

TD 2000/D3 - Income tax: Can a private company be taken to pay a dividend to another company pursuant to s 109C or s 109D of the Income Tax Assessment Act 1936 where the company is the target entity under an interposed entity arrangement?.

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This document has been finalised by TD 2001/2.

Draft Taxation Determination

Income tax: Can a private company be taken to pay a dividend to another company pursuant to s 109C or s 109D of the *Income Tax Assessment Act 1936* where the company is the target entity under an interposed entity arrangement?

Preamble

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office. DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the Australian Taxation Office.

1. Yes, pursuant to the operation of section 109X of the Income Tax Assessment Act 1936 (ITAA 1936).
2. Under sections 109C and 109D of the ITAA 1936, a private company can be taken to pay a dividend to another entity which is either a shareholder in the private company or an associate of such a shareholder if the private company pays an amount or makes a loan to that other entity.
3. Under section 109T of the ITAA 1936, the private company can be taken to make such a payment or loan under an 'interposed entity arrangement'. Under such an arrangement, the private company makes a payment or loan to an interposed entity and a payment or loan is made to the target entity by the interposed entity or another interposed entity. It is a further requirement that a reasonable person would conclude that the private company made the payment or loan solely or mainly as part of an arrangement involving a payment or loan to the target entity.
4. For the purposes of Division 7A, the term 'entity' is defined to include a 'body corporate' (section 109ZD of the ITAA 1936 and s 960-100 of the *Income Tax Assessment Act 1997* (ITAA 1997)). A 'target entity' can be any kind of entity that is within the definition of 'entity'. It follows that the term 'target entity' can include a company.
5. Pursuant to section 109K of the ITAA 1936, a private company is not taken under section 109C or 109D to pay a dividend because of a payment or loan the private company makes to another company.
6. However, this exclusion does not apply in the case of an interposed entity arrangement. Pursuant to section 109X of the ITAA 1936, a private company can be taken to pay a dividend as a result of the interposed entity provisions despite the operation which s 109K would otherwise have.

The exclusion of the general operation of s 109K applies even if the interposed entity is also a company. Section 109X provides where the provisions of Subdivision E apply, a private company may be taken to pay a dividend despite the recipient of that dividend being a company. The effect of section 109X is that section 109K does not prevent a deemed dividend arising pursuant to section 109C or section 109D.

7. Use of the word 'may' in subsection 109X(1) refers to the fact that other circumstances can exist which prevent a dividend being taken to be paid. The denial of the exclusion provided by section 109K does not of itself mean that payment or loan is taken to be a dividend. Neither section 109X nor section 109T operate to deem the existence of a dividend. A payment or loan is deemed to be a dividend under either section 109C or section 109D. In particular, circumstances may exist which satisfy other exclusions available in Subdivision D of Division 7A from having a payment or loan treated as a dividend under either section 109C or section 109D. Also an interposed entity payment or loan deemed to be made 'may' not be taken to be a dividend because the required conclusion in paragraph 109T(1)(b) cannot be formed.

Your comment

8. We invite you to comment on this Draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

Comments by Date: 28 April 2000
Contact Officer: Brian Whitby
E-Mail address: Brian.Whitby@ato.gov.au
Telephone: (02) 4923 1816
Facsimile: (02) 4923 1054
Address: PO Box 9990,
Newcastle NSW 2300

Commissioner of Taxation

29 March 2000

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

Subject references:

- anti avoidance measures;
- deemed dividends;
- shareholder loans;
- shareholder payments

Legislative references:

Div 7A; Section 109X; Sub section 109C, D, K, T, X, ZD

ATO references:

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