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Ruling Compendium – TD 2012/10

This is a compendium of responses to the issues raised by external parties to draft Taxation Determination TD 2012/D1 – Income tax: when is income tax of a private company a ‘present legal obligation’ for the purposes of the distributable surplus calculation under subsection 109Y(2) of Division 7A of Part III of the *Income Tax Assessment Act 1936*?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft Ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	There should be another example in the draft Ruling to explain the view of the ATO regarding ‘present legal obligations’ and tax refunds. In particular, the additional example should clarify the situation where there is an unpaid instalment at the end of the year, this instalment is paid prior to the company lodging its tax return for the year but on assessment/amended assessment the total of the instalments paid for the year is found to exceed the actual tax payable for the year – leading to a refund.	Determinations are ‘short form’ rulings on a specific issue which in this case is when is income tax of a private company a ‘present legal obligation’ for the purposes of the distributable surplus calculation. The full amount of the unpaid instalment at the end of the income year is a present legal obligation for the purposes of the distributable surplus calculation. A refund is not a present legal obligation and in the context of calculating the distributable surplus, it may be more appropriate to look at the assets of the company. The final Determination will include a footnote noting the possibility that the amount refundable in the circumstances described could be an asset for the purposes of the distributable surplus calculation. If additional guidance is required on amounts refundable then the Commissioner will provide guidance in a future product.

Issue No.	Issue raised	ATO Response/Action taken
2.	In Example 4, paragraph 12 states that 'the income tax paid by C Pty Ltd on 30 September 2010 is a present legal obligation'. It is queried whether this should instead refer to the income tax payable on the amended assessment rather than the actual payment of the amount on 30 September. It is the raising of the assessment/amended assessment not the payment of the tax that confirms the present legal obligation.	The Commissioner agrees that the raising of the assessment/amended assessment confirms the present legal obligation. The obligation exists before the making of the assessment and service of the notice of assessments. Paragraph 3 in the draft Determination does state that the amount payable under an amended assessment will be a present legal obligation for the purposes of the distributable surplus calculation. The paragraph in the final Determination will be amended to clarify the basis of the income tax present legal obligation.
3.	Date of effect for those cases in which there is a credit amendment. There will be an increase in the distributable surplus in these cases and some taxpayers will be worse off as a result of the change of ATO view. There is an argument that the Determination should only apply after the date of issue for cases in which the income tax present legal obligation is reduced with a corresponding increase in the distributable surplus.	There could be an increase in the distributable surplus in cases in which there is a credit amendment or refund. However, this Determination is concerned with present legal obligations. Credit amendment or refund cases are a separate issue that is not addressed in either the draft determination or the final Determination. If additional guidance is required on amounts refundable then the Commissioner will provide guidance in a future product.
4.	The issue of liquidated companies and whether tax owed by a company that has since been liquidated is a 'present legal obligation'. For example, if in the 2008/09 year a company makes a loan to a shareholder which was neither repaid nor put under a qualifying section 109N written agreement, the company then liquidates in 2010 (and had unpaid tax debts to the ATO for \$10,000). As the company has since liquidated must the \$10,000 still be taken into account when calculating the distributable surplus at 30 June 2009 or is it no longer a present legal obligation because of liquidation.	The fact that instalments unpaid at 30 June and tax due and payable (after credits for instalments payable for the income year) are not paid or recovered in a later income year is not relevant to the calculation of the distributable surplus for the current income year.

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Issue No.	Issue raised	ATO Response/Action taken
5.	Clarify the treatment of the unpaid income tax liability as a present legal obligation of a company where the Commissioner makes amended assessments for the company, increasing the income tax liability, across a number of income years. That is, does the present legal obligation of a company take into account the accumulated unpaid tax, including the tax arising on the amended assessment in relation to an earlier income year? For example, in 2010 the Commissioner issued amended assessments for 2001, 2002, 2003 increasing a company's income tax liability. In determining the distributable surplus for the 2001-2003 income years, would the company's unpaid tax from the 2001 income year, also be considered a present legal obligation in the 2002 income year? Similarly would the unpaid tax from the 2001 and 2002 amended assessments, also be a present legal obligation in the 2003 year?	An additional example has been included in the final Determination.