist of passively receiving returns on its investments (including investments in the trust).

The Commissioner's view is that most corporate beneficiaries of family discretionary trusts are formed and appointed beneficiaries of trusts, with the clear expectation of being made entitled to any trust income that exceeds the amounts the trustee will appoint to individuals in the family (this is the case with Tran Co). They are usually appointed income, often repeatedly. They either reinvest the income in the trust, by way of a formal loan, by leaving the income uncalled for, or invest it in other ways that give rise to an entitlement to a return of profits. However, a company does not carry on a business merely because it is the object or a potential beneficiary of a trust.

Therefore, even if Tran Co does not actively engage in business activities other than receiving trust distributions and in turn distributes those amounts as dividends to its shareholders, its annual turnover should be included in the calculation of Sundance's aggregated turnover.

Note that any dealings between Tran Co and the Tran F/T — which is also connected with Sundance — are excluded from the aggregated turnover calculation under s. 328-115(3) (see [page 39](#)). In practice this means only externally sourced income (e.g. bank interest, rental income, dividends) of Tran Co will need to be included in the aggregated turnover calculation.

## Alternative 1 — Discretionary trust as beneficiary

What if the beneficiary was not a company, but another discretionary family trust T2 F/T?

The Commissioner's views in TR 2019/1 do not apply as T2 F/T is not a company. If it cannot be demonstrated that T2 F/T is carrying on a business under the established indicia, then none of its income will be included in the calculation of Sundance's aggregated turnover.

## Aggregated turnover calculation 2022–23

Entity	Relationship	Annual turnover 2022–23
Sundance Pty Ltd	Taxpayer	\$3.7m
The Smith Family Trust	Connected	\$2.0m
Mrs Smith (not carrying on a business)	Connected	—
Mr Smith	Connected	\$1.0m
Smith Co	Connected	\$0.2m
Tran Family Trust	Connected	\$1.5m
Mr Tran	Connected	\$0.5m
Mrs Tran	Connected	\$0.3m
Tina	Not connected or an affiliate	—
Tran Co	Connected	\$0.1m
<b>Aggregated turnover</b>		<b>\$9.3m</b>



## Implications

Sundance's aggregated turnover for 2022–23 is **\$9.3 million**. As this is less than \$10 million, Sundance is eligible to utilise the SBE concessions in Subdiv 328-D.

# Analysis – 2023–24

## Mr Smith's retirement

From late in the 2022–23 income year Mr Smith begins to wind down his business. He sells all of his business capital assets by 31 October 2023, winds up his business and retires from that date.

As a result of Mr Smith's desire to retire, Mrs Smith resigns as trustee of the Smith F/T and an independent, paid professional adviser is appointed as sole trustee. From early November Mr Smith has no significant influence over a trustee's decision making.<sup>14</sup>

Although Mr Smith no longer controls the trust — under the control of trustee test (see [page 45](#)) — and therefore no longer indirectly controls Sundance from 1 November 2023, he is connected with Sundance for the first 123 days (up to 31 October) of the year. Therefore, an amount of his annual turnover for 2023–24 is included in the calculation of Sundance's aggregated turnover.

The question is: what is the *amount* of Mr Smith's annual turnover to be included, taking into account the following modifications where relevant:

- (i) in working out the *annual turnover* of the taxpayer, an entity connected with the taxpayer or an affiliate of the taxpayer — if the entity (in this case Mr Smith) does not carry on a business for the whole of an income year, the entity's annual turnover must be worked out using a reasonable estimate of what it would have been if the entity carried on a business for the whole of the income year (in other words, the part year turnover must be 'annualised') — s. 328-120(5) (see [page 42](#))
- (ii) in working out the *aggregated turnover* of the taxpayer (in this case Sundance) — exclude any amounts derived in the income year by an entity while the entity is not connected with the taxpayer and is not the taxpayer's affiliate — s. 328-115(3)(c) (see [page 39](#)).

Mr Smith did not carry on a business for the whole of the 2023–24 income year. Section 328-120(5) requires that his actual turnover must be annualised, based on a reasonable estimate, to arrive at his annual turnover for the year. For the purposes of this case study assume that a simple tripling of the four months' actual turnover is a reasonable estimate of the annual turnover that would have arisen had Mr Smith continued to carry on his business for the whole year.

Mr Smith also ceases to be connected with (or an affiliate of) Sundance from 1 November 2023.

However, it would appear that s. 328-115(3)◎ does not operate to exclude the part of the annual turnover that is estimated under s. 328-120(5) to be attributable to the period 1 November 2023 to 30 June 2024. The exclusion in s. 328-120(5) only applies to turnover amounts **derived** when the entity is not connected with or an affiliate of the taxpayer — there does not appear to be an exclusion for turnover amounts **estimated** under s. 328-120(5) (see [page 42](#)).<sup>15</sup>

<sup>14</sup> See TR 2002/6 (Withdrawn) para. 70.

<sup>15</sup> See also the Commissioner's views in PBR no. 1051942243197, date of advice: 25 January 2022: 'This exclusion [in s. 328-115(3)(c)] does not work to restrict the estimation of an entity's annual turnover under subsection 320-120(5) of the ITAA 1997, as it only excludes amounts derived by entities while they are not connected or affiliated'.

Therefore, the reasonable estimate calculated under s. 328-120(5) is included in Sundance's aggregated turnover without an exclusion for the part of the year in which Mr Smith was no longer connected with Sundance.<sup>16</sup>



### Note

Annual turnover comprises ordinary income and does not include statutory income, i.e. capital gains, derived from the sale of Mr Smith's business assets (see [page 40](#)).

## Aggregated turnover calculation 2023–24

Entity	Relationship	Annual turnover 2023–24
Sundance Pty Ltd	Taxpayer	\$4.0m
The Smith Family Trust	Connected	\$2.0m
Mrs Smith (not carrying on a business)	Connected	—
Mr Smith (123 days)	Connected	\$0.3m × 366/123 = approx \$0.9m <sup>17</sup>
Smith Co	Connected	\$0.2m
Tran Family Trust	Connected	\$2.5m
Mr Tran	Connected	\$0.4m
Mrs Tran	Connected	\$0.3m
Tina	Not connected or an affiliate	—
Tran Co	Connected	\$0.1m
<b>Aggregated turnover</b>		<b>\$10.4m</b>



### Implications

Sundance's aggregated turnover for 2023–24 is **\$10.4 million**. As this is not less than \$10 million, Sundance is not eligible to utilise the SBE concessions in Subdiv 328-D. (Note that had it not been for the requirement in s. 328-120(5) to annualise Mr Smith's turnover, it would have been less than \$10 million.)

<sup>16</sup> The outcome would be different if Mr Smith continued to carry on his business after he ceased to be connected with AgriCo on 31 October 2023. In that case amounts actually derived by Mr Smith from 1 November 2023 — while he is a third party who is not connected with or an affiliate of AgriCo — would be excluded by s. 328-115(3)(c).

<sup>17</sup> Figures have been rounded for simplicity. Assume that this represents a 'reasonable estimate' of what Mr Smith's annual turnover would have been had he carried on the business for the whole year as required by s. 328-120(5).

# The aggregated turnover grouping rules

## Concessions for which aggregated turnover is relevant

The reason that taxpayers and their advisers need to understand the nuances and complexities of the ‘connected entity’ and ‘affiliate rules’ and how to calculate a taxpayer’s aggregated turnover is to determine whether the taxpayer can access certain tax concessions which either result in less tax payable or ease administrative burden. Generally, these are known as small business concessions but in recent years some concessions have been extended to larger business taxpayers as part of government economic stimulus measures.

While not the focus of this paper and not detailed in this paper, taxpayers also need to understand the eligibility criteria for each specific concession which they wish to access. Many concessions only require the taxpayer to have an aggregated turnover below the applicable threshold but some have additional conditions to satisfy.

For most of these concessions, the aggregated turnover concept is relevant via a requirement that the taxpayer must satisfy the definition of an SBE (or an SBE with a different threshold).

An entity is defined in s. 328-110 as an SBE for an income year (‘the current year’) if:

1. it carries on business in the current year
2. it satisfies the aggregated turnover test<sup>18</sup>:
  - (a) the entity carried on a business in the previous income year and its *aggregated turnover for the previous year* was less than \$10 million
  - (b) the entity’s aggregated turnover for the current year is likely to be less than \$10 million — i.e. estimated turnover, or
  - (c) the entity’s aggregated turnover for the current year, worked out as at the end of that year, is less than \$10 million — i.e. actual turnover.

A taxpayer can only access the small business CGT concessions in Div 152 if it satisfies certain basic conditions, including that the taxpayer is a CGT small business entity (CGT SBE) for the income year as defined in s. 152-10(1AA). An entity is a CGT SBE for an income year if it satisfies the SBE definition in s. 328-110 if:

- (a) it is an SBE for the income year
- (b) it would be an SBE for the income year if each reference in s. 328-110 to \$10 million were a reference to \$2 million.

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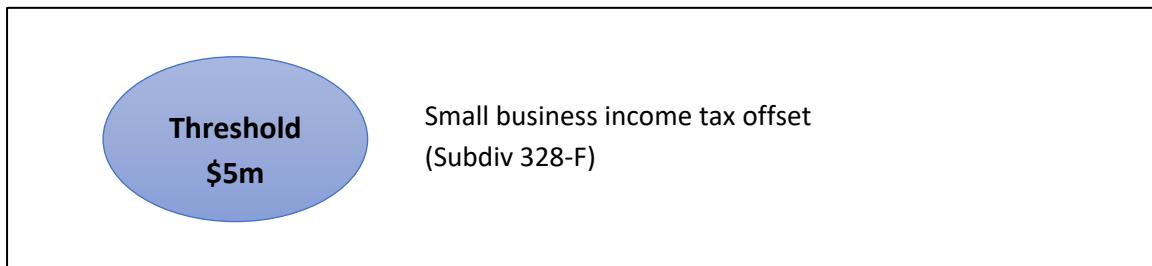
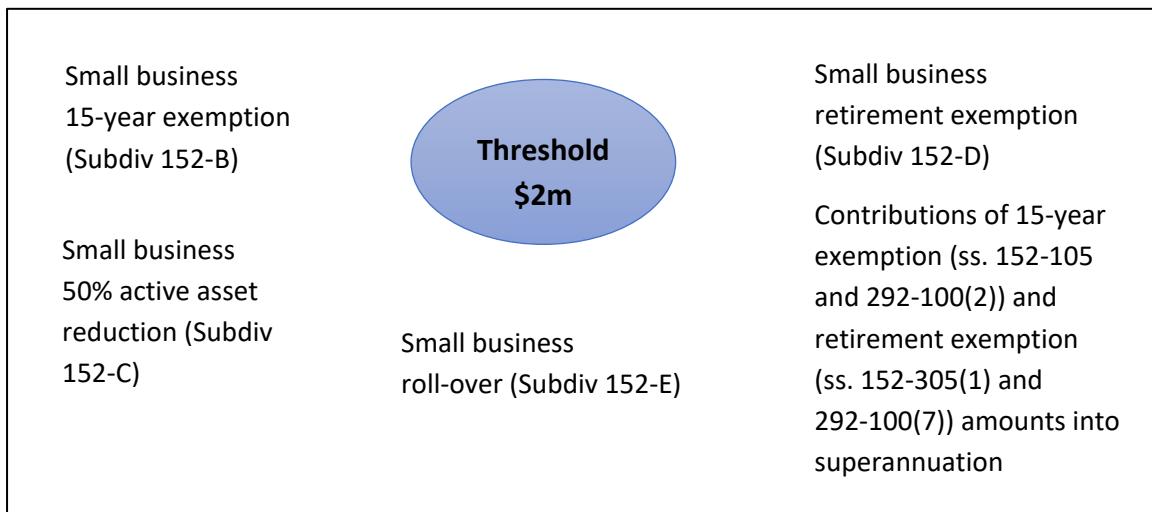
<sup>18</sup> Further rules apply in relation to the calculation of aggregated turnover for certain entities.

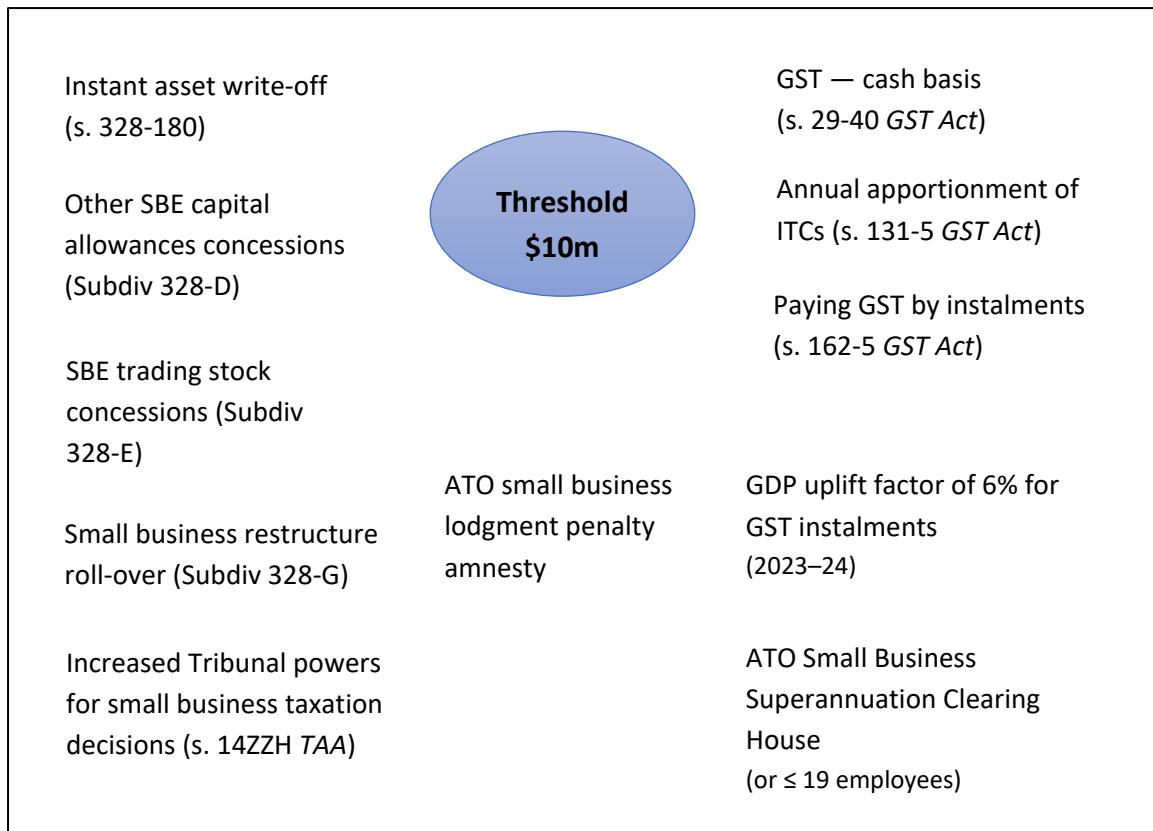
There are a number of concessions with an eligibility aggregated turnover threshold other than \$10 million. Similarly to the CGT SBE test, the provisions for these concessions generally specify that the taxpayer must satisfy the s. 328-110 SBE test but with each reference to \$10 million replaced with the relevant threshold. However, unlike the CGT SBE concept, these other concessions do not create a new category of entity.

## Concessions available under each aggregated turnover threshold

The graphics below provide a snapshot of the different concessions which are applicable at each aggregated turnover threshold.

Refer to the **Appendix at page 62** for a brief description of each concession.





Threshold \$50m		
Professional expenses for start-ups (s. 40-880(2A))		Two-year amendment period (s. 170(1) TAA)
Simplified trading stock rules (Subdiv 328-E)		GST — simplified accounting methods (Div 123 GST Act)
COVID-19 grants — NANE treatment (2020–21 and 2021–22)	Proposed small business energy incentive (proposed new ss. 328-465 and 328-470 ITTPA 1997)	Excise concession (s. 69(1A)(d) Customs Act 1901)
Prepaid expenses (s. 82KZM ITAA 1936)	(2023–24)	
Skills and training boost (ss. 328-445 and 328-450 ITTPA 1997) (29 March 2022 to 30 June 2024)	Car parking FBT exemption (s. 58GA FBTA Act)	PAYG instalments concession (s. 45-112 Schedule 1 to TAA)
Technology investment boost (ss. 328-455 and 328-460 ITTPA 1997) (29 March 2022 to 30 June 2023)	Work-related devices FBT exemption (s. 58X FBTA Act)	GDP uplift factor of 6% for PAYG instalments (2023–24)
	Lower company tax rate (ss. 23(2)(a) and 23AA Income Tax Rates Act 1986)	Trial expansion of ATO independent review process subject to audit from 1 July 2024 ( $\geq \$10m$ )

Threshold \$100m	
	Exclusion from TOFA rules (s. 230-455(4))

Threshold \$5b	
Temporary full expensing (Subdiv 40-BB and s. 328-181 ITTPA 1997) (6 October 2020 to 30 June 2023)	Loss carry-back (Div 16) (2020–21, 2021–22 and 2022–23)

# Aggregated turnover

Section 328-115 sets out how to work out an entity's aggregated turnover for an income year and defines relevant terms. See the **Appendix at page 68** for the text of the provision.

The aggregated turnover of a particular entity (i.e. the taxpayer) for an income year is the sum of the relevant **annual turnovers** (see **page 40**) of<sup>19</sup>:

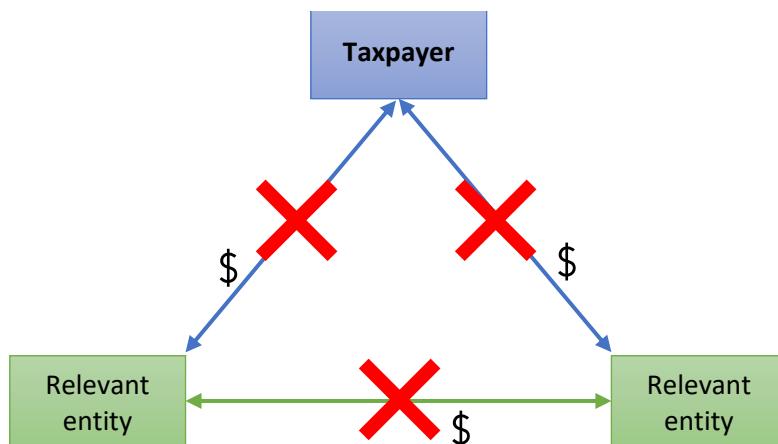
- the taxpayer
- an entity (a relevant entity) that is **connected with** the taxpayer at any time during the income year (see **page 43**)
- an entity (a relevant entity) that is an affiliate of the taxpayer at any time during the income year (see **page 51**).

## Exclusions from calculation of aggregated turnover

### Exclusions from aggregated turnover — s. 328-115(3)

An entity's aggregated turnover does not include:

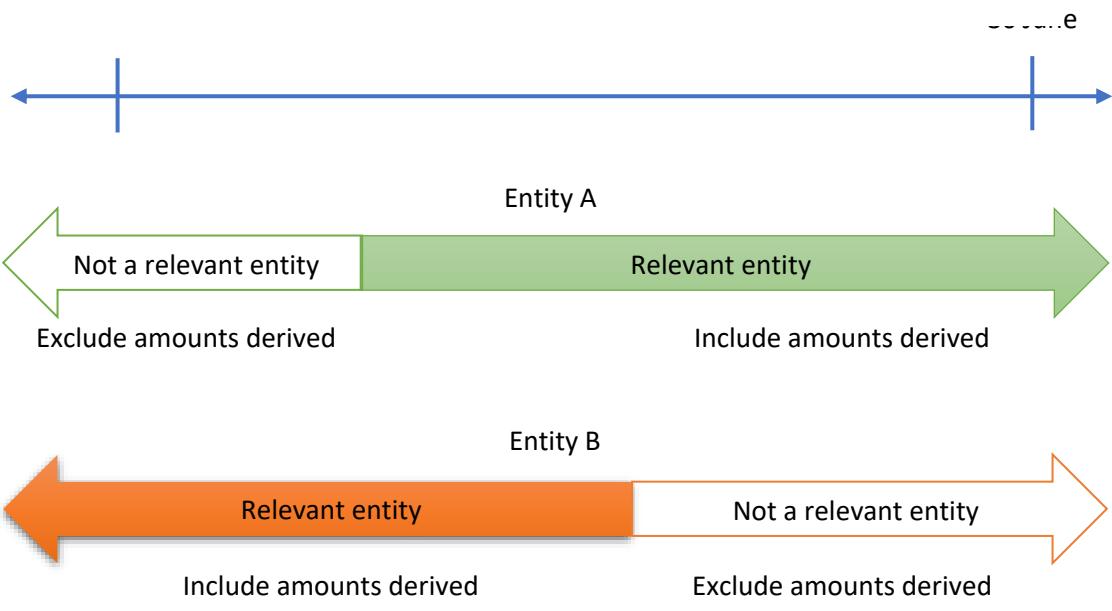
- amounts derived in the income year by the taxpayer or a relevant entity from **dealings between the taxpayer and the relevant entity** while the relevant entity is connected with the taxpayer or an affiliate of the taxpayer — s. 328-115(3)(a)
- amounts derived in the income year by a relevant entity from **dealings between the relevant entity and another relevant entity** while each relevant entity is connected with the taxpayer or is an affiliate of the taxpayer — s. 328-115(3)(b)



A relevant entity is an entity that is connected with or an affiliate of the taxpayer

<sup>19</sup> Sections 328-115(1) and (2).

An entity's aggregated turnover does not include amounts derived in the income year by a relevant entity **while the relevant entity is not connected with** the taxpayer and is **not an affiliate** of the taxpayer — s. 328-115(3)(c)



## Special rule for passively held CGT assets

### Background – basic conditions for passively held assets

A taxpayer must satisfy the basic conditions in s. 152-10 to access the small business CGT concessions. Where the taxpayer passively holds the CGT asset, the taxpayer may satisfy the basic conditions<sup>20</sup> by satisfying the special rule in s. 152-10(1A) or (1B).

The condition in s. 152-10(1A) is satisfied if:

- the taxpayer does not carry on a business in the income year (other than in partnership — and the CGT asset is not an interest in a partnership asset)
- the taxpayer's affiliate, or an entity connected with the taxpayer, is a CGT SBE for the income year
- the CGT SBE carries on a business in relation to the CGT asset at a time in the income year.

Where the non-business taxpayer is a partner in a partnership, the condition in s. 152-10(1B) will be satisfied where the partnership is a CGT SBE for the income year and it carries on a business in relation to the CGT asset at a time in the income year.

<sup>20</sup> As one of four alternative conditions listed in s. 152-10(1)(c), which also include that the taxpayer is a CGT small business entity or satisfies the maximum net asset value test.

## Calculating aggregated turnover to determine whether entity is a CGT SBE

Section 152-48 sets out a special rule for calculating the aggregated turnover of the entity carrying on a business in relation to the CGT asset (the test entity) in determining whether it is a CGT SBE for the purposes of working out whether the taxpayer satisfies the alternative conditions in s. 152-10(1A) or (1B).

Under the special rule, an entity (the deemed entity) that is an affiliate of, or connected with, the taxpayer that owns the CGT asset is taken to be an affiliate of, or connected with, the test entity (if the deemed entity is not otherwise an affiliate of, or connected with, the test entity).

This means that the test entity must include the annual turnovers of the asset owner's connected entities and affiliates in calculating its aggregated turnover for the year.

This deeming rule only applies for the purposes of determining whether the test entity is a CGT SBE for the purposes of s. 152-10(1A) or (1B).

## Annual turnover

Section 328-120 prescribes the methodology for calculating an entity's annual turnover for an income year. See the **Appendix at page 69** for the text of the provision.

### The general rule

As the general rule, an entity's annual turnover for an income year is the total **ordinary income** that it derives in the income year in the **ordinary course of carrying on a business**.<sup>21</sup>



#### Definition — a 'business' — s. 995-1

... includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee.<sup>22</sup>

There are exclusions and modifications to this general rule.

### The exclusions

Amounts which are not included in annual turnover are<sup>23</sup>:

- non-assessable non-exempt income under s. 17-5 — i.e.:
  - GST payable on a taxable supply
  - an increasing adjustment that relates to a supply
  - an increasing adjustment that relates to an acquisition and arises in circumstances that also give rise to a recoupment that is included in assessable income

<sup>21</sup> Section 328-120(1).

<sup>22</sup> Some ATO guidance on what it means to be carrying on a business can be found in TR 97/11 and TR 2019/1.

<sup>23</sup> Sections 328-120(2) and (3).

- sales of retail fuel — i.e. taxable fuel, within the meaning of the *Fuel Tax Act 2006*, that is sold by retail.<sup>24</sup>

## The modifications

### Dealings with associates

An amount of ordinary income that an entity derives from any dealing with an associate of the entity is taken to be the amount of ordinary income the entity would derive from the dealing if it were at arm's length.<sup>25</sup>

In determining whether the amount of income was derived under arm's length conditions, the entity is required to consider any connection between the parties and any other relevant circumstance.<sup>26</sup>

See the **Appendix** at page 71 for a summary of who is an associate of an entity per s. 318 of the *ITAA 1936*.

### Business carried on for part of the year

Section 328-120(5) provides that where an entity does not carry on a business for the whole of an income year, its annual turnover for that income year is worked out using a *reasonable estimate* of what its annual turnover for the income year would be if the entity carried on a business for the whole of the income year.



### Implications

A taxpayer cannot qualify for a concession only because it, a connected entity or an affiliate carried on its business for less than a full income year and therefore derived less ordinary income than what it would have for the full year.

There is no further legislative guidance as to what constitutes a 'reasonable estimate'. The Explanatory Memorandum to the *Tax Laws Amendment (Small Business) Bill 2007* provided the following commentary<sup>27</sup>:

The intent of this provision is to ensure that the eligibility test of turnover, as an indicator of the size of a business, is based on income for a full year. Without this rule, entities that carry on a business for part of an income year would have a lower turnover than is truly representative of the size of the business.

The ATO has stated<sup>28</sup> that while a reasonable estimate need only be an approximation, it must be based on a sound and reasoned process of estimation that has been undertaken in good faith.

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<sup>24</sup> The Tribunal in *PFGG and FCT* [2015] AATA 972 found that a reimbursement for fuel costs from a customer did not constitute a 'retail sale' of fuel. A 'retail sale' required a sale to an ultimate consumer.

<sup>25</sup> Section 328-120(4).

<sup>26</sup> See the definition of 'arm's length' in s. 995-1.

<sup>27</sup> Private Binding Rulings no. 1052040608200, date of advice: 6 October 2022 and no. 1051942243197, date of advice: 22 January 2022.

<sup>28</sup> Private Binding Ruling no. 1051386240996, date of advice: 20 June 2018.

As noted above at [page 39](#), amounts **derived** by entities while they were not affiliated or connected with the taxpayer are not included in the aggregated turnover calculation. For example, where an entity is sold as a going concern to an unrelated party that is not affiliated or connected with the taxpayer, the amount actually derived by the third party in operating the business is not to be included in the aggregated turnover calculation.

However it would appear that s. 328-115(3)(c) does not operate to exclude the part of the annual turnover that is estimated under s. 328-120(5) to be attributable to the period after an entity ceases carrying on a business. The exclusion in s. 328-120(5) only applies to turnover amounts **derived** when the entity is not connected with or an affiliate of the taxpayer — there does not appear to be an exclusion for turnover amounts **estimated** under s. 328-120(5).<sup>29</sup>

- The entity ceases carrying on a business before, or on the same day, it ceases to be connected or an affiliate — the entity's part year turnover is annualised under s. 328-120(5) but no amount of the estimated portion of the turnover can be excluded under s. 328-115(3)(c).
- The entity ceases to be connected or an affiliate before it ceases carrying on a business — the part of the turnover derived after it ceases to be connected or an affiliate is excluded under s. 328-115(3)(c).

### **Multiple businesses carried on during the year, one ceased**

ATO ID 2009/49 clarifies that s. 328-120(5) applies to a situation where a taxpayer carries on two or more businesses and ceases to carry on one of those businesses during an income year while still carrying on another business for the whole of the income year. The provision is not limited to applying only where a taxpayer has ceased to carry on *all* their businesses.

A reasonable estimate of what the full year turnover of the ceased business must therefore be taken into account in working out the taxpayer's annual turnover for the income year.

### **Modification by regulation**

The Regulations may provide that an entity's annual turnover for an income year is to be calculated in a different way so long as it would be less than the annual turnover worked out under s. 328-160.<sup>30</sup> No such regulation has been registered.

## **When an entity is 'connected with' another entity**

Section 328-125 provides that an entity is 'connected with' another entity in a number of circumstances. See the [Appendix](#) at [page 70](#) for the text of the provision.

1. An entity is connected with another entity if **directly controls** the other entity.
2. An entity is connected with another entity if it **indirectly controls** the other entity, through direct control of an interposed entity which directly or indirectly controls the other entity.
3. An entity is connected with another entity if both entities are **directly or indirectly controlled** by the same **third entity**.

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<sup>29</sup> See also the Commissioner's views in PBR no. 1051942243197, date of advice: 25 January 2022: 'This exclusion [in s. 328-115(3)(c)] does not work to restrict the estimation of an entity's annual turnover under subsection 320-120(5) of the *ITAA 1997*, as it only excludes amounts derived by entities while they are not connected or affiliated'.

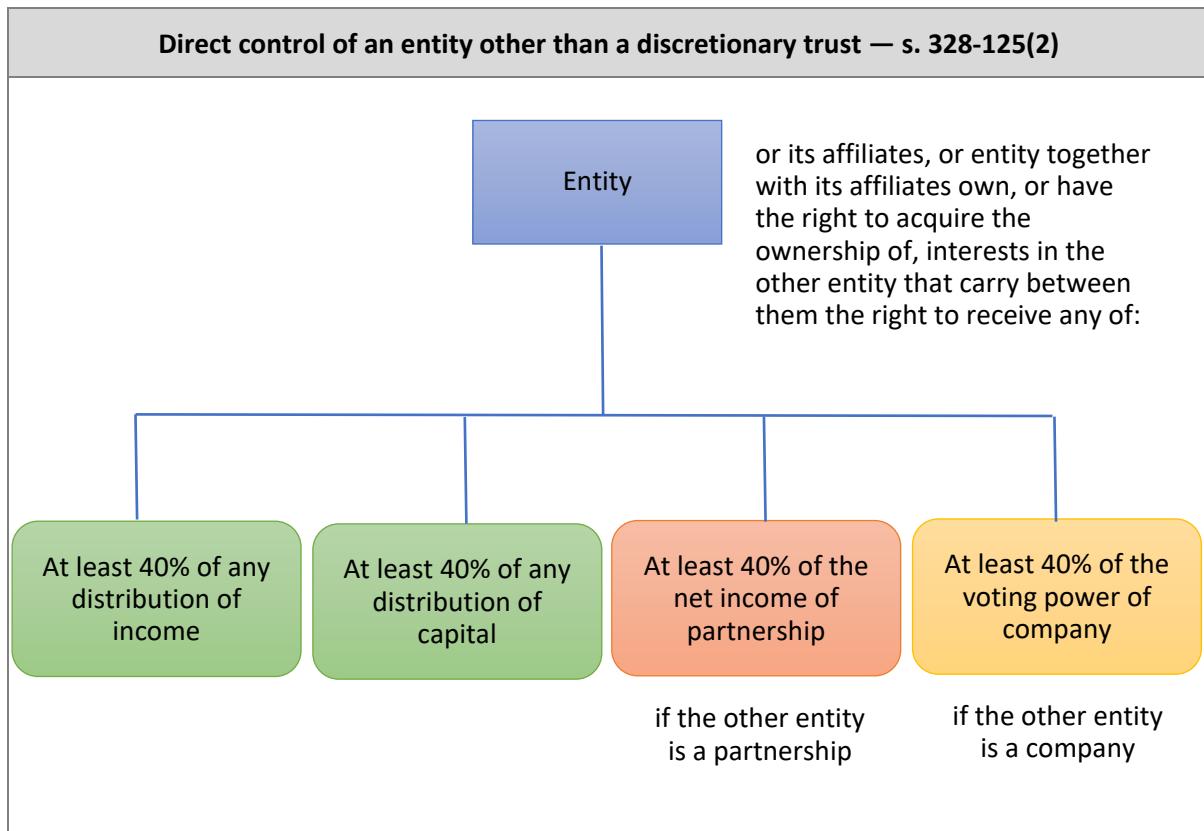
<sup>30</sup> Section 328-120(6).

## The meaning of direct control

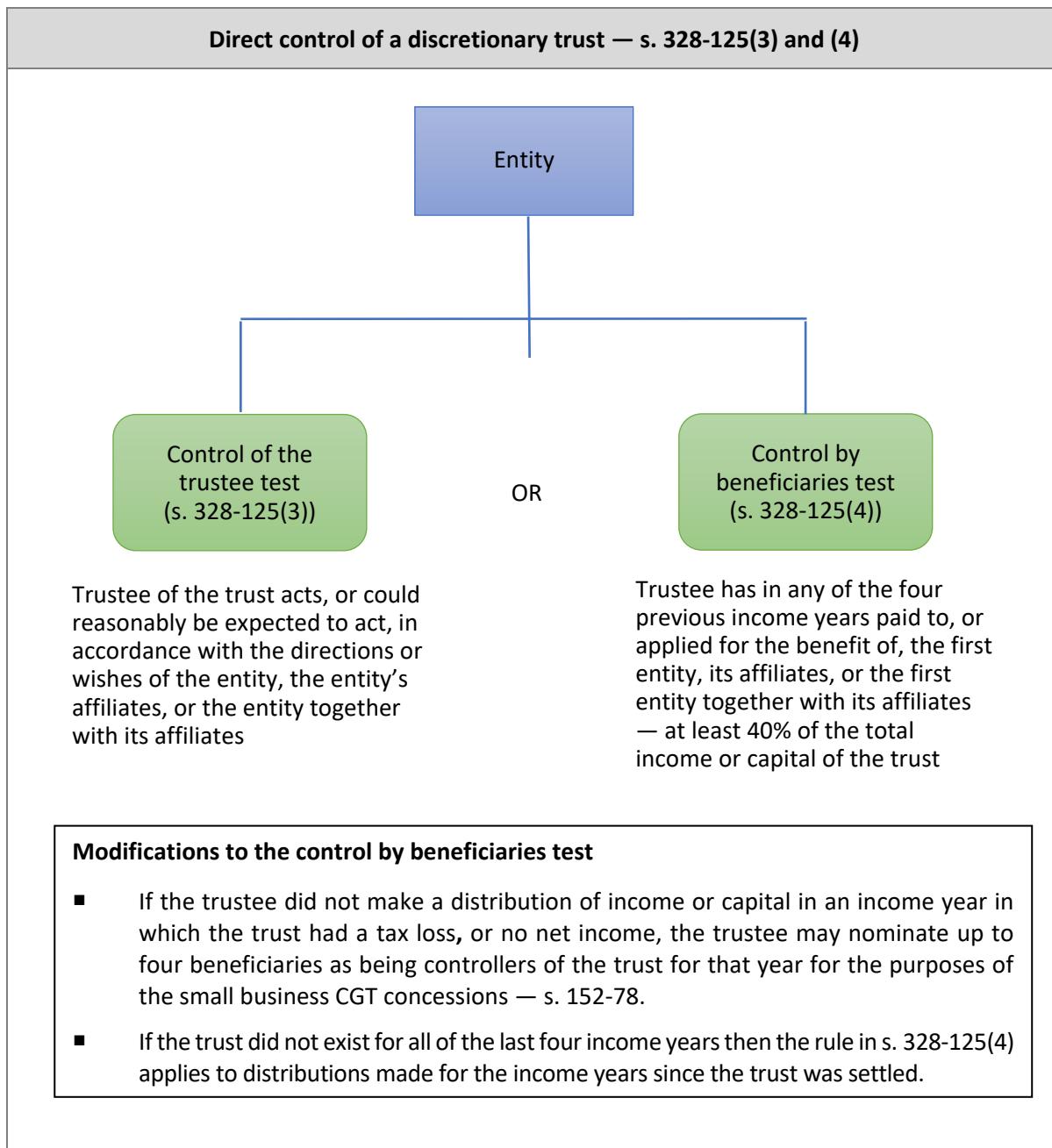
The relevant test for determining whether one entity directly controls another entity depends on whether the second entity is a discretionary trust.

Note: the percentage of rights referred to below is known as the 'control percentage'.

### Direct control of an entity other than a discretionary trust



## Direct control of a discretionary trust



### The control of the trustee test — s.328-125(3)

The following factors may be considered in determining whether a trustee is accustomed to acting, or might reasonably be expected to act<sup>31</sup>, in accordance with the directions or wishes of another:

- the way in which the trustee has acted in the past
- the relationship between the entities and the trustee
- the amount of any property or services transferred to the trust by the entities

<sup>31</sup> A 'reasonable expectation' requires more than a mere possibility: *FCT v Peabody* (1994) 181 CLR 359 (at page 385).

- any arrangement or understanding between the entities and a person(s) who has benefited under the trust in the past.<sup>32</sup>

The wording in s. 328-125(3) does not directly address the question of whether an individual trustee is considered to control the trust on the basis that the trustee acts, or could reasonably be expected to act, in accordance with the directions or wishes of an entity *being themselves*.

The ATO in private binding rulings has clarified its position that a sole individual trustee can be considered to control the trust because the individual is the entity referred to in s. 328-125(3) and the trustee could reasonably be expected to act in accordance with the directions or wishes of that entity.<sup>33</sup>

TR 2002/6W considers when a trustee of a non-fixed trust might reasonably be expected to act in accordance with an entity's directions, instructions or wishes for the purposes of the former Simplified Tax System.<sup>34</sup> According to the Ruling, whether a trustee acts, or could reasonably be expected to act, as directed by another entity depends upon whether the entity stands in a position of control or influence over the trustee.

The trustee may be a relative or associate of the entity, or an independent professional adviser, or a professional trustee. The nature of the relationship will affect whether it can be viewed as of sufficient strength to enable the entity to direct or influence the trustee's actions in relation to all or a substantial part of the trust's business.

For example, if the trustee is a corporate trustee and the entity controls that company, the inference of control or influence will be stronger than if the trustee is a professional trustee engaged at arm's length.<sup>35</sup>

The Commissioner is of the view that the ability of an appointer of a discretionary trust to remove the trustee and appoint a new one does not, of itself, mean the appointer controls the trust for the purposes of s. 328-125(3) (noting that whether an entity controls a discretionary trust depends on the particular facts and circumstances).<sup>36</sup>

In *Gutteridge and FCT*<sup>37</sup> The Tribunal found that a discretionary trust was in fact controlled by a shadow, or de facto, director of the corporate trustee — and not by the sole director of the trustee.<sup>38</sup>

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<sup>32</sup> Refer to the Explanatory Memorandum to the *Tax Laws Amendment (Small Business) Bill 2007*, at para. 2.53.

<sup>33</sup> See for example PBR nos. 1052117739258 and 1052163288379.

<sup>34</sup> The Ruling was withdrawn on 12 April 2017. However, comments in the Ruling continue to be relevant for the purposes of establishing whether the trustee acts, or could reasonably be expected to act, in accordance with the directions of another entity under the first limb of the discretionary trust control test in s. 328-125(3).

<sup>35</sup> See para. 70 of TR 2002/6W.

<sup>36</sup> Refer to the withdrawal notice for ATO ID 2008/139, withdrawn on 3 October 2014. The ATO ID stated the Commissioner's view that a person with the power to appoint or remove a trustee controlled the trust for the purposes of s. 328-125(3).

<sup>37</sup> [2013] AATA 947.

<sup>38</sup> In this case the control test was relevant for the application of the maximum net asset value test and not the aggregated turnover test.

### Gutteridge and FCT — sole director did not ‘control’ corporate trustee

The Taxpayers, Mr and Mrs Gutteridge, were beneficiaries of a discretionary trust (the Trust) which carried on a business. The Taxpayers’ daughter was the sole director and shareholder of the corporate trustee. The Trust made capital gains and the Taxpayers were subsequently taxed on those capital gains.

The Commissioner denied the application of the CGT small business concessions on the basis that the Trust did not satisfy the maximum net asset value test (MNAV). The Commissioner formed the view that the trust was controlled by the sole director and shareholder of the corporate trustee. On that basis, another entity (the other entity) that the Taxpayers’ daughter controlled was considered to be connected with the Trust. Accordingly, the other entity’s assets were taken into account in applying the MNAV test.

The taxpayers contended that the Trust was controlled solely by Mr Gutteridge. It was not controlled by their daughter and therefore the other entity was not connected with the trust.

The Tribunal considered whether the Trustee could reasonably be expected to act in accordance with the directions or wishes of the taxpayers’ daughter.

The Tribunal considered the control test has parallels with the definition of ‘director’ in the *Corporations Act 2001*. There is a reasonable expectation that a person will act in a certain way if the person is ‘accustomed to act’ in that way.

The Tribunal held that the test was not simply who held the formal office of director, nor what the Trust deed stated. It called for an examination of the actual circumstances. Based on the evidence before it, the Tribunal found that although the daughter was the director and public face of the business carried on by the Trust, **the Trustee was not accustomed to act in accordance with her wishes**. The Tribunal considered that Mr Gutteridge alone controlled the Trustee and was, in effect, a shadow director or de facto director of the corporate trustee.

In the ATO’s Decision Impact Statement on the case, the Commissioner accepted that the decision was open to the Tribunal in view of the findings of fact it made. However, while the circumstances in this case allow for a finding that a person could be reasonably be expected to act in a certain way because they were ‘accustomed to act’ in that way, the Commissioner does not accept that the ‘reasonable expectation’ test can be substituted with an ‘accustomed to act’ test in all cases. It depends on an examination of all the circumstances. For example, if there is no history at all of a trustee having acted on the directions of another, there may nonetheless be an expectation (reasonably founded) that they would act on the directions of a particular person, were such directions to be given.

### The control by beneficiaries test — s. 328-125(4)

In the Commissioner’s view, the reference to distributions of ‘income’ means the income of the trust to which a beneficiary could be entitled, determined according to the general law of trusts. Depending on the trust deed and/or the actions of the trustee, this may be an amount that differs from the ordinary income of the trust.<sup>39</sup>

<sup>39</sup> ATO ID 2012/99. While the ATO ID relates to the calculation of the direct small business participation percentage in s. 152-70(1), it states the reasoning would also broadly apply to the interpretation of income in s. 328-125(4).

## **Commissioner's discretion to determine that an entity does not control another entity — s. 328-125(6)**

Where the control percentage in s. 328-125(2) or s. 328-125(4) is **at least 40 per cent but less than 50 per cent**, the Commissioner may determine that the first entity does not control the other entity, if the Commissioner thinks that the other entity is controlled by either:

- an entity other than the first entity or any of its affiliates, or
- entities that do not include the first entity or any of its affiliates.

### **New ATO guidance on 'control' — TD 2023/5**

TD 2023/5 sets out guidance on two issues relating to the concept of 'control' for the purposes of the Commissioner's discretion to determine that an entity does not control another entity under s. 328-125(6).

#### **1. Relevance of who has responsibility for managing day-to-day business**

Sole or primary responsibility for the day-to-day management of the affairs of the test entity, while not irrelevant to the question of who controls that entity, does not of itself constitute control for the purposes of the Commissioner's discretion in s. 328-125(6).

The nature of control relevant for the Commissioner's discretion is control over those matters typically associated with **ownership** of a business entity. That is, entitlements to income and capital of the entity as well as participation in decision making on key matters affecting the entity's constitution, funding, structure and management.

Managers or directors with responsibility for the day-to-day conduct of a company's business may have considerable autonomy in making significant business decisions, but this of itself is not considered 'control' of the entity for the purposes of s. 328-125(6).

Example 2.10 of the Explanatory Memorandum to the *Tax Laws Amendment (Small Business) Bill 2007* (EM) illustrates when the discretion might be exercised to disregard a control percentage of between 40 per cent and 50 per cent on the basis of a conclusion that a third entity controls the test entity. The example refers to a manager of the test entity with a 58 per cent shareholding in that entity, and another person with a 42 per cent shareholding who has no dealings at all with the manager.

The Commissioner considers that, in these circumstances, the significance of who manages the business of the test entity stems from the relative ownership interests which confer who has the power to determine who performs the managerial function. The identity of who actually performs the managerial function is generally of limited relevance to the question of control of the test entity in s. 328-125(6). The Commissioner considers that Example 2.10 of the EM illustrates circumstances in which he would be likely to conclude that the test entity is controlled by a third entity (the 58 per cent shareholder) and exercise the discretion to disregard the 42 per cent shareholding accordingly.

The holding of interests carrying rights to more than 50 per cent of the income, capital and voting power in a company is consistent with control of the company for the purposes of s. 328-125(6). Assuming that the majority ordinary shareholding is sufficient to decide most or all of the fundamental matters relating to the test entity, the Commissioner would consider that there is control by the third entity unless the third entity's control through its majority ordinary shareholding is in some way qualified or compromised by other circumstances or arrangements.

It therefore may be possible to control an entity in the relevant sense by means other than formal ownership of interests carrying relevant rights. For example, an owner of shares carrying a certain percentage of the voting power in a company may effectively surrender those rights by legal agreement with a third entity.

### **Example 1 — Management team managing day-to-day business**

ABC Co holds 43 per cent of the ordinary shares in listed XYZ Co. The remaining 57 per cent of ordinary shares are held by various, unrelated institutional and other investors. None of the other shareholders holds more than five per cent of the shares in their own right. XYZ Co's board of directors makes all strategic decisions for the company and delegates the day-to-day decisions to the executive management team. None of the individual directors or members of the executive management team owns more than a small percentage of the shares in XYZ Co.

ABC Co satisfies the test for control of XYZ Co in s. 328-125(2) as it holds at least 40 per cent of relevant interests. ABC Co seeks the exercise of the Commissioner's discretion to disregard its control percentage in XYZ Co on the basis that:

- the directors and executive management team control XYZ Co because they carry out all of the functions relating to the strategic and day-to-day management, operation and administration of the company's business, or
- the shareholders who own the remaining 57 per cent of shares in XYZ Co control the company.

In this case, the Commissioner would not think that the directors or executive management team controls XYZ Co in the relevant sense because although they manage the strategic and day-to-day business affairs of XYZ Co:

- they do not have controlling stakes in the income, capital or voting in respect of XYZ Co, and
- ultimately they would be accountable to the shareholders, of which ABC Co is clearly the most significant, in performing the management function.

On these facts, the question of who is responsible for the day-to-day management of XYZ Co is of no particular relevance to the question of control in s 328-125(6).

The Commissioner also would not think that XYZ Co is controlled by the remaining 57 per cent of shareholders. There is no evidence that each shareholder is not acting independently in respect of their ownership rights in XYZ Co. A history of, or potential for, shareholders to act in unison on particular issues would not alter this conclusion.

There is no basis for the Commissioner to think that any entity other than ABC Co controls XYZ Co.

*Source: Example 1 of TD 2023/5*

## **2. Control by more than one 'third entity'**

The Commissioner does not accept that an entity's control percentage of between 40 per cent and 50 per cent should be disregarded on the basis that the remaining interest holders together necessarily control the test entity, irrespective of their number or relationship to each other. While the Commissioner may look beyond a single third entity for relevant control, the discretion would not be exercised merely on the basis of identifying a group of unrelated entities that, when individual control percentages are aggregated, holds interests in the test entity amounting to a control percentage of more than 50 per cent.

In order to form a view that a group of third entities controls the test entity, the Commissioner would expect to see that the group has agreed to operate, and does operate, as a single controlling mind when it comes to decision making generally in respect of the test entity. This might be in accordance with proxy arrangements that put voting power in the hands of one member of the group, or other legal arrangements under which the entities are broadly bound to act jointly in respect of the affairs of the test entity.<sup>40</sup>

While control by a group of entities could be established without the existence of a formal agreement to act jointly, strong evidence would be required to support assertions that there is joint control in such circumstances. The ATO would closely scrutinise the nature of the relationship between the entities and ongoing patterns of behaviour in relation to the test entity to determine if there is a sound evidentiary basis for the Commissioner to think there is control of the test entity by a group.<sup>41</sup>

The conclusion that there is a single controlling mind is more readily reached in these circumstances if the group consists of associated entities in terms of common ownership or close familial relationships. Mere alignment of purpose or agreement to act cooperatively on certain issues by otherwise unrelated entities would rarely, if ever, be a sufficient basis to determine that there is control of the test entity by a group of third entities.

#### **Example 2 — Third entities with total shareholding of more than 50 per cent**

Cellnet Pty Ltd carries on a business of developing products to be used in connection with mobile phones. Cellnet Pty Ltd was originally started by Ms A and Mr B who now each own 28 per cent of the company. The remaining 44 per cent is owned by an unrelated company, MobTel Pty Ltd. Cellnet Pty Ltd has three directors, Ms A, Mr B and Mr C (representative of MobTel Pty Ltd). Ms A and Mr B meet regularly to discuss operational and strategic matters relating to Cellnet Pty Ltd, and have a history of reaching agreement on decisions relating to Cellnet Pty Ltd. Ms A and Mr B are otherwise unrelated and independent of each other. Cellnet Pty Ltd seeks an exercise of the Commissioner's discretion to ignore the control percentage of MobTel Pty Ltd for aggregated turnover purposes.

The Commissioner in this case would not exercise the discretion as it would not be concluded that Cellnet Pty Ltd is controlled by Ms A and Mr B. Although they have a history of agreement on issues relating to the company:

- they are not bound to act jointly, and
- each would require the support of MobTel Pty Ltd or its representative to prevail in decision making if not supported by the other.

In the absence of arrangements or circumstances of the kind described in paras. 27 or 28 of the Determination, it would not be concluded that Ms A and Mr B control Cellnet Pty Ltd for the purposes of s. 328-125(6).

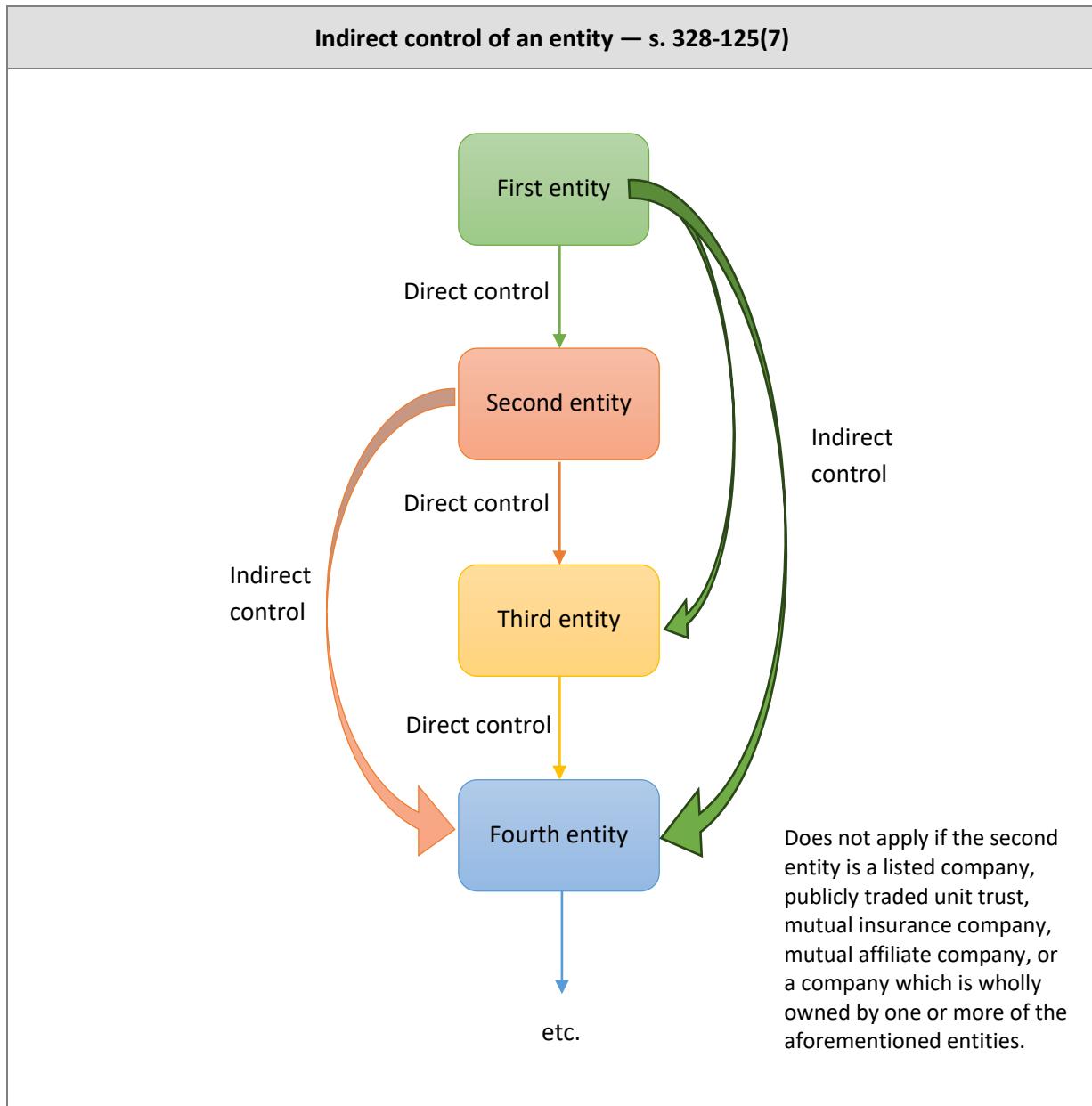
*Source: Example 4 of TD 2023/5*

<sup>40</sup> Para. 27 of TD 2023/5.

<sup>41</sup> Para. 28 of TD 2023/5.

## The meaning of indirect control

Where one entity (the first entity) directly controls an interposed entity (the second entity) which directly or indirectly controls a third entity, s. 328-125(7) provides that the first entity also indirectly controls the third entity. This rule also applies where there is a chain of more than three entities so long as there is direct control within each link (some exceptions apply).



In the above diagram, indirect control could potentially exist where the first entity has a control percentage of 16 per cent of the third entity, i.e. 40 per cent  $\times$  40 per cent (ignoring the Commissioner's discretion to determine that there is no direct control at a control percentage of 40 per cent to less than 50 per cent).

## Commissioner's guidance on the public entity exception

In **TD 2022/6**, the Commissioner sets out his view that the indirect control test in s. 328-125(7) does not apply if a public entity<sup>42</sup> is interposed between the first entity and the third entity. The first entity will not control the third entity merely because of its interest in the interposed public entity.

Subsection 328-125(8) provides an exception to the indirect control test, setting out a list of specific entities (broadly, public entities), the interposition of which results in the indirect control test not having application.<sup>43</sup>



### Note

The mere presence of an interposed public entity does not result in a control chain being broken — i.e. if a public entity is interspersed in an ownership structure, the first entity may still control the third entity through **direct** control.

Application of the 'connected with' rules to partnerships etc.

## Partnerships, foreign hybrids and non-entity JVs

**TD 2022/7** sets out the Commissioner's view in relation to when an entity will be connected with partnerships, foreign hybrids and non-entity joint ventures.

### Partnerships

The Determination states that Subdiv 328-C applies to a partnership as though it were an entity separate to its partners.

A partner is capable of directly controlling a partnership based on the general control tests or the specific test for determining whether an entity directly controls a partnership. When determining whether a partnership directly controls another entity, the partnership is the relevant entity, rather than the individual partners in their capacity as partners.

Where an entity is directly controlled by a partnership, that entity will also need to consider whether it is indirectly controlled by any other entities that control the partnership, including the individual partners in their capacity as partners of the partnership.



### Note — Affiliates

As only an individual or a company can be an affiliate of an entity (see [page 58](#)), a partnership is not capable of being an affiliate of another entity.

<sup>42</sup> Under s. 328-125(8), a public entity includes: a listed company (other than where the shares carry the right to a fixed rate of dividend); a publicly traded unit trust; a mutual insurance company; a mutual affiliate company; and a company wholly owned by any of the aforementioned.

<sup>43</sup> The Explanation in the Appendix states that the reasoning behind the public entity exception to the indirect control test is that the very diffuse and regularly traded ownership of such entities means that it can be a complicated and difficult process to trace interests through such entities.

## Foreign hybrids

A foreign hybrid<sup>44</sup> is treated as a partnership for Australian tax purposes<sup>45</sup>, and is therefore treated as though it were a partnership for the purposes of Subdiv 328-C.

Therefore, a partner of a foreign hybrid limited partnership or a member of a foreign hybrid company is capable of directly controlling the foreign hybrid based on the general control test or the partnership control test.

Section 328-125(2)(b), which is a specific test for determining whether an entity directly controls a company (the ‘voting control test’), does not apply to determining direct control of a foreign hybrid.



### Note — Affiliates

A foreign hybrid is not capable of being an affiliate (see [page 58](#)), by virtue of it being treated as a partnership.

## Non-entity joint ventures

Unlike a partnership, a ‘non-entity joint venture’<sup>46</sup> is not an entity in its own right for the purposes of Subdiv 328-C. Therefore, when applying the aggregation rules in Subdiv 328-C, the relevant entities are each of the parties to the non-entity joint venture, in their separate capacities.



### Note — Affiliates

A party to a non-entity joint venture will not be an affiliate of another party to that non-entity joint venture merely because of the nature of their business relationship (see [page 58](#)).

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<sup>44</sup> ‘Foreign hybrid’ encompasses a foreign hybrid limited partnership and a foreign hybrid limited company.

<sup>45</sup> Pursuant to Div 830 of the *ITAA 1997*.

<sup>46</sup> As defined in s. 995-1(1) of the *ITAA 1997*. A non-entity joint venture means an arrangement that the Commissioner is satisfied is a contractual arrangement under which two or more parties undertake an economic activity subject to the parties’ joint control, and that is entered into to obtain individual benefits for the parties in the form of a share of output rather than joint profits.

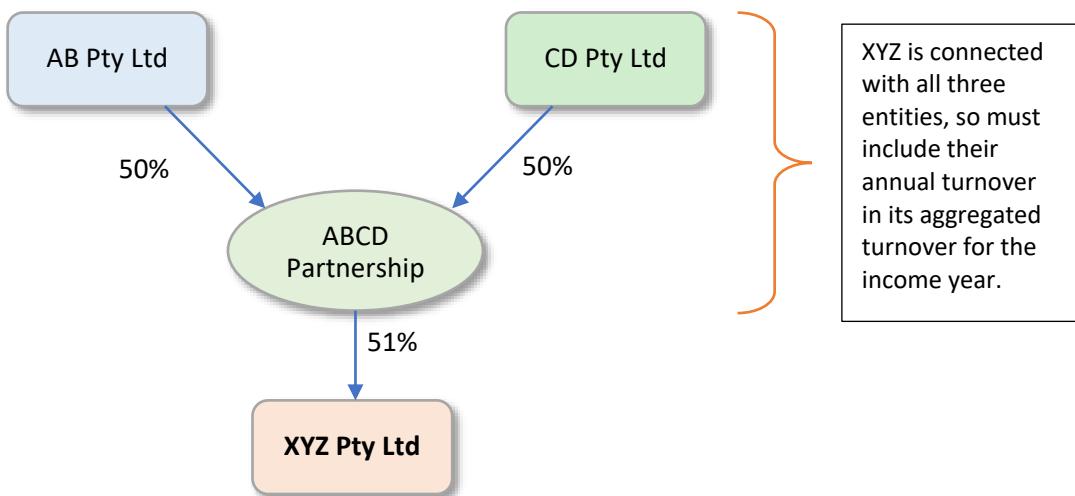
### Example 3 — Working out whether an entity is connected with a partnership

XYZ Pty Ltd (XYZ) needs to calculate its aggregated turnover for the 2022–23 income year to determine its eligibility for the loss carry back tax offset.

Under s. 328-115, XYZ's aggregated turnover includes its own annual turnover, together with the annual turnover of any entity that is connected with, or an affiliate of, XYZ at any time during the income year. Therefore, to undertake this calculation, XYZ needs to identify any entities connected with it.

The major shareholder in XYZ is a partnership known as ABCD Partners (the Partnership). AB Pty Ltd (AB) and CD Pty Ltd (CD) each hold 50 per cent of the interests in the Partnership and receive equal distributions of income and capital made by the Partnership.

The Partnership's assets include 51 per cent of the ordinary shares in XYZ. These shares carry full rights to voting, capital and dividends.



The Partnership directly controls XYZ by virtue of holding 51 per cent of the rights to voting, capital and dividends in XYZ (satisfying the general control tests in s. 328-125(2)(a)(i) and (iii), as well the voting control test in s. 328-125(2)(b)).

As XYZ is directly controlled by the Partnership, it also needs to consider whether it is indirectly controlled by AB and/or CD. As AB and CD are each entitled to receive 50 per cent of any distributions of income or capital made by the Partnership, they are each taken to directly control the Partnership in accordance with the general control tests in s. 328-152(2)(a)(i) and (ii). Accordingly, by virtue of the indirect control test in s. 328-125(7), AB and CD each indirectly control XYZ.

Therefore, XYZ is connected with the Partnership, AB and CD, and will need to include the annual turnover of each of these entities in its aggregated turnover for the 2022–23 income year.



#### Note

In accordance with s. 328-115(3)(a) and (b), XYZ's aggregated turnover does not include amounts derived by each of XYZ, the Partnership, AB and CD from their dealings with each other. For example, this would include distributions made by XYZ to the Partnership, and by the Partnership to AB and CD during the 2022-23 income year, to the extent those amounts would otherwise have been included in the respective annual turnovers of each of those entities under s. 328-120.

*Source: Adapted from Example 1 of TD 2022/7*

## Corporate limited partnerships

TD 2022/5 sets out the Commissioner's view that the aggregation rules apply to a corporate limited partnership<sup>47</sup> as though it were a company, rather than a partnership.<sup>48</sup>

Accordingly, for the purposes of determining whether an entity is 'connected with' a corporate limited partnership, by virtue of directly controlling the corporate limited partnership within the meaning of s. 328-125(2):

- an entity is capable of directly controlling a corporate limited partnership by operation of either the 'general control' test<sup>49</sup> or the 'voting control' test<sup>50</sup>; and
- the specific test for determining whether an entity directly controls a partnership<sup>51</sup> does not apply to determining whether an entity directly controls a corporate limited partnership.

### Example 4 — Application of the general control test to a corporate limited partnership

ABC LP (ABC), a corporate limited partnership, needs to work out its aggregated turnover for the 2022–23 income year to determine its eligibility for temporary full expensing.

Under ABC's limited partnership agreement, ABC's profits for an income year are to be allocated and distributed to each of its limited partners in accordance with their respective percentage of contributed capital relative to ABC's total capital.

ABC's limited partners have contributed a total of \$20 million of capital to ABC. ABC's limited partners include EFG Pty Ltd (EFG), which contributed \$12 million of capital to ABC (equating to 60 per cent of ABC's total capital). ABC also has four other limited partners, which each contributed \$2 million of capital to ABC (equating to a total of 40 per cent of ABC's capital, or 10 per cent each). ABC's limited partners are not affiliates of each other within the meaning of s. 328-130.

ABC wants to know whether it is connected with any of its limited partners in accordance with s. 328-125.

By virtue of holding a 60 per cent interest in ABC's capital, EFG has the right to receive 60 per cent of any distributions of income made by ABC. Therefore, EFG is connected with ABC under the general control test in s. 328-125(2)(a)(i).

The other limited partners each hold less than 40 per cent of the interests in ABC and, based on the facts, are not connected with ABC. Therefore, ABC needs to include the annual turnover of EFG in its aggregated turnover for the 2022–23 income year.



#### Note

In accordance with s. 328-115(3)(a), ABC's aggregated turnover does not include amounts derived by ABC or EFG from their dealings with each other, to the extent those amounts would otherwise be included in the respective annual turnovers of ABC or EFG under s. 328-120.

*Source: Adapted from Example 1 of TD 2022/5*

<sup>47</sup> As defined in s. 94D of the *ITAA 1936*.

<sup>48</sup> Division 5A of the *ITAA 1936* operates to treat certain limited partnerships as companies for income tax purposes.

<sup>49</sup> The general control test (as is applicable to determining the direct control of a corporate limited partnership) is in s. 328-125(2)(a)(i) and (iii).

<sup>50</sup> The voting control test is outlined in s. 328-125(2)(b).

<sup>51</sup> The specific test for determining whether an entity directly controls a partnership is in s. 328-125(2)(a)(ii).



## Note — Affiliates

By virtue of being treated as a company for income tax purposes, a corporate limited partnership is capable of being an ‘affiliate’ of another entity within the meaning of s. 328-130 (see the next section).

## Assumption for small business CGT concessions — shares and trust interests

The connected entity rule is adjusted in the situation where the taxpayer is seeking to access the small business CGT concessions in respect of a capital gain made on the sale of a CGT asset which is a share in a company or an interest in a trust (the company or trust being the ‘object entity’) — see s. 152-10(2).

There are additional alternative basic conditions which must be satisfied. While there are a number of ways in which the additional basic conditions may be met, the relevant condition for this discussion is where the object entity would be a CGT SBE for the income year if a number of assumptions were made, relevantly including the following three<sup>52</sup>:

- the only annual turnovers considered are those of the object entity, each affiliate of the object entity, and each entity controlled by the object entity
- the relevant control percentage is 20 per cent instead of 40 per cent
- there is no determination that the object entity does not control another entity in force.

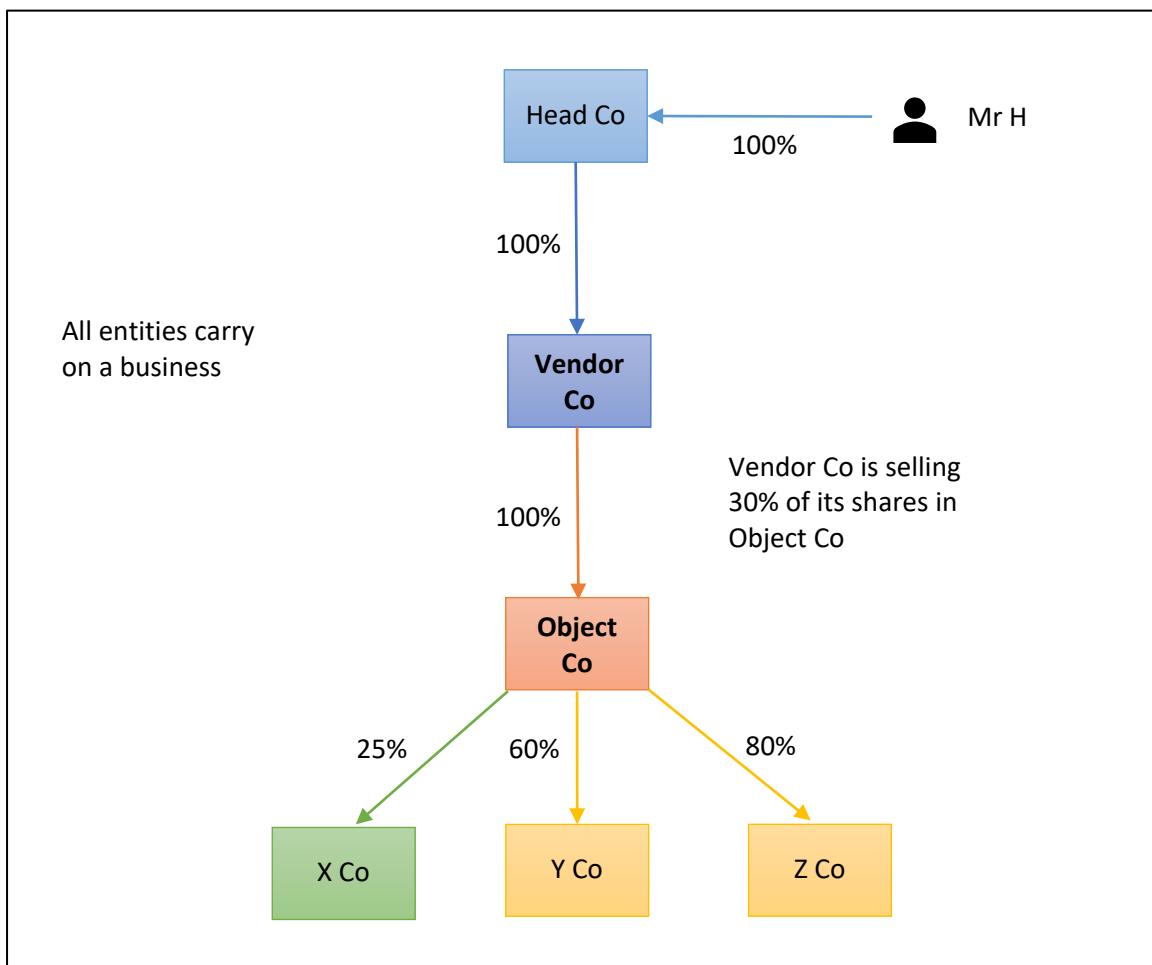
The first assumption means that the control test — in relation to the object entity — only operates on a downstream basis. The alternative condition is satisfied if the object entity carries on a business, and its aggregated turnover is less than \$2 million — not taking into account any entity that directly or indirectly controls it (including the taxpayer selling the interest in the object entity).

While this adjustment to the connected entity rules may appear to bring fewer entities into the object entity’s net, the lowering of the control percentage from 40 per cent to 20 per cent may bring other (downstream) entities into the net which would not otherwise be the case if the object entity or the taxpayer was testing its eligibility for other small business tax concessions.

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<sup>52</sup> Section 152-10(2)(c).

## An illustration



Vendor Co needs to work out whether it is eligible for the small business CGT concessions in relation to the capital gain that it will make on the sale of its shares in Object Co.

As the CGT assets are shares in a company, Vendor Co must satisfy additional basic conditions in s. 152-10(2).

One of the alternative basic conditions which Vendor Co may satisfy is that the object entity — Object Co — would be a CGT SBE for the income year assuming that:

- the only annual turnovers considered are those of Object Co, each affiliate of Object Co, and each entity controlled by Object Co
- the relevant control percentage is 20 per cent instead of 40 per cent
- there is no determination that Object Co does not control another entity in force.

Object Co also needs to confirm whether it is eligible for general SBE concessions (e.g. Subdiv 328-D) for the income year.

The following table summarises which entities are included in the calculation of Object Co's aggregated turnover for the purposes of Vendor Co's eligibility for the small business CGT concessions and Object Co's eligibility for general SBE concessions.

Entity	Whether entity is connected with Object Co	
	Small business CGT concessions — additional conditions for shares (Vendor Co)	Other income tax SBE concessions (Object Co)
Mr H	✗	✓
Head Co	✗	✓
Vendor Co	✗	✓
X Co	✓	✗
Y Co	✓	✓
Z Co	✓	✓

In this example assume there are no affiliates.

Object Co will be eligible for the SBE concessions if the annual turnovers of itself, Mr H, Head Co, Vendor Co, Y Co and Z Co total less than \$10 million.

Vendor Co will satisfy this particular additional condition for eligibility for the small business CGT concessions in relation to the sale of its shares in Object Co if the annual turnovers of Object Co, X Co, Y Co and Z Co total less than \$2 million.<sup>53</sup>

## When an entity is an ‘affiliate’ of another entity

An ‘affiliate’ of an entity is defined in s. 328-130.

Only an individual or a company can be an affiliate of a taxpayer.

The individual or company is an affiliate of the taxpayer if the individual or company acts, or could reasonably be expected to act:

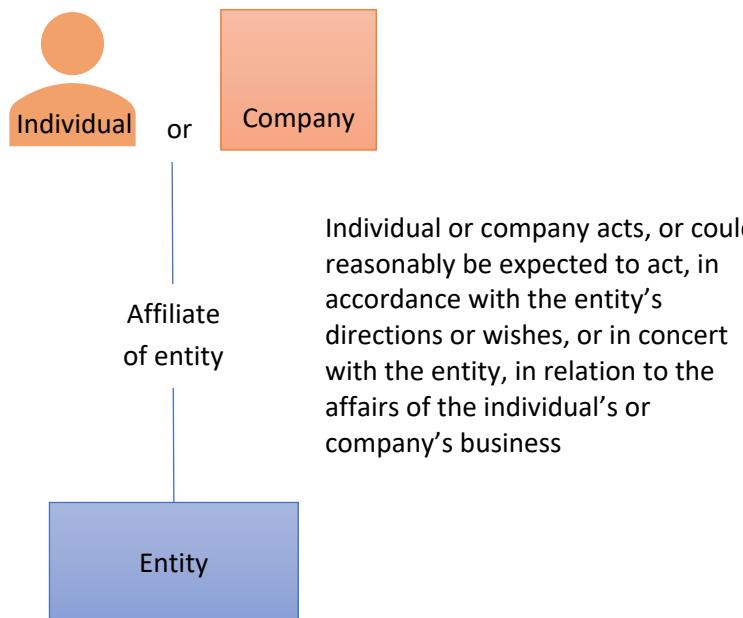
- in accordance with the taxpayer’s directions or wishes; or
- in concert with the taxpayer,

in relation to the affairs of the individual’s or company’s business.

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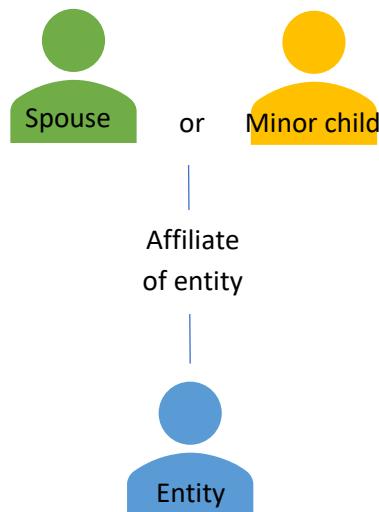
<sup>53</sup> If this condition cannot be met then Vendor Co should consider whether it can satisfy the other alternative condition, being that Object Co would satisfy the maximum net asset value test under the same assumptions. Further, there are other additional conditions in s. 152-10(2) which need to be satisfied — outside the scope of this example.

### Affiliate of an entity — s. 328-130



### Small business CGT concessions — passively held assets — s. 152-47(2)

In the case of certain passively held assets, an affiliate also includes:



## Deemed affiliate rule for Div 152 purposes — spouses and minor children — passively held assets

Section 152-47 provides that where one entity (the asset owner) owns a CGT asset that is:

- used by another entity (the business entity) in the course of carrying on a business in an income year, or
- inherently connected with a business that is carried on by the business entity,

and the business entity is not an affiliate of, or connected with, the asset owner, the spouse or minor child of an individual are deemed to be affiliates of the individual for the purposes of working out whether the business entity is an affiliate of, or connected with, the asset owner.

This rule does not affect the definition of ‘affiliate’ in s. 328-130 — rather, it expands the circumstances in which the spouse or child of an individual is taken to be their affiliate — but only for the purposes of the small business CGT concessions.

In order for the owner of a CGT asset to access the small business CGT concessions in Div 152, they must satisfy the basic conditions for relief set out in s. 152-10. Where the taxpayer does not carry on a business (other than in partnership<sup>54</sup>), and is passively holding the asset, they will satisfy the condition where<sup>55</sup>:

- the taxpayer’s affiliate, or an entity connected with the taxpayer, is a CGT SBE for the income year
- the CGT small business entity is the entity that, at a time in the income year, carries on the business in relation to the CGT asset.

Where the taxpayer who owns the asset does not carry on any business in the income year other than as a partner in a partnership, the condition will be satisfied where<sup>56</sup>:

- the partnership is a CGT SBE for the income year
- the CGT asset is not an interest in an asset of the partnership
- the business the taxpayer carries on as a partner is the business carried on, at a time in the income year, in relation to the CGT asset.

The deemed affiliate rule ensures that the annual turnover of the asset owner’s spouse or child is taken into account in determining whether the entity that uses the CGT asset in its business is a CGT SBE, i.e. whether its aggregated turnover is below \$2 million.<sup>57</sup>

A spouse is an affiliate of the taxpayer only while they remain a spouse. Similarly, a child will be an affiliate only while the child is under 18 years of age.<sup>58</sup>

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<sup>54</sup> And the CGT asset is not an interest in an asset of the partnership.

<sup>55</sup> Section 152-10(1A).

<sup>56</sup> Section 152-10(1B).

<sup>57</sup> The s. 152-47 deemed affiliate rule also applies to treat the spouse or minor child as an affiliate of the individual for the purposes of the maximum net asset value test and active asset test for determining eligibility for the small business CGT concessions. If the business entity does not satisfy the \$2 million threshold and is not a CGT SBE, the asset owner may use the \$6 million MNAV in s. 152-15 which does not require that the asset owner carries on a business. The test requires that the sum of the net values of the CGT assets of the taxpayer, entities connected with them, their affiliates, and entities connected with their affiliates does not exceed \$6 million. The meaning of ‘active asset’ in s. 152-40 states that the asset must be used in the course of a business carried on by the taxpayer, their affiliate or an entity connected with them.

<sup>58</sup> Section 152-47(4)(b).

## The application of s. 152-47 – two different views

The Commissioner has expressed his preferred view in recent PBR no. 1052103982176<sup>59</sup> that where s. 152-47 applies to make one spouse (Person A) an affiliate of the other (Person B), it does not necessarily apply the other way. That is, where it deems Person B to be an affiliate of Person A, the provision does not operate such that the same affiliate finding must work in the other direction. The operation of the section needs to be considered afresh for Person B.

The PBR acknowledges that it is conceivable that where any entity has been deemed to be an affiliate or connected with another entity under s. 152-47(2), spouses will be treated as affiliates for CGT small business concession purposes more generally, on the basis that there is no requirement in s. 152-47(2)( and (3) that the individual must be either the asset owner or the business entity. However, in this PBR the Commissioner does not consider this alternative view to be the better view.

In another PBR no. 1051976460739<sup>60</sup>, where Individual X and Individual Y were spouses, the Commissioner concluded that s. 152-47 applied such that Individual Y was a deemed affiliate of Individual X and Individual X was a deemed affiliate of Individual Y. As a consequence, both Individual X and Individual Y were each taken to — together with their affiliate spouse — hold 40 per cent or more of the voting rights in a company. Individually they each held less than 40 per cent.

However note that in this PBR, both Individual X and Individual Y own equal controlling interests of 50 per cent each in the company which owned the passively held CGT asset. In arriving at its conclusion that the spouses were to be treated as affiliates of each other under s. 152-47, it is unclear as to whether the ATO had taken the approach that the provision should apply both ways, or whether it had applied the rule to each taxpayer independently (and the outcome would be the same given that they had the same ownership interests).

There is no public binding guidance in relation to the issue of whether s. 152-47 automatically applies to treat both spouses as a deemed affiliate of the other spouse or whether it does not operate such that the same affiliate finding for one spouse must automatically work in the other direction.

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<sup>59</sup> Date of advice: 31 March 2023.

<sup>60</sup> Date of advice: 30 May 2022.

# Appendix

## Summary of tax concessions

Concessions with a \$2 million aggregated turnover threshold

<b>Small business CGT 15-year exemption</b> Subdiv 152-B	CGT-free where the taxpayer has continuously owned the asset for at least 15 years.
<b>Small business CGT 50% active asset reduction</b> Subdiv 152-C	The taxable gain is reduced by 50 per cent.
<b>Small business CGT retirement exemption</b> Subdiv 152-D	Eligible capital gains are CGT-exempt up to a lifetime limit of \$500,000.
<b>Small business CGT roll-over</b> Subdiv 152-E	Taxpayer can defer all or part of capital gain until a later year if a replacement asset is acquired.
<b>Contributions of small business CGT 15-year exemption amounts into superannuation</b> ss. 152-105 and 292-100(2)	Individual can contribute an amount into superannuation without affecting their non-concessional contribution limit. <sup>61</sup>
<b>Contributions of small business CGT retirement concession amounts into superannuation</b> ss. 152-305(1)(b) and 292-100(7)	Individual under 55 years old can contribute an amount into superannuation without affecting their non-concessional contribution limit. <sup>62</sup>

Concession with a \$5 million aggregated turnover threshold

<b>Small business income tax offset</b> Subdiv 328-F	Individuals who are sole traders or receive business income from a partnership or trust can claim a tax offset equal to 16 per cent of tax payable on net small business income, capped at \$1,000.
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<sup>61</sup> Section 292-90(2)(c)(iii) excludes a contribution of a retirement concession amount from an individual's non-concessional contributions, to the extent that it does not exceed the individual's CGT cap amount when it is made.

<sup>62</sup> Section 292-90(2)(c)(iii) excludes a contribution of a 15-year exemption amount from an individual's non-concessional contributions, to the extent that it does not exceed the individual's CGT cap amount when it is made.

## Concessions with a \$10 million aggregated turnover threshold

### Income tax

<b>Instant asset write-off</b> s. 328-180	Simplified depreciation taxpayers must claim an immediate deduction for the cost of eligible assets under the relevant threshold. The threshold was uncapped from 6 October 2020 to 30 June 2023. It has reverted to \$1,000 from 1 July 2023, but is proposed to temporarily increase to \$20,000 from 1 July 2023 to 30 June 2024. <sup>63</sup>
<b>Other SBE capital allowances concessions</b> Subdiv 328-D	Taxpayers are eligible for the pooling rules in relation to eligible depreciating assets which do not qualify for the instant asset write-off. The small business general pool is written off as a single asset at 30 per cent diminishing value per year. New assets are depreciated at 15 per cent in the year in which they are added to the pool. Certain disposals are eligible for roll-over relief.
<b>SBE trading stock concessions</b> Subdiv 328-E	Taxpayers can choose not to account for changes in the value of their trading stock for an income year if the difference between the value of the trading stock on hand at the start of the year and the value the taxpayer reasonably estimates of trading stock on hand at the end of the year is not more than \$5,000.
<b>Small business restructure roll-over</b> Subdiv 328-G	Taxpayers may disregard gains and losses that would otherwise arise where they restructure the ownership of the assets of the business, without changing the ultimate economic ownership of the assets.

### GST

<b>GST — cash basis</b> s. 29-40 <i>GST Act</i>	Taxpayers may make the choice to account for GST on the BAS that covers the period in which the sales and purchases occur.
<b>Annual apportionment of GST input tax credits</b> s. 131-5 <i>GST Act</i>	Taxpayers may choose to make a single year-end adjustment to account for the private use proportion of input tax credits already claimed.
<b>Paying GST by instalments</b> s. 162-5 <i>GST Act</i>	Taxpayers may elect to pay GST in quarterly instalments.
<b>GDP uplift factor of 6% for GST instalments</b>	Taxpayers can use the instalment amount option for GST. The ATO calculates the instalment amount using information from the taxpayer's most recent tax return, with an adjustment for likely growth in income. The adjustment is based on changes in Australia's gross domestic product (GDP). The GDP adjustment is 6 percent for the 2023–24 income year for taxpayers whose quarter starts on or after 1 April 2023.

## Tax administration

<b>Increased Tribunal powers for small business taxation decisions</b> s. 14ZZH TAA	The Tribunal may make an order to limit or modify the Commissioner's discretionary powers to recover all or part of a tax debt in relation to a reviewable objection decision that relates to a small business taxation assessment decision.
<b>ATO small business lodgment penalty amnesty</b>	The ATO's small business lodgment penalty amnesty applies to overdue income tax returns, business activity statements and FBT returns that were originally due between 1 December 2019 and 28 February 2022. The amnesty ran from 1 June to 31 December 2023. The overdue obligation must be lodged within that timeframe. Any associated failure to lodge penalties are remitted.
<b>ATO Small Business Superannuation Clearing House</b> <sup>64</sup>	Employers can pay superannuation guarantee for all employees through a single payment to the clearing house.

## Concessions with a \$20 million aggregated turnover threshold

<b>Refundable R&amp;D tax offset</b> s. 67-30 and item 1 of table in s. 355-100	Taxpayers with aggregated annual turnover under \$20 million are entitled to a refundable R&D tax offset equal to a percentage <sup>65</sup> of notional deductions between \$20,000 and \$150 million.
<b>Non-refundable R&amp;D tax offset</b> items 2 or 3 of table in s. 355-100	Taxpayers with aggregated annual turnover of \$20 million or over are entitled to a non-refundable R&D tax offset equal to a percentage <sup>66</sup> of notional deductions between \$20,000 and \$150 million.

<sup>63</sup> The *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* was introduced into the House of Representatives on 13 September 2023.

<sup>64</sup> The ATO is an approved clearing house for the purposes of s. 79A(3) of the SGA Act (reg. 24 of the SGA Regs). The ATO sets the eligibility requirements for the use of the clearing house.

<sup>65</sup> Taxpayer's corporate tax rate for the income year plus 18.5 percentage points.

<sup>66</sup> Taxpayer's corporate tax rate for the income year plus, increased by a premium in certain circumstances (s. 355-100(1A)).

## Concessions with a \$50 million aggregated turnover threshold

### Income tax

<b>Professional expenses for start-ups</b> s. 40-880(2A)	Taxpayers may claim certain start-up expenditures <sup>67</sup> in the income year incurred.
<b>COVID-19 grants — NANE treatment</b> s. 59-97	State and Territory grants paid to businesses affected by COVID-19 trading restrictions during the 2020–21 or 2021–22 income years are non-assessable non-exemption (NANE) income where the grant is declared as NANE income by the Treasurer.
<b>Simplified trading stock rules</b> Subdiv 328-E	Taxpayers can choose not to conduct a stocktake at year end if there is an estimated difference of \$5,000 or more from the opening value.
<b>Prepaid expenses</b> s. 82KZM ITAA 1936	Taxpayers may claim an immediate deduction for prepaid expenses which cover ≤ 12 months and ends in the next income year.
<b>Skills and training boost</b> ss. 328-445 and 328-450 ITTPA	Taxpayers may claim a 20 per cent bonus deduction for eligible expenditure on external training for employees incurred between 7.30 pm (AEDT) on 29 March 2022 and 30 June 2024.
<b>Technology investment boost</b> ss. 328-455 and 328-460 ITTPA	Taxpayers may claim a 20 per cent bonus deduction for eligible expenditure on the entity's digital operations or digitising the entity's operations incurred between 7.30 pm (AEDT) on 29 March 2022 and 30 June 2023.  The bonus deduction is capped at the lower of 20 per cent of eligible expenditure or \$20,000 per income year.
<b>Proposed small business energy incentive</b> ss. 328-465 and 328-470 ITTPA	It is proposed that taxpayers will be provided with a bonus 20 per cent bonus deduction on expenditure that supports electrification and more efficient use of energy. The asset must be first used or installed ready for use, or the improvement cost incurred, between 1 July 2023 and 30 June 2024. The bonus deduction is capped at \$20,000. <sup>68</sup>

<sup>67</sup> Fees for professional advice, and government agency fees, taxes or charges.

<sup>68</sup> The *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* is currently before the Senate.

## FBT

<b>Car parking exemption</b> s. 58GA <i>FBTA Act</i>	FBT exemptions for certain car parking benefits.
<b>Work-related devices exemption</b> s. 58X <i>FBTA Act</i>	FBT exemptions for multiple work-related portable electronic devices that have substantially identical functions provided to an employee in the same FBT year.

## Tax administration

<b>Lower company tax rate</b> ss. 23(2)(a) and 23AA <i>Income Tax Rates Act 1986</i>	Corporate tax entities that are ‘base rate entities’ have a lower tax rate of 25 per cent from 2021–22. <sup>69</sup>
<b>Two-year amendment period</b> item 1 s. 170(1) <i>ITAA 1936</i>	Individual taxpayers generally have a two-year time limit from the day the notice of assessment is issued for the Commissioner to amend the assessment. <sup>70</sup>
<b>PAYG instalments concession</b> s. 45-112 of Sch 1 <i>TAA</i>	Taxpayers can pay PAYG instalments using an amount calculated by the ATO.
<b>GDP uplift factor of 6% for PAYG instalments</b>	Taxpayers can use the instalment amount option for PAYG. The ATO calculates the PAYG instalment amount using information from the taxpayer’s most recent tax return, with an adjustment for likely growth in income. The adjustment is based on changes in Australia’s gross domestic product (GDP). The GDP adjustment is 6 per cent for the 2023–24 income year for taxpayers whose quarter starts on or after 1 April 2023.
<b>GST — simplified accounting methods</b> Div 123 <i>GST Act</i>	Eligible ‘small enterprise entities’ and retailers may choose to apply a simplified accounting method determined by the Commissioner.
<b>Excise concession</b> s. 69(1A)(d) <i>Customs Act 1901</i>	Taxpayers may defer settlement of excise duty and excise equivalent from weekly to monthly.
<b>Trial expansion of ATO independent review process subject to audit</b>	<p>There will be a trial expansion of the ATO independent review process to small businesses — with aggregated turnover between \$10 million and \$50 million — subject to an ATO audit. The permanent small business independent review service is available to small businesses with a turnover less than \$10 million.</p> <p>The trial will commence on 1 July 2024 and run for 18 months.</p>

## Concession with a \$100 million aggregated turnover threshold

<b>Exclusion from Taxation of Financial Arrangements (TOFA) rules</b> s. 230-455(4)	Non-individual taxpayers may be excluded from the TOFA rules unless the financial arrangement extends for more than 12 months. <sup>71</sup>
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## Concessions with a \$5 billion aggregated turnover threshold

<b>Loss carry back</b> Div 16	Corporate tax entities can elect to carry back losses to earlier years and claim a refundable tax offset in 2020–21, 2021–22 and 2022–23.
<b>Temporary full expensing</b> Subdiv 40-BB and s. 328-181 <i>ITPA</i>	Taxpayers may immediately deduct the cost of eligible depreciating assets from 7.30 pm (AEDT) on 6 October 2020 to 30 June 2023. Division 40 taxpayers may opt out. SBE taxpayers who have opted into Subdiv 328-D must immediately write-off eligible costs under the uncapped instant asset write-off.

<sup>69</sup> The lower company tax rate was 26 per cent in 2020–21, and 27.5 per cent in 2017–18 to 2019–20.

<sup>70</sup> Also applies to an individual who is a partner of a partnership, or a trustee or beneficiary of a trust, where the partnership or trust satisfies the requirement to be an SBE or a medium business entity (i.e. an SBE but with an aggregated turnover \$10 million to less than \$50 million).

<sup>71</sup> Individuals are excepted regardless of turnover. For certain financial entities, the aggregated turnover threshold is \$20 million — s. 230-455(3).

# Definition of 'aggregated turnover'

## Definition of aggregated turnover — s. 328-115

### Meaning of *aggregated turnover*

- (1) Your ***aggregated turnover*** for an income year is the sum of the relevant annual turnovers (see subsection (2)) excluding any amounts covered by subsection (3).
- Note: For small business CGT relief purposes, additional entities may be treated as being connected with you or your affiliate under sections 152-48 and 152-78.
- (2) The ***relevant annual turnovers*** are:
- (a) your \*annual turnover for the income year; and
  - (b) the annual turnover for the income year of any entity (a ***relevant entity***) that is \*connected with you at any time during the income year; and
  - (c) the annual turnover for the income year of any entity (a ***relevant entity***) that is an \*affiliate of yours at any time during the income year.
- (3) Your ***aggregated turnover*** for an income year does not include the following amounts:
- (a) amounts \*derived in the income year by you or a relevant entity from dealings between you and the relevant entity while the relevant entity is \*connected with you or is your \*affiliate;
  - (b) amounts derived in the income year by a relevant entity from dealings between the relevant entity and another relevant entity while each relevant entity is connected with you or is your affiliate;
  - (c) amounts derived in the income year by a relevant entity while the relevant entity is not connected with you and is not your affiliate.

# Definition of 'annual turnover'

## Definition of annual turnover — s. 328-120

### Meaning of *annual turnover*

#### *General rule*

- (1) An entity's ***annual turnover*** for an income year is the total \*ordinary income that the entity \*derives in the income year in the ordinary course of carrying on a \*business.

#### *Exclusion of amounts relating to GST*

- (2) In working out an entity's \*annual turnover for an income year, do not include any amount that is \*non-assessable non-exempt income under section 17-5 (which is about GST).

#### *Exclusion of amounts derived from sales of retail fuel*

- (3) In working out an entity's \*annual turnover for an income year, do not include any amounts of \*ordinary income the entity \*derives from sales of \*retail fuel.

#### *Amounts derived from dealings with associates*

- (4) In working out an entity's \*annual turnover for an income year, the amount of \*ordinary income the entity \*derives from any dealing with an \*associate of the entity is the amount of ordinary income the entity would derive from the dealing if it were at \*arm's length.

Note: Amounts derived in an income year from any dealings between an entity and an associate that is a relevant entity within the meaning of section 328-115 are not included in the entity's aggregated turnover for that year: see subsection 328-115(3).

#### *Business carried on for part of income year only*

- (5) If an entity does not carry on a \*business for the whole of an income year, the entity's \*annual turnover for the income year must be worked out using a reasonable estimate of what the entity's annual turnover for the income year would be if the entity carried on a business for the whole of the income year.

#### *Regulations may provide for different calculation of annual turnover*

- (6) The regulations may provide that an entity's \*annual turnover for an income year is to be calculated in a different way, but only so that it would be less than the amount worked out under this section.

# Definition of 'connected with an entity'

## Meaning of connected with an entity — s. 328-125

### Meaning of connected with an entity

- (1) An entity is connected with another entity if:
- either entity controls the other entity in a way described in this section; or
  - both entities are controlled in a way described in this section by the same third entity.

Note 1: See Subdivision 106-B if a CGT asset of yours is vested in a trustee in bankruptcy or a liquidator.

Note 2: See Subdivision 106-C if you are absolutely entitled to a CGT asset as against the trustee of a trust.

Note 3: See Subdivision 106-D if you provided security over an asset to another entity.

### *Direct control of an entity other than a discretionary trust*

- (2) An entity (the first entity ) controls another entity if the first entity, its \* affiliates, or the first entity together with its affiliates:
- except if the other entity is a discretionary trust--own, or have the right to acquire the ownership of, interests in the other entity that carry between them the right to receive a percentage (the control percentage ) that is at least 40% of:
    - any distribution of income by the other entity; or
    - if the other entity is a partnership--the net income of the partnership; or
    - any distribution of capital by the other entity; or
  - if the other entity is a company--own, or have the right to acquire the ownership of, \* equity interests in the company that carry between them the right to exercise, or control the exercise of, a percentage (the control percentage ) that is at least 40% of the voting power in the company.

### *Direct control of a discretionary trust*

- (3) An entity (the first entity ) controls a discretionary trust if a trustee of the trust acts, or could reasonably be expected to act, in accordance with the directions or wishes of the first entity, its \* affiliates, or the first entity together with its affiliates.
- (4) An entity (the first entity ) controls a discretionary trust for an income year if, for any of the 4 income years before that year:
- the trustee of the trust paid to, or applied for the benefit of:
    - the first entity; or
    - any of the first entity's \* affiliates; or
    - the first entity and any of its affiliates;
  - the percentage (the control percentage ) of the income or capital paid or applied is at least 40% of the total amount of income or capital paid or applied by the trustee for that year.
- ...
- (5) An entity does not control a discretionary trust because of subsection (4) if the entity is:
- an \* exempt entity; or
  - a \* deductible gift recipient.

*Commissioner may determine that an entity does not control another entity*

## Meaning of connected with an entity — s. 328-125

- (6) If the control percentage referred to in subsection (2) or (4) is at least 40%, but less than 50%, the Commissioner may determine that the first entity does not control the other entity if the Commissioner thinks that the other entity is controlled by an entity other than, or by entities that do not include, the first entity or any of its \* affiliates.

### *Indirect control of an entity*

- (7) This section applies to an entity (the first entity) that directly controls another entity (the second entity) as if the first entity also controlled any other entity that is directly, or indirectly by any other application or applications of this section, controlled by the second entity.
- (8) However, subsection (7) does not apply if the second entity is an entity of any of the following kinds:
- (a) a company \* shares in which (except shares that carry the right to a fixed rate of \* dividend) are listed for quotation in the official list of an \* approved stock exchange;
  - (b) a \* publicly traded unit trust;
  - (c) a \* mutual insurance company;
  - (d) a \* mutual affiliate company;
  - (e) a company (other than one covered by paragraph (a)) all the shares in which are owned by one or more of the following:
    - (i) a company covered by paragraph (a);
    - (ii) a publicly traded unit trust;
    - (iii) a mutual insurance company;
    - (iv) a mutual affiliate company.

## Associates of an entity

An ‘associate’ is defined in s. 318 of the *ITAA 1936*.

### Associates of an individual

The associates of a **natural person** (other than in the capacity of a trustee) are:

- a relative of the individual
- a partner of the individual or a partnership in which the individual is a partner
- if a partner of the individual is a natural person other than in the capacity of trustee — the spouse<sup>72</sup> or a child of that partner
- a trustee of a trust where the individual, or an associate of the individual, benefits under the trust
- a company which is sufficiently influenced by one or more of:
  - the individual
  - another entity (including a company) that is an associate of the individual

<sup>72</sup> A ‘spouse’ for s. 318 purposes excludes a spouse who is living separately and apart from the person on a permanent basis — s. 318(7).

- a company in which a majority voting interest is held by any of:
  - the individual
  - associates of the individual
- the individual and its associates.

## Associates of a company

The associates of a **company** are:

- a partner of the company or a partnership in which the company is a partner
- if a partner of the company is a natural person other than in the capacity of trustee — the spouse or a child of that partner
- a trustee of a trust where the company, or an associate of the company, benefits under the trust
- another entity (the controlling entity), where the company is sufficiently influenced<sup>73</sup> by:
  - the controlling entity, or
  - the controlling entity and another entity or entities
- the controlling entity, where a majority voting interest in the company is held by:
  - the controlling entity, or
  - the controlling entity and the entities that would be associates of the controlling entity if it was the primary entity
- another company (the controlled company) where it is sufficiently influenced by one or more of:
  - the company
  - an associate of the company (including another company)
- the controlled company where a majority voting interest<sup>74</sup> in it is held by:
  - the company, or
  - associates of the company, or
  - the company and its associates
- any other entity that, if a controlling entity was the primary entity, would be an associate of that controlling entity.

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<sup>73</sup> A company is sufficiently influenced by an entity or entities if the company, or its directors, are accustomed or under an obligation (directly or indirectly), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities (communicated directly or through interposed entities) — s. 318(6)(b).

<sup>74</sup> An entity or entities hold a majority voting interest in a company if the entity or entities are in the position to cast, or control the casting of, more than 50 per cent of the maximum number of votes at a general meeting — s. 318(6)(c).

## Associates of a trustee

The associates of a **trustee**<sup>75</sup> are:

- any entity that benefits under the trust<sup>76</sup>
- if a natural person benefits under the trust — any entity that, if the natural person were the primary entity, would be their associate
- if a company is an associate of the trustee — any entity that, if the company were the primary entity, would be its associate.

## Associates of a partnership

The associates of a **partnership** are:

- a partner in the partnership
- if a partner in the partnership is a natural person — any entity that, if the natural person were the primary entity, would be their associate
- if a partner in the partnership is a company — any entity that, if the company were the primary entity, would be its associate.

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<sup>75</sup> The trustee of a public unit trust is treated as a company instead of a trustee — see s. 318-(5).

<sup>76</sup> An entity may benefit, or be capable of benefiting, under the trust, either directly or through any interposed entities — s. 318(6)(a).

