


***TD 2007/D1 - Income tax: does the notional assessable income of a controlled foreign company include an amount deemed to be a dividend under section 47A of the Income Tax Assessment Act 1936?***

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This document has been finalised by TD 2007/16.



## Draft Taxation Determination

Income tax: does the notional assessable income of a controlled foreign company include an amount deemed to be a dividend under section 47A of the *Income Tax Assessment Act 1936*?

**❶ This publication provides you with the following level of protection:**

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes. You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. No. An amount deemed to be a dividend under section 47A of the *Income Tax Assessment Act 1936* (ITAA 1936)<sup>1</sup> is not included in notional assessable income under either section 384 (in respect of an unlisted country controlled foreign company (CFC)) or section 385 (in respect of a listed country CFC).

### Example

2. *Aust Co, an Australian resident attributable taxpayer, owns 100% of the shares in two CFCs, Sing Co (resident in Singapore) and Malay Co (resident in Malaysia).*
3. *On 30 September 2006 Sing Co transfers an asset to Malay Co for less than market value consideration. The transfer is deemed to be a dividend under section 47A.*
4. *Malay Co fails the active income test in the 2006-2007 income year. The deemed dividend received by Malay Co does not constitute passive income and in turn, adjusted tainted income.*
5. *It follows that, as the dividend is not included in Malay Co's notional assessable income under section 384, it is not included in the attributable income in respect of Aust Co.*

<sup>1</sup> All subsequent section references are to the ITAA 1936 unless otherwise specified.

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## **Date of effect**

6. When the final Determination is issued, it is proposed to apply to amounts taken to be dividends under section 47A paid after 30 June 2004. However, the Determination will not apply to taxpayers to the extent it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination.

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**Commissioner of Taxation**

31 January 2007

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## Appendix 1 – Explanation

**①** *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

### Explanation

7. Broadly, section 47A applies when a CFC resident in an unlisted country provides (directly or indirectly) a specified benefit to an associated entity. Where section 47A applies, the benefit is taken to be a dividend paid to the associated entity as a shareholder for the purposes of the ITAA 1936. That associated entity can be another CFC.

8. An amount is included in a CFC's notional assessable income only if it is an amount to which either section 384 (in respect of a CFC resident in an unlisted country) or section 385 (in respect of a CFC resident in a listed country) applies. Relevantly, both sections apply to an amount which is 'adjusted tainted income' where the CFC fails the active income test.<sup>2</sup>

9. 'Adjusted tainted income' is defined in section 386 to be passive income, tainted sales income or tainted services income as defined in Division 8 of Part X but modified by subsection 386(2).<sup>3</sup>

10. 'Passive income' is defined in subsection 446(1) in Division 8 of Part X to include amounts that are 'dividends (within the meaning of section 6) paid to the company in the statutory accounting period'.<sup>4</sup> The definition also includes unit trust dividends and amounts deemed to be dividends under section 47.<sup>5</sup>

11. An amount deemed to be a dividend under section 47A is not a dividend 'within the meaning of section 6'. While section 47A deems an amount to be a dividend for the purposes of the ITAA 1936, such an amount is not brought within the section 6 definition of dividend. Section 47A only applies to distributions from a company that are not otherwise a dividend. Therefore an amount deemed to be a dividend under section 47A will not have satisfied the requisite conditions in section 6.

12. The general definition of 'dividend' contained in section 6 operates cumulatively with section 47A to inform the meaning of 'dividend' where used in the Act. The fact that subsection 446(1) refers to 'dividends (within the meaning of section 6)' and amounts deemed to be dividends under section 47, rather than simply referring to 'dividends', suggests that the definition of 'passive income' was only intended to cover those deemed dividends specifically listed, rather than all amounts deemed to be dividends for the purposes of the ITAA 1936. If it were the case that the reference to 'dividends (within the meaning of section 6)' encompassed all amounts deemed to be dividends for the purposes of the ITAA 1936, then paragraph 446(1)(c), which covers amounts deemed to be dividends under section 47, would be superfluous.

<sup>2</sup> See paragraph 384(2)(a) (unlisted country CFCs) and subparagraph 385(2)(a)(i) (listed country CFCs). If the CFC is resident in a listed country there is an additional requirement that the amount must be eligible designated concession income. Other amounts included as income by sections 384 and 385 are not relevant to the question considered in this Tax Determination.

<sup>3</sup> The modifications are not relevant for the purposes of the question considered in this Tax Determination.

<sup>4</sup> Paragraph 446(1)(a).

<sup>5</sup> Paragraph 446(1)(c).

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13. Given that section 47A deemed dividends are not listed in subsection 446(1), such dividends do not constitute 'passive income', and in turn adjusted tainted income, and they will not form part of notional assessable income.

14. Note that while the section 47A amount will not fall within the notional assessable income (and hence attributable income) of the recipient CFC in relation to an attributable taxpayer, the paying CFC may still have notional assessable income (and hence attributable income in relation to the attributable taxpayer).

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## **Appendix 2 – Your comments**

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15. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date. (Note: The Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

**Due date:** 2 March 2007  
**Contact officer:** Brett O'Neill  
**Email address:** [brett.o'neill@ato.gov.au](mailto:brett.o'neill@ato.gov.au)  
**Telephone:** (08) 8208 1832  
**Facsimile:** (08) 8208 1898  
**Address:** 91 Waymouth Street  
Adelaide SA 5000

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TD 92/194

*Subject references:*

- controlled foreign companies
- deemed dividends
- dividend income
- foreign attributable income
- foreign income
- international tax

*Legislative references:*

- ITAA 1936 6
- ITAA 1936 47
- ITAA 1936 47A
- ITAA 1936 384
- ITAA 1936 384(2)(a)
- ITAA 1936 385
- ITAA 1936 385(2)(a)(i)
- ITAA 1936 386
- ITAA 1936 Pt X Div 8
- ITAA 1936 446(1)
- ITAA 1936 446(1)(a)
- ITAA 1936 446(1)(c)

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ATO references

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