Division 7A and trusts

How trust amounts are treated as dividends when paid to shareholders of private companies or their associates.

13 December 2017

Trust amounts treated as dividends when paid to shareholders of private companies or their associates under Division 7A.

- Subdivision EA – Trust payments, loans and debt forgiveness
- Present entitlement
- Types of benefits
- Amount assessable as a dividend

It is a common practice for a trustee to distribute a share of the income of the trust in a particular year to a private company beneficiary. Division 7A can apply where the present entitlement remains unpaid (commonly referred to as unpaid present entitlement, or UPE) before the trust lodgment day for that year.

When a private company has a UPE from an associate trust, Division 7A can apply in the following situations:

- the UPE amounts to the provision of financial accommodation, which is a loan for Division 7A purposes
- the trustee makes a payment or loan to a shareholder of the private company or their associate during the year, either directly or through one or more interposed entities
- the trustee forgives a debt owing by a shareholder of the private company or their associate during the year.

A UPE of a private company may be treated as a Division 7A loan.

See also

- To work out whether a UPE is a Division 7A loan refer to **Division 7A – Unpaid present entitlement**.

Subdivision EA – Trust payments, loans and debt forgiveness

Present entitlement

Types of benefits

Amount assessable as a dividend

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Subdivision EA – Trust payments, loans and debt forgiveness

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Where a UPE of a private company exists and it is not a loan for Division 7A purposes, any benefits the trustee provides to shareholders of the private company or their associates may be assessable dividends under Subdivision EA (of Division 7A).

Subdivision EA operates to treat a trust as a nominal private company with certain modifications. The effect is that any payments, loans, repayments or debts forgiven by the trust to a shareholder of the private company or their associate may be treated as being made by the company, and can be assessable as dividends.

Amounts from a trust will be treated as a dividend paid to a shareholder of a private company or their associate if both the following apply:

- as at the lodgment day of the trust return for the year, the trust has an amount of UPE owing to a private company beneficiary (this also applies to the UPEs that are placed on sub-trust investment agreements)
- during the income year, the trustee provided a benefit to a shareholder of the private company or their associate.

A deemed dividend can arise even where the arrangement involves a chain of UPEs through interposed trusts, or a chain of payments or loans through other entities.

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Present entitlement

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Present entitlement can be direct, where the private company is a beneficiary of the associated target trust.

In the simplest case, a beneficiary company is made presently entitled to the income of a trust. However, the income is not actually paid to the company (creating a UPE), but used for the benefit of a shareholder or associate. In this situation, the trust will be treated as a nominal company and the benefit may be assessed as a dividend paid to the shareholder or associate.

Example 1 – Direct unpaid present entitlement

Jay is a shareholder of Trading Company Pty Ltd and both are beneficiaries of Target Discretionary Trust.

Trading Company Pty Ltd is made presently entitled to the income of Target Trust. The amount remains unpaid at the lodgment day of Target Trust's tax return for the income year. Target Trust and Trading Company Pty Ltd place the UPE on sub-trust with a legally binding investment agreement.

During the year the trustee of Target Trust made a loan to Jay. Because Trading Company Pty Ltd has a UPE with Target Trust and Jay is a shareholder of Trading Company Pty Ltd, the loan is subject to Division 7A. The loan amount may be deemed a dividend from Trading Company Pty Ltd to be included in Jay's assessable income.

Example 1 - Direct unpaid present entitlement flow diagram

Deemed present entitlement

In some circumstances, present entitlement may be deemed. This happens where the arrangement involves a chain of UPEs through interposed trusts.

A private company is deemed to be presently entitled to trust income where:

- at least one trust is interposed between the private company and the target trust
- the company is entitled to an amount of the net income of the first interposed trust
- one of the trusts is entitled to an amount from the income of the target trust
- the entitlement to the income of the trust is mainly part of an arrangement involving entitlement to an amount from the target trust.

The company may become entitled to income before, at the same time, or after an interposed trust becomes entitled to the income of the target trust. It is taken to become entitled at the time the company becomes entitled to the net income from the first interposed trust. It doesn't matter if the company becomes entitled to the same amount.

Example 2 – Deemed present entitlement

Again, Jay is a shareholder of Trading Company Pty Ltd and a beneficiary of Target Trust.

As part of an arrangement, the Target Trust declares a present entitlement of income to Interposed Trust. In turn, the trustee of Interposed Trust exercises its discretion to make Trading Company Pty Ltd entitled to the income of the trust. These entitlements to income remain unpaid as at the lodgment day of the Target Trust's tax return for the income year.

Because of this arrangement, Trading Company Pty Ltd is deemed to be presently entitled to the income of Target Trust, for the purposes of Division 7A. So, the loan to Jay will also be subject to Division 7A.

Example 2 - Deemed present entitlement flow diagram

Value of the deemed present entitlement

The Commissioner of Taxation determines the amount the private company is taken to be presently entitled to. It's limited by the amount of unpaid present entitlement that an interposed trust has in the net income of the target trust immediately before the lodgment day.

The Commissioner will consider:

- the unpaid present entitlement of the private company to the net income of the first interposed trust and any unpaid present entitlement to net income of a trust interposed between the target trust and the company as part of the arrangement
- how much (if any) of that amount represents arm’s length consideration payable to the private company by the target trust or any of the interposed trusts
- how much (if any) of the private company's unpaid entitlement to the net income of the first interposed trust is attributable to the unpaid entitlement that an interposed entity has from the net income of the target trust at that date
- amounts included in the assessable income of a shareholder or an associate of a shareholder of the private company, before the lodgment date, as a result of the company's actual present entitlement to an amount from an interposed trust.

Example 3 – Working out the value of the deemed present entitlement

Following on from Example 2, the amount of UPE of Interposed Trust to the net income of Target Trust is $50,000 and the amount of UPE of Trading Company Pty Ltd to the income of Interposed Trust is $75,000.

For the purposes of Division 7A, Trading Company Pty Ltd is deemed to be presently entitled to the income of Target Trust. The amount of the deemed present entitlement is limited to the UPE of Interposed Trust, so it will be $50,000.

Any benefits to shareholders or associates of Trading Company Pty Ltd subject to Division 7A will be limited to the amount of deemed UPE.

Example 3 – Working out the value of the deemed present entitlement flow diagram

Example 4 – How deemed dividends affect the value

In this example, Interposed Trust has a UPE from Target Trust of $50,000 and Trading Company Pty Ltd has a UPE from Interposed Trust also of $50,000. Because it is part of an arrangement, Trading Company Pty Ltd is deemed to be presently entitled to the income of Target Trust.

In the same year, Jay receives a $5,000 loan from Interposed Trust. The loan is a non-complying loan and $5,000 deemed dividend is included in Jay's assessable income under Division 7A.

The amount of the deemed present entitlement to Trading Company Pty Ltd is reduced by the $5,000 loan amount that is otherwise included in Jay's assessable income. Therefore, the deemed present entitlement amount is $45,000.

Example 40 – How deemed dividends affect the value flow diagram

See also:

- TD 2011/15 *Income tax: Division 7A – unpaid present entitlements - factors the Commissioner will take into account in determining the amount of any deemed entitlement arising under section 109XI of the Income Tax Assessment Act 1936*

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Types of benefits

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Subdivision EA will operate differently depending on the type of benefit provided to the shareholders or their associates. The types of benefits Subdivision EA applies to are:

- payment
- loan
- repayment
- debt forgiveness.

Payments and loans through trusts

A payment or loan provided by a trustee may be treated as a dividend where both:

- the trustee makes a payment or loan to a shareholder of a private company or their associate
- the private company has a UPE to an amount of trust income at lodgment day of the trust's tax return for the income year in which the payment or loan is made.

A payment to a shareholder or associate won't result in a deemed dividend unless the payment is a discharge or, or a reduction in, a present entitlement of the shareholder or associate that is attributable to an unrealised gain. This does not apply to loan repayments made as part of certain arrangements.

Provision of payments and loans through interposed entities

In some circumstances, the provision of a benefit may be deemed. This happens where the arrangement involves a chain of payments or loans through other entities.

Where a trust makes payments or loans to shareholders or their associates (the target entity) through one or more interposed entities, Division 7A operates as if the trustee had paid the amount or made the loan directly to the target entity.

The trustee is deemed make a payment or loan to a shareholder or associate if:

- at least one entity is interposed between the trust and the shareholder or associate (target entity)
- the trustee provides a payment or loan to one of the interposed entities
- one of the interposed entities provides a payment or loan to the target entity
- a reasonable person would conclude that the trustee made the payment or loan solely or mainly as part of an arrangement involving the provision of benefit to the target entity
- the interposed entity may provide the payment or loan to the shareholder or associate before, at the same time, or after the trustee provides the payment or loan to the interposed entity.

Where this applies, the trustee is taken to have made the payment or loan at the time the interposed entity made the payment or loan to the shareholders or associates.

Example 5 – Benefits provided through interposed entities

Trading Company Pty Ltd has an unpaid present entitlement from Family Trust. Family Trust makes a payment to Interposed Trust, which makes a loan to Jay, a shareholder of Trading Company Pty Ltd. The notional transaction between Family Trust and Jay is a loan because the transaction between Jay and Interposed Trust is a loan.

It does not matter:

- whether the interposed entity made the payment or loan to the target entity before, after or at the same time as the first interposed entity received the payment or loan from the trustee
- whether the amount paid or lent to the target entity is the same amount as the trustee paid or lent the first interposed entity.

Example 5 – Benefits provided through interposed entities flow diagram

Value of deemed loans and payments

The amount of the deemed payment or loan is determined by the Commissioner, who must take into account:

- the amount paid or lent to the shareholders or associates whether any part of that amount represented consideration payable to the shareholders or associates by either the trustee or an interposed entities
- the payment or loan cannot exceed the amount of the unpaid present entitlement the private company has from the trust. The amount must also be reduced by amounts that represent arm's length payments to the target entity by either the trustee or interposed entities
- any repayments made by the target entity to the interposed entity will be taken into account when working out the value of a loan.

Example 6 – Calculating the notional loan with repayments

Trading Company Pty Ltd has an unpaid present entitlement to $25,000 from the Family Trust.

On 10 July, the Family Trust makes a loan of $10,000 to the J & J Partnership under an arrangement in which the partnership will lend the amount to Jane, an associate of Jay who is a shareholder of Trading Company Pty Ltd.

On 15 July, the J & J Partnership lends Jane $15,000. Before the end of the income year Jane repays $3,000 to the J & J Partnership.

In this example, the J & J Partnership is the interposed entity and Jane is the target entity. The Family Trust is taken to make a notional loan to Jane of $10,000, as under the arrangement this was the amount lent to Jane by the J & J Partnership. The J & J Partnership lent an additional amount of $5,000.

The amount the Family Trust is taken to have loaned Jane is reduced by a proportion of the repayment Jane made to the J & J Partnership. The amount of the reduction is:

- $3,000 x ($10,000 / $15,000) = $2,000

The Family Trust is taken to have loaned Jane $8,000 (that is, $10,000 - $2,000). Subject to the distributable surplus of Trading Company Pty Ltd, $8,000 is included in Jane's assessable income as if it were a dividend.

Example 6 – Calculating the notional loan with repayments flow diagram

Debt forgiveness through trusts

A debt forgiven by a trustee may be treated as a dividend where both:

- the trustee forgives all or part of a debt which is owed by a shareholder or their associate
- the private company has a UPE to an amount of trust income as at the lodgment day of the trust's tax return for the income year in which the debt forgiveness is made.

The basic features of this type of arrangement are shown in the following diagram:

Debt forgiveness through trusts - flow diagram

Debt forgiveness will not cause additional deemed dividends where:

- the forgiveness is for a loan that has previously been taken to be a dividend under Division 7A, former section 109UB or section 109G(3)(b)
- the same debt is forgiven at different times (only the first forgiveness is treated as a dividend).

Example 7 – Debt forgiveness

Kim is a shareholder of K Pty Ltd, and both are beneficiaries of the C Trust. On 29 March 2015, the C Trust forgives a $10,000 loan owed by Kim. At the time of the forgiveness, K Pty Ltd has a present entitlement to income from the C Trust of $60,000. This has not been paid by the lodgment day of the trust's tax return for the 2015 year. Kim may be treated as receiving an unfranked dividend of $10,000, subject to the distributable surplus of K Pty Ltd.

Example 8 – Forgiveness of a Division 7A loan

Anna is a shareholder of Elliot Pty Ltd, and both are beneficiaries of the Dawson Trust. In a previous income year, Anna received a loan from the Dawson Trust that resulted in an amount being included in her assessable income under Division 7A as a deemed dividend.

In a later income year, the Dawson Trust forgives the amount of the loan made to Anna. As the loan already resulted in an amount being taken to be a dividend under Division 7A, a new deemed dividend does not arise.

Example 9 – Former section 109UB amounts

Anthony is a shareholder of Tony Pty Ltd, and both are beneficiaries of the Z Trust. Tony Pty Ltd became presently entitled to $200,000 of trust income for the 2012 income year. That amount remains unpaid as at the earlier of the due date for lodgment or date of lodgment of the trust's tax return for the 2014 income year.

On 30 June 2012, the Z Trust makes a loan to Anthony of $130,000. Anthony was taken under the former section 109UB to receive a loan from Tony Pty Ltd of $130,000.

On 20 September 2013, the Z Trust lent Anthony an amount of $100,000 under a written agreement that meets the minimum interest rate and maximum term criteria for a Division 7A loan. On 14 April 2014, the Z Trust forgives the loan of $100,000.

For the purpose of determining the amount Anthony is taken to receive as a dividend in the 2014 year, the amount of the debt forgiveness is the lesser of:

- the $100,000 loan forgiven by the Z Trust in the 2014 income year
- the unpaid present entitlement to Tony Pty Ltd of $200,000, reduced by the $130,000 taken under the former section 109UB to be a loan from Tony Pty Ltd to Anthony in the 2012 year (that is, $70,000).

The amount of the debt forgiveness is therefore $70,000.

See also:

- Division 7A – Debt forgiveness by private companies

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Amount assessable as a dividend

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Where Subdivision EA applies, the amount of the dividend assessable to the shareholder or associate cannot be more than the UPE owing to the private company.

The dividend amount will be the lesser of either:

- the amount of the payment, the loan or the debt forgiven
- the amount of the company's present entitlement that remains unpaid at the relevant time less any previous benefit to which Division 7A or former section 109UB applied.

This dividend amount is assessable to the shareholder or associate as if the payment, loan or debt forgiveness was done by a private company and the shareholder or associate had been a shareholder of that company.

However, the dividend amount is subject to the distributable surplus of the private company that is presently entitled to the income of the trust.

See also:

- Division 7A – Distributable surplus
- Contact us – if you need to know more

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