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Ruling Compendium – TD 2015/20

This is a compendium of responses to the issues raised by external parties to draft TD 2015/D4 *Income tax: Division 7A: is a release by a private company of its unpaid present entitlement a ‘payment’ within the meaning 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.	Further clarification requested of the interaction between the comments made in paragraph 3 and Example 1 at paragraph 4 of TD 2015/D4. Example 1 does not appear to be consistent with paragraph 3 because, unless the UPE has been placed under a complying sub-trust arrangement (described in TR 2010/3) the UPE would have been treated as a Division 7A loan at some point in the 2013 income year.	Agreed, not clear that Example 1 was intended to describe a UPE that was not a Division 7A loan within the meaning of TR 2010/3. Example 1 updated. See also Issue no. 7 (with respect to paragraph 3).
2.	Request for content confirming that Division 7A (for example, section 109F of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936)) may still apply to a UPE that has been converted into a Division 7A loan and is subsequently forgiven.	Agree that confirmation appropriate to avoid uncertainty. See also Issue no. 7 (with respect to paragraph 3).
3.	Request additional example detailing application of TD 2015/D4 to situation where beneficiary has a cause of action against the trustee to recover a loss.	Example 3 inserted to reflect a situation where a beneficiary has a cause of action against a trustee to recover a loss.

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4.	Request for additional ATO guidance products on potential application of other provisions involving the release of a UPE (for example, Davison 245 of the <i>Income Tax Assessment Act 1997</i> and section 100A of the ITAA 1936).	Suggestion noted. The Commissioner will consider the most appropriate method for giving additional guidance on the potential application of other provisions involving the release of a UPE.
5.	As the accounting for the release of a UPE is the same whether or not it is pre- or post- 16 December 2009, if the view is formed that the release of a pre-16 December 2009 UPE is not considered to be a payment under subparagraph 109C(3)(b)(iii) of the ITAA 1936, then it would be beneficial for the reasoning to be documented in the final Determination.	The Commissioner is of the view that the release of a pre-16 December 2009 UPE is a payment under subparagraph 109C(3)(b)(iii) of the ITAA 1936. See further below in relation to Issue No.6.
6.	Noted uncertainty of application of Division 7A to released UPE prior to issue of TD 2015/D4, in particular to pre-16 December 2009 UPEs.	In the context of TD 2015/D4, the trigger point for the application of section 109C of the ITAA 1936 is the release of the UPE. This requires a conscious decision on the part of the beneficiary and is unrelated to the date on which the UPE came into existence. The Commissioner has not publicly stated that the release of a UPE is not a payment to which Division 7A would apply. Further, the Commissioner does not consider that he had an existing administrative practice that explicitly or implicitly encouraged a particular course of action in relation to the issue considered in TD 2015/D4. When the final Determination is issued, it is proposed to apply both before and after its date of issue, and in relation to both pre and post-16 December 2009 UPEs.

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7.	<p>The final TD should include commentary to clarify that:</p> <ul style="list-style-type: none">where the UPE constitutes a 'debt' – section 109F of the ITAA 1936 is the more specific provision that is applicable, and that the ATO will apply section 109F and not section 109C of the ITAA 1936, andwhere the UPE does not constitute a 'debt' – the ATO will only apply section 109C of the ITAA 1936 to the release of the UPE and section 109F will have no application.	Paragraph 3 of TD 2015/D4 has been amended to make clear that the determination does not apply to a UPE that has been converted to a debt. Paragraph 3 also updated to confirm the scope of application in circumstances where another provision of Division 7A applies, or has already applied.
8.	The facts in example in TD 2015/D4 should be amended to explicitly state that the UPE is not a debt for the purposes of section 109F of the ITAA 1936.	Agreed. Facts in each example amended to explicitly state this.
9.	The final TD should include an example on which the UPE crystallises into a 'debt' prior to the release by the corporate beneficiary. The ATO should explain whether the facts and circumstances surrounding the UPE and its release result in the application of section 109F instead of 109C of the ITAA 1936 and provide reassurances that there will be no double taxation.	Based on the Commissioners understanding of the circumstances in which a UPE may be converted into a debt, it is not clear when, in practice, a private company beneficiary would release a debt after the crystallisation from a UPE. However, if such circumstances presented, the most specific provision in Division 7A of the ITAA 1936 would apply (if more than one provision was capable of application). For example, if a UPE has been converted into a debt, then any subsequent release or forgiveness may give rise to a deemed dividend under section 109F of the ITAA 1936 (and not under section 109C of the ITAA 1936). See also, Issue No. 7 (with respect to paragraph 3).

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10.	Further clarification is required about what constitutes an action or dealing that would be properly reflected as a credit for the purposes. For example, does the ATO believe that the mere raising of a provision for a doubtful debt in respect of the UPE constituted a 'credit' to the account?	TD 2015/D4 is concerned specifically with the release of a UPE by a private company beneficiary. It is not intended that it attempt to address the full range of transactions or dealings that might properly be reflected by way of a credit entry in a private company beneficiary's books of account. However, with respect to the specific example, as noted by the commenting entity, subparagraph 109C(3)(b)(iii) of the ITAA 1936 requires a 'credit' to be a 'benefit' before such a credit is a payment for the purposes of section 109C. The mere raising of a provision for a doubtful debt would not give rise to the requisite benefit in subparagraph 109C(3)(b)(iii) of the ITAA 1936.
11.	It would be useful to include some commentary, or a practical example, to make it clear that a taxpayer cannot avoid the application of section 109C of the ITAA 1936 simply by crediting an account other than the UPE account, where the underlying intention of the credit entry is to effectively release the UPE.	Not only can the consequences not be avoided by crediting the wrong account, nor can they be avoided by not crediting any account. Rather than going into the many examples of what may happen in practice we have noted in paragraph 24 of the final Determination that what is important is whether a credit ought to have been properly reflected by a credit entry into the accounts.
12.	The final TD should confirm that a partial release of a UPE under the circumstances described will be a payment to which section 109C of the ITAA 1936 may apply.	Agreed. Paragraph 1 of TD 2015/D4 amended to reflect this.

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13.	We recommend that the final TD includes a commentary as to the circumstances in which the release of a UPE may constitute a transfer of property, with an accompanying example if appropriate.	Paragraph 27 of TD 2015/D4 was included for completeness. While specific examples may exist, the addition of further examples in TD 2015/D4 is not considered necessary. The Commissioner is of the view that relevant examples that constitute a transfer of property would also constitute a payment within the meaning in subparagraph 109C(3)(b)(iii) of the ITAA 1936 (that is, the credit of an amount for the benefit of the transferor).
14.	We recommend that the public ruling section includes a comment to indicate that a release to which the binding ruling applies must be a binding undertaken which is effect by way of deed or agreement.	Disagree. In the context of the former section 108 of the ITAA 1936, the Commissioner is already of the view that a writing off of a debt in a company's books of account (when accompanied by an intention, on the company's part, not to seek to recover the debt) constitutes a crediting of an amount for the benefit of the debtor (see paragraphs 17-21 of Taxation Ruling IT 2637). It is considered that the view expressed in IT 2637 applies equally to the release of a UPE in the context of section 109C of the ITAA 1936.
15.	It is considered that the mutual release (by a private company beneficiary and a trustee) of corresponding and commensurate liabilities (for example, release of UPE by a beneficiary, and release of trade debt by trustee) does not trigger the application of section 109C of the ITAA 1936 because there is no financial benefit conferred on the trustee.	The Commissioner is of the view that the mutual release (by a private company beneficiary and a trustee) of corresponding and commensurate liabilities would amount to an equitable set-off. The effect of this is that each party to the transactions make a payment to the other in the amount of the liability. An affected private company beneficiary would need to consider whether the payment was one to which section 109C of the ITAA 1936 applied, and whether section 109J of the ITA 1936 applied to reduce the amount of any resultant section 109C of the ITAA 1936 deemed dividend.

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16.	Include some commentary, including practical examples, which outline the Commissioners views in relation to the range of circumstances in which section 109C of the ITAA 1936 would or could apply where the release of a UPE does not give rise to a benefit.	<p>Whether or not the release of a UPE gives rise to a benefit to the trustee is a question of fact to be determined having regard to the facts and circumstances of each case (including a proper examination of any relevant trust instrument).</p> <p>Given the range of circumstances that may potentially come within the principles-based approach described in paragraphs 28 to 31 of TD 2015/D4 (that is, an approach requiring the ascertainment of an existing cause of action against a trustee in breach of their duties), it is considered neither possible nor desirable to attempt to identify an exhaustive list of examples.</p> <p>However, an additional example of the kind of circumstances that may be beyond the trustees control has been added.</p>
17.	The ATO should confirm whether you use the face value of the UPE or the market value of the UPE for the purposes of the calculation of distributable surplus in section 109Y of the ITAA 1936.	<p>One element of the distributable surplus calculation in section 109Y of the ITAA 1936 is the total of any amounts the company is taken under section 109C of the ITAA 1936 to have paid as dividends in the year of income apart from the application of section 109Y (Division 7A amounts) (that is, the amounts before being potentially reduced under section 109Y).</p> <p>As described at paragraph 29 of TD 2015/D4, the release of a UPE is a payment for the purposes of subparagraph 109C(3)(b)(iii) of the ITAA 1936 only to the extent that a financial benefit is conferred on the entity to which the UPE is released.</p> <p>The amount of the payment (for the purposes of subsection 109D(2) of the ITAA 1936), in relation to the release of a UPE, is the amount of the financial benefit conferred. This will generally be the market value of the UPE. Where the trustee is not in financial distress or otherwise prevented from paying the beneficiary that to which they are entitled, the market value of the UPE will usually be its face value.</p> <p>TD 2015/D4 amended accordingly.</p>

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18.	We suggest that the implications (if any) of the Statute of Limitations applying to a UPE should be addressed in the final TD.	The Commissioner does not consider it necessary or appropriate to make any statement of general application in relation to the possible implications of the various Statutes of Limitation that may apply to a UPE. An affected taxpayer may request guidance from the Commissioner in the form of a private binding ruling.