

TD 2002/D1 - Income tax: can a private company be taken to have paid a dividend under section 109D of the Income Tax Assessment Act 1936 ('the Act') in respect of a loan taken to have been made by the operation of section 109UB of the Act where the loan is made to another company?

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This document has been finalised by TD 2002/19.



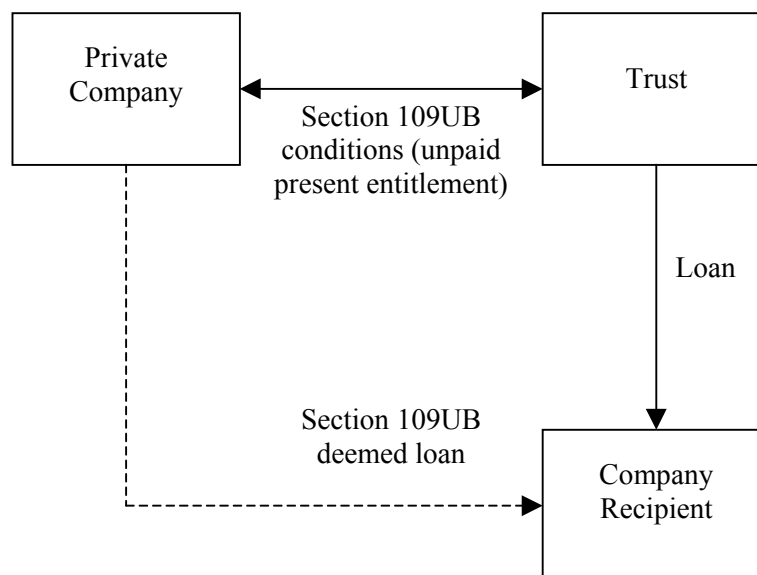
Draft Taxation Determination

Income tax: can a private company be taken to have paid a dividend under section 109D of the *Income Tax Assessment Act 1936* ('the Act') in respect of a loan taken to have been made by the operation of section 109UB of the Act where the loan is made to another company?

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. No.
2. This Determination deals with the situation set out in the following diagram:



3. Where:

- a private company is, or has been, presently entitled to an amount from the net income of a trust estate; and
- the trustee has not paid the amount to the private company; and
- the trustee has made a loan to a shareholder of the private company, or associate of such a shareholder, after the private company first became presently entitled to that amount,

the private company is taken to have made a loan ('deemed loan') to the shareholder of the private company, or the associate of such a shareholder, at the time the trustee made the loan (subsection 109UB(1) of the Act).

4. Such a deemed loan can arise where the recipient of the loan is a company or any other entity. However, if the loan is made to a company, the private company is not taken to have paid a dividend under section 109D of the Act because of this loan. This is because section 109K of the Act excludes payments and loans from a private company made to another company from the operation of both section 109C of the Act and section 109D.

5. Loans taken to have been made by operation of subsection 109UB(1) are taken to be loans for the purposes of Division 7A of the Act. The provisions of Division 7A apply on the basis that a deemed loan is to be treated as if it were a loan. That is, Division 7A applies to a deemed loan in the same way as it applies to an actual loan.

6. This result is not affected by the operation of subsection 109X(1) of the Act. This section has no effect on a deemed loan that arises by operation of subsection 109UB(1).

7. Subsection 109X(1) only ensures that a private company cannot avoid being taken to have paid a dividend under either section 109C or section 109D in respect of a deemed payment or loan even though it has made a loan to another company which is interposed between the private company and the target entity. This situation is not present in the case dealt with in this determination. Accordingly, the application of this provision does not affect the tax treatment in this case. Subsection 109X(1) of the Act does not deny the operation of section 109K where the deemed loan is made to a company (see Taxation Determination TD 2001/2).

8. As a result, by operation of section 109K, a deemed dividend can not arise under section 109D in respect of a deemed loan to a company that arises under section 109UB.

Note: A private company can be taken to have paid a dividend where the deemed loan forms part of an arrangement involving a payment or loan to another entity (see Taxation Determination TD 2001/2).

Example

9. *On 30 June 2000, the trustee of the ABC trust resolves to distribute trust income of \$200,000 to its corporate beneficiary, private company A, but does not pay this amount to private company A. On 1 January 2001, the trustee of the ABC Trust makes a loan of \$100,000 to private company B which is an associate of a shareholder in private company A. Given that the conditions triggering the operation of section 109UB are satisfied, private company A is taken to have made a loan of \$100,000. Under section 109D of the*

Act, private company A is taken to have paid a dividend to private company B of \$100,000. However, section 109K operates to ensure that private company A is not taken to have paid a dividend under section 109D in respect of the subsection 109UB(1) loan that private company A is taken to have made to private company B. Subsection 109X(1) does not deny the operation of section 109K in these circumstances.

Your comments

10. 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: 26 April 2002
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Commissioner of Taxation

27 March 2002

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations

TD 2001/2

Subject references:

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

Legislative references:

- ITAA 1936 Division 7A of Part III
- ITAA 1936 109C
- ITAA 1936 109D
- ITAA 1936 109K
- ITAA 1936 109UB
- ITAA 1936 109UB(1)
- ITAA 1936 109X(1)

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ATO references:

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