TR 2013/D6 - Income tax: matrimonial property proceedings and payments of money or transfers of property by a private company to a shareholder (or their associate)

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Draft Taxation Ruling

Income tax: matrimonial property proceedings and payments of money or transfers of property by a private company to a shareholder (or their associate)

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What this Ruling is about

1. In matrimonial property proceedings,[1] under section 79 of the *Family Law Act 1975* (FLA 1975), the Family Court can order:

- a private company, or
- a party to the matrimonial proceedings to cause the private company,

to

- pay money, or
- transfer property,

to a party to the matrimonial proceedings.

2. This draft Ruling is concerned with the taxation effect under section 44 of the *Income Tax Assessment Act 1936* (ITAA 1936) and Division 7A of Part III of the ITAA 1936 (Division 7A) of private companies paying money or transferring property in satisfaction with such orders.

[1] This ruling only applies to matrimonial property proceedings. However, the approach adopted in this ruling would be equally applicable to property settlement proceedings as they apply to de facto couples, where the governing legislation is substantially similar to section 79 of the FLA 1975.

3. In this draft Ruling, a reference to:

- **an associate of a shareholder**, includes an entity that receives a payment or transfer of property from a private company because it was formerly a shareholder or an associate of a shareholder of that company, and
- **the Family Court** means a reference to another court exercising jurisdiction in relevant proceedings by virtue of the FLA 1975, which includes the Federal Circuit Court (formerly the Federal Magistrates Court).

Ruling

Money or property to be paid or transferred to a shareholder

4. Where an order is made under section 79 of the FLA 1975 and that order requires:

- a private company, or
- a party to the matrimonial proceedings to cause the private company,

to pay money or transfer property to a party to the matrimonial proceedings who is a shareholder of the private company, the payment of money or transfer of property in satisfaction of that order is an ordinary dividend to the extent paid out of the private company profits and is assessable income of the shareholder under section 44 of the ITAA 1936. (See Examples 1 to 4 of this ruling).

Money or property to be transferred to an associate of a shareholder

5. Where an order is made under section 79 of the FLA 1975 and that order requires

- a private company, or
- a party to the matrimonial proceedings to cause the private company,

to pay money or transfer property to a party to the matrimonial proceedings who is an associate of a shareholder of the private company, the subsequent payment of money or transfer of property in satisfaction of the order is a payment for the purposes of subsection 109C(3) of the ITAA 1936.

6. Section 109J of the ITAA 1936 does not prevent the payment from being treated as a dividend under subsection 109C(1) of the ITAA 1936. (See Examples 5 to 8 of this ruling)

Examples

Money paid or property transferred to a shareholder

Example 1: Section 79 orders to pay money to a shareholder

7. In the 2014 income year, Mal, Justine and DEF Pty Ltd are parties to matrimonial property proceedings before the Family Court. Mal and Justine are both shareholders of DEF Pty Ltd which is the vehicle for the family business and has retained profits of $500,000. On 29 March 2014, the Family Court makes an order pursuant to section 79 of the FLA 1975 for DEF Pty Ltd to pay Justine $250,000.

8. On 30 April 2014, DEF Pty Ltd makes the payment of $250,000 to Justine in satisfaction of the Family Court order.

9. The payment of $250,000 is an assessable dividend to Justine under section 44 of the ITAA 1936.

Example 2: Section 79 orders to transfer property to a shareholder

10. In the 2014 income year, Tim, Helene and MNO Pty Ltd are parties to matrimonial property proceedings before the Family Court. Tim and Helene are both shareholders of MNO Pty Ltd which is the vehicle for the family business and has retained profits of $2,000,000.

11. On 15 May 2014, the Family Court makes an order pursuant to section 79 of the FLA 1975 for MNO Pty Ltd to transfer a rental property with market value of $1,000,000 to Tim.

12. On 30 June 2014, MNO Blue Sky Pty Ltd makes the transfer of the property to Tim in satisfaction of the Family Court order.

13. The transfer of property is an assessable dividend to Tim under section 44 of the ITAA 1936.

Example 3: Section 79 orders against a matrimonial party to cause a private company to pay money to a shareholder

14. In the 2003 income year, Bobby and Pat are parties to matrimonial property proceedings before the Family Court. Bobby and Pat are the sole shareholders/directors of LMN Pty Ltd which is the vehicle for the family business and has retained profits of $3,000,000. LMN Pty Ltd is not a party to the proceedings.

15. On 15 February 2003, the Family Court makes an order pursuant to section 79 of the FLA 1975 for Bobby and Pat to cause LMN Pty Ltd to pay to Pat an amount of $1,500,000. On 25 March 2003, LMN Pty Ltd makes the payment of money to Pat in satisfaction of the Family Court order.

16. The payment of $1,500,000 is an assessable dividend to Pat under section 44 of the ITAA 1936.

Example 4: Section 79 orders against a matrimonial party to cause a private company to transfer property to a shareholder

17. In the 2003 income year, Robert and Marg are parties to matrimonial property proceedings before the Family Court. Robert and Marg are the sole shareholders/directors of ZAB Pty Ltd which is the vehicle for the family business and has retained profits of $7,000,000. ZAB Pty Ltd is not a party to the proceedings.

18. On 28 February 2003, the Family Court makes an order pursuant to section 79 of the FLA 1975 for Robert and Marg to cause ZAB Pty Ltd to transfer real property to Marg with a market value of $2,000,000. On 25 March 2003, ZAB Pty Ltd makes the transfer of property to Marg in satisfaction of the Family Court order.

19. The transfer of property is an assessable dividend to Marg under section 44 of the ITAA 1936.

Money paid or property transferred to an associate of a shareholder

Example 5: Section 79 orders for a private company to pay money to an associate of a shareholder

20. In the 2014 income year, Sam, Martha and ABC Pty Ltd are parties to matrimonial property proceedings before the Family Court. Sam is the sole shareholder of ABC Pty Ltd which is the vehicle for the family business and has retained profits of $200,000. The distributable surplus of ABC Pty Ltd as worked out under section 109Y of the ITAA 1936 is greater than $100,000.

21. On 29 May 2014, the Family Court makes an order pursuant to section 79 of the FLA 1975 for ABC Pty Ltd to pay Martha $100,000. On 30 June 2014, ABC Pty Ltd makes the payment of $100,000 to Martha in satisfaction of the Family Court order.

22. The payment to Martha is a payment as defined in paragraph 109C(3)(a) of the ITAA 1936. Section 109J of the ITAA 1936 does not prevent section 109C operating to treat the payment as a deemed dividend.

23. The payment is assessable to Martha as a dividend under section 44 of the ITAA 1936, by virtue of section 109C of the ITAA 1936.

Example 6: Section 79 orders for a private company to transfer property to an associate of a shareholder

24. In the 2014 income year, Max, Denise and XYZ Pty Ltd are parties to matrimonial property proceedings before the Family Court. Denise is the sole shareholder of XYZ Pty Ltd which is the vehicle for the family business and has retained profits of $1,000,000. The distributable surplus of XYZ Pty Ltd as worked out under section 109Y of the ITAA 1936 is greater than $500,000.

25. On 28 April 2014, the Family Court makes an order pursuant to section 79 of the FLA 1975 for ABC Pty Ltd to transfer a rental property with market value of $500,000 to Max. On 30 June 2014, XYZ Pty Ltd makes the transfer of the rental property to Max in satisfaction of the Family Court order.

26. The transfer of property to Max is a payment as defined in paragraph 109C(3)(c) of the ITAA 1936. Section 109J of the ITAA 1936 does not prevent section 109C operating to treat the transfer of property as a deemed dividend.

27. The transfer of property is assessable to Max as a dividend under section 44 of the ITAA 1936, by virtue of section 109C of the ITAA 1936.

Example 7: Section 79 orders against a matrimonial party to cause a private company to pay money to an associate of a shareholder

28. In the 2003 income year, Roger and Michelle are parties to matrimonial property proceedings before the Family Court. Roger is the sole shareholder/director of PQR Pty Ltd which is the vehicle for the family business and has retained profits of $10,000,000. The distributable surplus of PQR Pty Ltd as worked out under section 109Y of the ITAA 1936 is greater than $6,000,000. PQR Pty Ltd is not a party to the proceedings.

29. On 15 April 2003, the Family Court makes an order pursuant to section 79 of the FLA 1975 for Roger to cause PQR Pty Ltd to pay money of $6,000,000 to Michelle. On 30 June 2003, PQR Pty Ltd makes the payment of $6,000,000 to Michelle in satisfaction of the Family Court order made against Roger.

30. The payment to Michelle is a payment as defined in paragraph 109C(3)(a) of the ITAA 1936. Section 109J of the ITAA 1936 does not prevent section 109C operating to treat the payment of money as a deemed dividend.

31. The payment is assessable to Michelle as a dividend under section 44 of the ITAA 1936, by virtue of section 109C of the ITAA 1936.

Example 8: Section 79 orders against a matrimonial party to cause a private company to transfer property to an associate of a shareholder

32. In the 2003 income year, Alan and Tania are parties to matrimonial property proceedings before the Family Court. Tania is the sole shareholder/director of UVW Pty Ltd which is the vehicle for the family business and has retained profits of $20,000,000. The distributable surplus of UVW Pty Ltd as worked out under section 109Y of the ITAA 1936 is greater than $12,000,000. UVW Pty Ltd is not a party to the proceedings.

33. On 15 February 2003, the Family Court makes an order pursuant to section 79 of the FLA 1975 for Tania to cause UVW Pty Ltd to transfer real property with market value of $12,000,000 to Alan. On 25 May 2003, UVW Pty Ltd makes the transfer of property to Alan in satisfaction of the Family Court order made against Tania.

34. The transfer of property to Alan is a payment as defined in paragraph 109C(3)(c) of the ITAA 1936. Section 109J of the ITAA 1936 does not prevent section 109C operating to treat the transfer of property as a deemed dividend.

35. The transfer of property is assessable to Alan as a dividend under section 44 of the ITAA 1936, by virtue of section 109C of the ITAA 1936.

Date of effect

36. Subject to the exception mentioned in paragraph 38 of this draft Ruling, when the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

37. ATO Interpretative Decision ATO ID 2004/462 correctly explains that section 109J of the ITAA 1936 will only apply to prevent a payment by a private company giving rise to a deemed dividend under section 109C of the ITAA 1936 where, amongst other things, that payment discharges an obligation of the private company. The ATO ID explains that no relevant obligation can arise as a result of an order under section 79 of the FLA 1975, where that order does not bind the private company (for example, where the private company is not a party to the relevant proceedings). The ATO ID is silent on the role of section 109J of the ITAA 1936 where orders under section 79 of the FLA 1975 *do* bind the private company (as can now be the case). A significant body of private rulings issued subsequent to this ATO ID have proceeded on the basis that an order made under section 79 of the FLA 1975 which *does* give rise to an obligation for a private company to pay money to an associate of a shareholder, will attract the protection of section 109J of the ITAA 1936.

38. The body of private rulings referred to in paragraph 37 of this draft Ruling evidence a prior general administrative practice contrary to the view, set out in paragraph 6 of this draft Ruling that orders made (directly) to a private company under section 79 of the FLA 1975, to pay money to an associate of a shareholder of that company, will result in a deemed dividend arising under Division 7A. Example 5 (at paragraphs 20 to 23 of this draft Ruling) goes on to illustrate that view. In any case where the view set out in paragraph 6 and/or Example 5 of this draft Ruling is less favourable to a taxpayer than the Commissioner's previous practice in respect of such orders against a private company, the Commissioner proposes not to undertake active compliance activities so as to apply that view in respect of any such orders made before the date the final Ruling is issued. However, if the Commissioner is asked or required to state a view in respect of such orders (for example in a private ruling or in submissions in a litigation matter), the Commissioner will do so consistent with the views set out in this draft Ruling (including paragraph 6).

39. Comments are specifically sought from impacted taxpayers on this proposed date of effect.

40. When the final Ruling is issued, ATO ID 2004/462 will be withdrawn.

Commissioner of Taxation
13 November 2013

Appendix 1 – Explanation

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.

Summary and context

41. This draft Ruling deals with certain income tax consequences that may arise where, as a result of the Family Court ordering that interests in property be altered upon the breakdown of a marriage, money or other property is transferred from a private company to a shareholder, or an associate of a shareholder, of that company. Specifically, it explains that in these circumstances, section 44 of the ITAA 1936 (dealing with dividends) or Division 7A (dealing with amounts deemed to be dividends) may apply to assess the recipient of that money or property.

42. In reaching this conclusion, this draft Ruling also considers the specific provisions contained within Division 7A that, in certain circumstances, can stop its application. One of those exclusions involves certain payments made in satisfaction of particular obligations (section 109J of the ITAA 1936). This draft Ruling explains why an obligation imposed by the Family Court cannot attract the protection of section 109J so as to stop the operation of Division 7A.

Family Law Context

43. Section 79 of the FLA 1975 enables the Family Court to make orders altering interests in matrimonial property on the breakdown of matrimonial relationships.

44. Section 90AE of the FLA 1975 commenced on 17 December 2004. Section 90AE gives the Family Court certain powers to make orders under section 79 of the FLA 1975 in relation to third parties. Paragraph 90AE(2)(b) of the FLA 1975 specifically empowers the Court to make an order that:

> alters the rights, liabilities or property interests of a third party in relation to the marriage.

45. Prior to 17 December 2004, the Family Court was not empowered to make orders directly against a private company. Rather, property of a party to matrimonial property proceedings was treated by the Family Court as including any property which a party had an ability to unilaterally invest in or divest as controlling shareholder, trustee or otherwise.[2] In such cases, the Family Court might have made an order against a party with a controlling interest to cause the private company to pay money or transfer property to the other matrimonial party.[3]

[2] *In the Marriage of Harris* (1991) 104 FLR 458; [1991] FLC 92-254.
[3] *In the Marriage of Prince* (1984) 69 FLR 150; [1984] FLC 91-501.

46. Paragraph 90AE(2)(b) of the FLA 1975 now empowers the Family Court to make orders directly against a third party such as a private company of which one or both of the matrimonial parties are shareholders.[4] In practice such orders have been for the private company to make a payment of money or a transfer of property to one or both of the parties to the matrimonial proceedings.

47. Rule 6.02(1) of the *Family Law Rules 2004* now requires that if a party seeks an order affecting a third party, the third party is a necessary party to the proceedings. Therefore, such orders would now be expected to be made directly against the third party rather than against a matrimonial party.

48. In making orders for the division of matrimonial property, the Family Court is required under subsection 90AE(4) of the FLA 1975 to take into account the taxation effect of the order on the matrimonial parties as well as to the third party.

49. The taxation effect of payments or transfers of property to shareholders or associates of shareholders primarily arise from the operation of section 44 of the ITAA 1936 and Division 7A.

50. Where the taxation effect of an order on the matrimonial parties was not taken into account, the Court may be empowered under subsection 79A(1) of the FLA 1975 to vary the order or set the order aside and, if it considers appropriate, make another order under section 79.

Income tax laws and matrimonial property proceedings

Section 44 of the ITAA 1936

51. A payment of money or transfer of property to a shareholder out of the profits of a private company is an assessable dividend under section 44 of the ITAA 1936.

52. Section 44 relevantly provides:

> The assessable income of a shareholder in a company (whether the company is a resident or a non-resident) includes:
>
> (a) if the shareholder is a resident:
>
> (i) dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

[4] Paragraph 147 of the Explanatory Memorandum to the Family Law Amendment Bill 2003 explains that the range of orders available because of the insertion of section 90AE is intended to be broad and includes for example, the ordering of the transfer of shares between the parties to the marriage.

53. The word 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include:

(a) any distribution made by a company to any of its shareholders, whether in money or other property.[5]

The meaning of distribution

54. The meaning of 'distribution' in context has been judicially considered and held:

1. to at least involve a dealing out or bestowal;[6]
2. to encompass a very broad range of applications of company property and money to shareholders while the company is a going concern;[7]
3. to undoubtedly be of wide import and concerned with the manner in which the shareholder receives the benefit of the dividend, emphasising that, in whatever manner the dividend reaches the shareholder it is to be regarded as assessable income;[8]
4. that the legal form of the transaction and the capacity in which the benefit is conferred on the shareholder will be relevant factors;[9]
5. to not require the existence of the conditions necessary to declare a lawful dividend under the *Corporations Act 2001* ('*Corporations Act*').[10]

[5] Excluding certain amounts not relevant in the circumstances considered in this draft Ruling – namely reversionary bonuses on life assurance policies and certain amounts debited against or to the company's share capital account.
[6] *Commissioner of Taxation v. Black* (1990) 25 FCR 274 at 281; (1990) 21 ATR 701 at 707; 90 ATC 4699 at 4705.
[7] *Commissioner of Taxes (Victoria) v. Nicholas* (1938) 59 CLR 230 at 238; (1938) 1 AITR 266 at 268-9; (1938) 4 ATD 484 at 486 per Latham CJ.
[8] *Commissioner of Taxation (New South Wales) v. Stevenson* (1937) 59 CLR 80 at 108.
[9] *Davis Investments Pty Ltd v. Commissioner of Stamp Duties (New South Wales)* (1958) 100 CLR 392.
[10] *MacFarlane v. Federal Commissioner of Taxation* (1986) 13 FCR 356; 86 ATC 4477; (1986) 17 ATR 808.

Paid out of profits

55. The High Court in *Federal Commissioner of Taxation v. Slater Holdings Ltd* (No. 2)[11] confirmed that it is the fact that a payment to a shareholder is sourced in the profits of a company (as opposed to whether that payment has the character of income in the hands of the shareholder) that is decisive of whether that payment is a dividend for the purposes of section 44 of the ITAA 1936. In that case, Gibbs CJ said:

> In *FC of T v. Uther, Kitto* J., in his dissenting judgment at pp. 638-640, advanced a criticism of the judgment of *Fullagar* J., which, with all respect, I find compelling. *Fullagar* J. was right in saying that the distribution made to the shareholders in *F.C. of T. v. Blakely* was a capital receipt according to general principles, but he gave insufficient weight to the change that had been effected to the law by defining ``dividend'' so as to include a distribution made by a company to any of its shareholders. As *Kitto* J. pointed out at p. 639, the effect of the amendments to the law, first made by the *Income Tax Assessment Act 1934* and repeated when the Act was passed in 1936, was to make shareholders in a company which is a going concern assessable to tax on a principle fundamentally different from that of the previous legislation. *Kitto* J. continued:
>
> > 'The criterion for the inclusion of a shareholder's receipts from the company is no longer the 'dividend' character of the receipts, that is to say their income character when considered from the shareholder's point of view; it is the profit character – from the company's point of view – of the source from which distributions should be made.'[12]

56. In terms of whether a distribution has been paid out of profits, the Commissioner has previously explained in paragraphs 15 and 16 of Taxation Ruling TR 2003/8: *Income tax: distributions of property by companies to shareholders – amount to be included as an assessable dividend*:

> 15. In deciding whether, as a question of fact, a distribution has been made out of profits derived by the company in cases where the distribution is not formally acknowledged as such, a substantive approach should be adopted. There does not need to be a formal debiting of an account of profit of the company. So long as the market value of the company assets exceeds the total amount (as shown in its books of account) of its liabilities and share capital what remains is profits. If the distribution is not debited to share capital the distribution is one of profits.

[11] (1984) 156 CLR 447; (1984) 15 ATR 1299; (1984) 84 ATC 4883.
[12] At CLR 457, At ATR 1304, At ATC 4887.

> 16. Such an approach was adopted by the NSW Supreme Court in *Masterman v. FCT* 85 ATC 4015. In reaching its decision that the payment to shareholders in that case was a payment out of profits derived by the company, the court noted (at page 4030) that the company was solvent and that there was no evidence that the relevant payment was out of non-profit sources, and that 'commonsense would require that the company be kept solvent and that only surplus amounts not putting that requirement at risk be paid out'.

A dividend for tax purposes

57. It follows for tax purposes that it does not matter whether a dividend is intended or predicated upon any particular process. Rather, a factual enquiry is required as to whether there is a distribution to a shareholder and whether it is made out of profits.

Section 79 orders to pay money or transfer property (or cause money to be paid or property transferred) to a shareholder

Distribution out of profits

58. A payment or transfer of property by a private company to a shareholder in satisfaction of an order of the Family Court in a matrimonial property proceeding falls for consideration under section 44 of the ITAA 1936.

59. It would ordinarily be expected that such orders would relate to money or other property comprising the net assets of the private company, being the private company's realised or unrealised profits. This is because under paragraph 90AE(4)(f) of the FLA 1975, the Family Court must take account of the economic, legal or other capacity of the private company to comply with the order.

60. If the net assets of a private company have a bona fide nil value, the directors of the private company would, in ordinary circumstances, be in breach of section 588G of the *Corporations Act* if they were to divest the private company of assets so as to cause the private company to be insolvent. Further, were that divesting of assets an uncommercial transaction, it may be voidable under section 588FE of the *Corporations Act*.

61. The Family Court would therefore not be expected to make an order under section 79 of the FLA for the private company to make a payment of money or to transfer property for less than market value in excess of the private company's retained profits.

To a shareholder

62. In complying with a section 79 order for a payment or transfer of property to a matrimonial party who is shareholder, a private company might recognise the payment or transfer of property as a distribution to a shareholder.[13] The terms of the section 79 order might also expressly require that the payment or transfer of property be effected by the making of a formal distribution.

63. Nonetheless, the express characterisation by the private company of the payment or transfer as a distribution to a shareholder, or the express requirement by the section 79 order that such a payment or transfer be in the form of a distribution to a shareholder, is not essential. Paragraph (a) of the definition of dividend in subsection 6(1) of the ITAA 1936 merely requires a distribution 'to' a shareholder (unlike the second limb of that definition which only includes amounts credited to any of its shareholder 'as shareholders').[14]

Conclusion

64. In cases where there is a payment of money or transfer of property to a matrimonial party who is a shareholder representing the realised or unrealised profits of the private company, in satisfaction with an order of the Family Court, there will be:

(a) a bestowal by the private company upon a shareholder in terms of the transfer of property or payment of money, and

(b) in both substance and/or legal form, a Court ordered appropriation from the private company profits.

65. In these cases, the shareholder will have been paid a dividend as defined, out of profits, which is assessable under section 44 of the ITAA 1936. The characterisation of the payment or transfer of property as a dividend is not altered by the fact that it is made pursuant to an order of the Family Court. The cause for the directors resolving to make the payment or transfer the relevant property does not determine its character.

66. Section 44 of the ITAA 1936 applies in these circumstances regardless of whether the order is made against the private company or against a party to the matrimonial proceedings to cause the private company to transfer the property or make the payment.

67. Given that a payment of money or transfer of property made in these circumstances is dealt with under section 44 of the ITAA 1936, Division 7A will not also apply.[15]

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[13] The accounting treatment describing satisfaction with an order of the Family Court for example might show a debiting of a ledger account of realised or unrealised profits of the private company and be coded as a distribution to a shareholder.
[14] See paragraph (b) of the definition of dividend in subsection 6(1) of the ITAA 1936.
[15] See section 109L of the ITAA 1936.

Division 7A

68. Section 44 only applies on its face to shareholders. That is, without more, it does not apply where the recipient of the transfer of property or payment of money is an associate of a shareholder. In such cases, Division 7A is considered.

69. Division 7A is broadly directed at ensuring that disguised or informal distributions of private company profits to shareholders or their associates are included in the assessable income of the shareholder or associate.[16]

109C Payments to associates can be deemed to be dividends

70. Under Division 7A (specifically, under paragraph 109C(1)(a) of the ITAA 1936), where a private company makes a payment or transfers property to an entity that is a shareholder or an associate of a shareholder of that company, the private company is taken to have paid a dividend to the shareholder or associate.

71. Under section 109ZD of the ITAA 1936, associate has the meaning given by section 318 of the ITAA 1936. Pursuant to paragraph 318(1)(a) of the ITAA 1936, a spouse[17] of a natural person is an associate of that person.

72. Under paragraph 109C(1)(b), Division 7A may also operate to deem a dividend where the payment or transfer of property is made to an entity that is a former shareholder or former associate of a shareholder. The paragraph operates where a reasonable person would conclude that the payment or transfer of property was made 'because' the recipient entity is a former shareholder or former associate of a shareholder. The Commissioner's view on the meaning of 'because' in context is contained in Taxation Determination TD 2008/14.[18] Paragraph 1 of TD 2008/14 relevantly states:

> 1. In this context 'because' means by reason that. The reason must be a real and substantial reason for the payment, loan or debt forgiveness concerned, even if it is not the only reason or not the main reason for the transaction.

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[16] See for example, paragraph 1.4 of the Explanatory Memorandum to Tax Laws Amendment (2010 Measures No. 2) Bill 2010.

[17] Note that subsection 318(7) provides that for these purposes, a 'spouse' excludes a spouse who is living separately and apart from the person on a permanent basis. This means that matrimonial couples who are not formally divorced, but (physically) separated cease to be 'associates' of each other under this definition.

[18] Taxation Determination TD 2008/14: *Income tax: Division 7A of Part III of the Income Tax Assessment Act 1936 - what is the meaning of 'because' in the context of the expression 'because the entity has been such a shareholder or associate at some time' in relation to payments, loans and debt forgiveness made by a private company to the entity?*

73. In the family law context, where the matrimonial parties are already divorced or separated, the very reason why the section 79 order is available to the Court is that a right to bring Family Court proceedings[19] is available by virtue of the recipient's status as a former spouse. Therefore, the 'real and substantial' reason for the payment or transfer of property (as contemplated in TD 2008/14) is the recipient's status as a former associate of a shareholder.[20] The temporal question of whether at the time a payment or transfer of property is made, the recipient is still an associate of a shareholder does not, therefore, affect the operation of Division 7A.

74. The explanation which follows only refers to associates but the reasoning is equally applicable to relevant former associates and former shareholders.

75. Subsection 109C(3) defines a payment to mean:

(a) a payment to the extent that it is to the entity, on behalf of the entity or for the benefit of the entity; and

(b) a credit of an amount to the extent that it is:

(i) to the entity; or

(ii) on behalf of the entity; or

(iii) for the benefit of the entity; and

(c) a transfer of property to the entity.

76. Both a payment of money and a transfer of property by a private company to an associate of a shareholder in satisfaction of an order of the Family Court is 'a payment to an entity', under paragraphs (a) and (c) of this definition respectively.

77. Accordingly, in either of these situations, a deemed dividend will arise under subsection 109C(1) of the ITAA 1936 unless an exclusion contained in Subdivision D of Division 7A applies.

Certain payments discharging pecuniary obligations excepted

78. One of the exclusions in Subdivision D of Division 7A is contained in section 109J of the ITAA 1936, which provides that payments discharging certain pecuniary obligations do not give rise to a deemed dividend under section 109C of the ITAA 1936.

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[19] A right to bring Family Court proceedings is included in the definition of a 'matrimonial cause' in section 4 of the FLA 1975.

[20] Under the paragraph (ca) meaning of matrimonial cause in subsection 4(1) of the FLA 1975, such causes include proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

(i) arising out of the marital relationship;

(ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties……

79. Section 109J of the ITAA 1936 reads as follows:

> A private company is not taken under section 109C to pay a dividend because of the payment of an amount, to the extent that the payment:
>
> (a) discharges an obligation of the private company to pay money to the entity; and
>
> (b) is not more than would have been required to discharge the obligation had the private company and entity been dealing with each other at arm's length.

Paragraph 109J(a): discharge of an obligation to pay money

Orders made against a matrimonial party – no relevant obligation

80. In order for section 109J of the ITAA 1936 to be satisfied, there needs to be an obligation of the private company to pay money to an entity. Where an order is made under section 79 of the FLA 1975 against a matrimonial party to *cause* a private company to pay money or transfer property to an associate of a shareholder, no binding requirement in law is imposed upon the private company to make a payment of money or transfer of property.

81. The binding requirement in law is imposed against the matrimonial party against whom the order is made.

82. Therefore, the requirement in paragraph 109J(a) of the ITAA 1936 that the payment:

> 'discharges an obligation of the private company to pay money'

cannot be satisfied.

83. Section 109J of the ITAA 1936 therefore cannot operate to prevent a deemed dividend from arising under section 109C in respect of the transfer of property or payment of money where the transfer or payment has arisen as a result of an order against a matrimonial party to cause the company to make the payment or transfer the property to an associate of a shareholder.

Orders made against private company – no relevant obligation if order is to transfer property

84. Where the private company is made party to the proceedings such that the Family Court can impose orders directly on the private company, any subsequent order of the Family Court under section 79 of the FLA 1975 for a private company to pay money to an associate of a shareholder imposes a binding requirement in law for the payment to be made.[21] This type of obligation is 'an obligation of the private company to pay money to an entity' in terms of paragraph 109J(a) of the ITAA 1936. Where a private company makes a payment to an associate of the shareholder in satisfaction of the obligation imposed by the order of the Family Court, this constitutes a 'discharge' of that obligation for the purposes of paragraph 109J(a).

85. However, where the obligation imposed on the private company is to transfer property, paragraph 109J(a) of the ITAA 1936 is not satisfied. Paragraph 109J(a) of the ITAA 1936 requires the obligation which is discharged to be for a payment of money. A discharge of an order of the Family Court to transfer property to an associate of a shareholder, does not involve the discharge of an obligation to make a payment of money. Therefore, where the order of the Family Court is to require a private company to transfer property to an associate of a shareholder, section 109J does not operate to stop a deemed dividend from arising under section 109C.

Paragraph 109J(b): arm's length alternative hypothesis

86. Where the private company satisfies the requirements of paragraph 109J(a) of the ITAA 1936 (for example, and order has been made against the private company for it to pay money to a matrimonial party who is an associate of one of its shareholders), paragraph 109J(b) must also be satisfied for the section to prevent a deemed dividend arising under section 109C of the ITAA 1936.

87. Paragraph 109J(b) of the ITAA 1936 requires consideration of whether the payment made is more than would be required to discharge the obligation had the private company and the entity who received the payment (in this case, the shareholder's associate) been dealing at arm's length.

88. It is not sufficient to test what ought to be paid to discharge the relevant obligation. A test of what the relevant obligation would be, had the parties been dealing at arm's length, is also required. So much is evident from the Explanatory Memorandum to Taxation Laws Amendment Bill (No. 3) 1998 which inserted section 109J of the

[21] The FLA 1975 enables the court to impose sanctions on parties to property settlements who fail to comply with orders made. The sanctions include under section 112AD of the FLA 1975:

- A bond (for up to 2 years);
- A sentence (not more than 12 months);
- A fine (not more than 60 penalty units).

ITAA 1936 (the Explanatory Memorandum), which relevantly states at paragraph 9.49:

> This section ensures that such commercial dealings are not unfairly taxed and that, for example, disguised distributions are not **made by inflating the amount of a debt** owed to a shareholder or associate by a private company. (emphasis added)

89. In *Di Lorenzo Ceramics Pty Ltd & Anor v. FCT,*[22] this was confirmed as the proper construction to be placed on section 109J of the ITAA 1936, where, after quoting this section, Lindgren J said:

> Accordingly, if Ceramics purchased property from Tile and thereby incurred an obligation to pay Tile the purchase price, and if that price was no more than the price the parties would have agreed upon if they had been dealing with each other at arm's length, s 109C would not deem the payment to be a dividend.[23]

90. That is, a consideration of what would have been the payment had the parties been dealing with each other at arm's length (as paragraph 109J(b) of the ITAA 1936 directs us to do), necessarily involves an enquiry as to what would have been the obligation agreed between such parties.

91. The meaning of arm's length is well settled. In *The Trustee for the Estate of the late AW Furse No 5 Will Trust v. Federal Commissioner of Taxation*,[24] Hill J, in relation to the expression 'not dealing with each other at arm's length' for the purposes of subsection 102AG(3) of the ITAA 1936, said:

> What is required in determining whether parties dealt with each other in respect of a particular dealing at arm's length is an assessment whether in respect of that dealing they dealt with each other as arm's length parties would normally do, so that the outcome of their dealing is a matter of real bargaining.[25]

92. Further, in *Granby Pty Ltd v. Federal Commissioner of* Taxation,[26] Lee J said in the context of the former paragraph 160ZH(9)(c) of the ITAA 1936 that the phrase 'at arm's length' means:

> at least, that the parties to a transaction have acted severally and independently in forming their bargain.[27]

93. It follows that if the parties are acting severally and independently in forming their bargain that each must be bargaining in their respective best interests.

[22] [2007] FCA 1006; (2007) 67 ATR 42; (2007) 2007 ATC 4662.
[23] At FCA 27; At ATR 47; At ATC 4666;
[24] (1990) 21 ATR 1123; 91 ATC 4007.
[25] (1990) 21 ATR 1123 at 1132; 91 ATC 4007 at 4015.
[26] (1995) 30 ATR 400; 95 ATC 4240.
[27] (1995) 30 ATR 400 at 403; 95 ATC 4240 at 4243.

94. In the present context, the testing in paragraph 109J(b) of the ITAA 1936 is concerned with what pecuniary obligation would have arisen had the matrimonial parties and the private company been dealing with each other at arm's length. The 'arm's length' requirement will thus require an alternative hypothesis in which the private company is engaged in a 'dealing' and pursuing its own best interests.[28]

95. A similar approach has been adopted in other statutory contexts which utilise the phrase, 'dealing with each other at arm's length'. For example, in *Industry Research & Development Board v. Bridgestone Australia Ltd*[29] Tamberlin, Sackville and Selway JJ said, in the context of section 39C of the *Industry Research and Development Act 1986*, that what is required is a:

> … a comparison between the actual contract and terms between the parties and the range of hypothetical transactions and contracts that might be entered into between parties dealing at arm's length [30]

96. In an earlier case of the same name,[31] Branson J said that in this context, the necessary hypothesis is what would be:

> …the result of negotiations between persons dealing with each other in circumstances which may rarely exist outside of economic theory, namely circumstances in which the result of their negotiations will be dictated purely by commercial or market considerations and not by their relationship one to the other or by appreciable disparities of power between them.[32]

97. In the present context, such an abstract hypothetical, namely what would have been settled between the parties if 'dictated purely by commercial or market considerations' is also required. This is because in all comparable Family Court proceedings the private company is never at arm's length from the matrimonial parties and there is no dealing or bargaining in such proceedings which imposes the obligation[33].

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[28] See for example Collier J in *Allen & Anor (As trustees for Allen's Asphalt Staff Superannuation Fund) v. FC of T* [2010] FCA 1276 at [89] to [90], whose decision other than as to penalties was upheld on appeal: See *Allen & Anor (As trustees for Allen's Asphalt Staff Superannuation Fund) v. FC of T* [2011] FCAFC 118.
[29] [2004] FCAFC 56.
[30] at [39].
[31] [2001] FCA 954;
[32] At [10].
[33] A matrimonial cause before the Family Court does not involve any 'dealing' or 'bargaining' between the parties to the proceedings. The Court must always exercise its own discretion on whether to make an order, and, if so what orders to make. This is so even if orders are sought by consent – see *Harris v. Caladine* (1991) 172 CLR 84 at 96, 103-104, 124, 133.

98. This is also consistent with the extrinsic materials which make it clear that what was in contemplation is what would have arisen between the parties in a commercial setting. The Explanatory Memorandum expressly states:

> An amount paid to discharge a pecuniary obligation owed by a private company to a shareholder or associate will not be treated as a dividend to the extent that the payment is not more than the amount the pecuniary obligation would have been if the private company and shareholder or associate had been dealing with each other at arm's length *[new section 109J]*. This section ensures that such **commercial dealings** are not unfairly taxed. (emphasis added)

99. In an arm's length (and not family law) setting, what then would a private company be obliged to pay (if anything) to a non-shareholder?

Arm's length obligation to pay associate?

100. As a practical matter, the consideration of what a private company might be obliged to pay an associate if acting at arm's length must proceed on the basis the private company would act in accordance with law, whether that be in terms of its own governing constituent documents or the *Corporations Act.*

101. In a commercial setting, the private company may be incapable of appropriating profits directly to a non-shareholder. Such an appropriation may be in breach of sections 181[34] or 182[35] of the *Corporations Act* and/or in breach of the director's fiduciary duty not to misuse company funds.[36]

102. In a commercial setting, for a private company to make a payment to a non-shareholder, the payment would ordinarily need to be in consideration for something of value provided in return by the non-shareholder.

103. Even if the private company is empowered to make gratuitous payments to non-shareholders,[37] this does not answer the question of what arm's length amount the company would be obliged to pay. The essence of a gratuitous payment is a voluntary appropriation of cash or property to a donee, that is, a gift. A gift involves no imposition of any obligation on the donor nor any discharge of an obligation in the making of the gift.[38]

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[34] Section 181 of the *Corporations Act* establishes a statutory duty to act in good faith and for proper purposes.

[35] Section 182 of the *Corporations Act* expressly prohibits officers or employees of a company from improperly using their position to gain an advantage for any other person or cause a detriment to the company.

[36] The fiduciary duty is found in a different context in *Paul A Davies (Aust) Pty Ltd v. Davies* (1983) 1 ACLC 1091.

[37] A private company may be empowered to confer a financial benefit on a related party if full disclosure is given and approval is obtained from shareholders in the manner prescribed in Chapter 2E of the Corporations Act.

[38] *Federal Commissioner of Taxation v. McPhail* (1968) 117 CLR 111 at 116; *Leary v. Federal Commissioner of Taxation* (1980) 11 ATR 145 at 147; 80 ATC 4438.

104. In view of the foregoing, the Commissioner considers there is no identifiable circumstance under which a private company might make a gratuitous appropriation of profits to a non-shareholder in discharge of an obligation in an arm's length dealing as required by the test in paragraph 109J(b) of the ITAA 1936. Therefore, any payment made in satisfaction of an order of the Family Court under section 79 of the FLA 1975 necessarily exceeds what would be paid in an arm's length dealing. Accordingly, section 109J will not apply to prevent such a payment from being treated as a deemed dividend under section 109C of the ITAA 1936.

105. Concluding that arm's length parties would not enter into a relevant transaction at all (so that transaction necessarily exceeds what would have occurred between arms-length parties) is not novel. In *Allen & Anor (as trustees for Allen's Asphalt Staff Superannuation Fund) v. FC of T*[39], which concerned the former paragraph 273(7)(b) of the ITAA 1936 Collier J held:

> Had the parties been at arm's length, there is no evidence before me to support a finding that the arrangement would have occurred at all and that the Super Fund would have derived the income it received. It follows that the amount of relevant income received by the Super Fund was greater than might have been expected to have been received if the parties had been dealing with each other at arm's length.[40]

106. Moreover, reaching this conclusion in the context of section 109J of the ITAA 1936 accords with the apparent policy intent. The Explanatory Memorandum to Taxation Laws Amendment (2007 Measures No. 3) Bill 2007 which inserted section 109RC of the ITAA 1936[41] makes it clear payments made in satisfaction of relevant Family orders are intended to be assessable as dividends. The Explanatory Memorandum relevantly states:

> Under the current law, transfers of property and other 'payments' in respect of marriage or relationship breakdown are caught by Division 7A even though they may be non-voluntary (e.g. by court order). [paragraph 1.44].
>
> The amendment provides that deemed dividends arising from 'payments' in respect of marriage or relationship breakdowns, may be frankable by the company ... [paragraph 1.45].
>
> While these payments could be completely removed from being caught by Division 7A this would arguably be providing a tax benefit to these taxpayers which is not the intention of these provisions.' [paragraph 1.99].

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[39] [2010] FCA 1276.

[40] At [99]. The decision of Collier J was upheld, other than as to penalties, on appeal: See *Allen & Anor (As trustees for Allen's Asphalt Staff Superannuation Fund) v. FC of T* [2011] FCAFC 118.

[41] Section 109RC provides that a deemed dividend that is taken to be paid because of a family law obligation may be franked.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.

Payments to associates: commercial transaction not required for Division 7A exception to apply

107. An alternative view exists that section 109J of the ITAA 1936 does not require a comparison between the payment made pursuant to the order under section 79 of the FLA 1975 and a commercial transaction.

108. This view focuses on the fact that the obligation and the amount required to discharge the obligation are determined, ultimately, by a court of law, sitting in judgement of a dispute between two parties. The proponents of this view argue that the relationship between the parties and the nature of their dealings (that is, whether or not they deal with each other at arm's length) is irrelevant to the amount of the court order, such that it cannot be said that the amount the company is obliged to pay is more or less than it would have been had the parties been dealing at arm's length.

109. But this overlooks the fact that it is only because the parties are not at arm's length, specifically because of their association with the matrimonial dispute, that the order is made against the private company in the first place.

110. Proponents of this view then argue that the amount the private company is required to pay is not more than what an arm's length party would be required to pay to satisfy such a court order. This however glosses over the technical construction of paragraph 109J(b) which requires a testing of what obligation would have arisen had the parties been 'dealing with each other at arm's length'.[42]

111. The Commissioner is of the view this requires a comparison between what has actually occurred and what would occur if the parties were dealing with each other in a genuine commercial setting, a context drawn in with the use of the term 'at arm's length', and not just an assumption that because the obligation was imposed by a court of law as a third party arbiter, the obligation and the amount required to satisfy the obligation are at arm's length.

112. Whilst the Family Court may impose an obligation and in turn, determine the amounts required to satisfy the obligation, the private company and matrimonial parties are not of themselves engaged in a 'dealing' that leads to that obligation.

113. Moreover, the alternative view disregards the purposive construction of section 109J favoured by the Commissioner, and available on the words of the provision.

[42] For the reasons explained in paragraphs 86 to 89 of this draft Ruling.

114. The Commissioner therefore disagrees with the alternative view for these reasons.

Payments to associates: equivalent commercial transaction can be found in a family law context

115. An alternative view also exists that the hypothesis required for paragraph 109J(b) of the ITAA 1936 to operate might be found not in a commercial setting but in an alternate mechanism used by the matrimonial parties and the private company to settle the division of matrimonial property for family law purposes.

116. In this regard, Part VIIIA of the FLA 1975 enables matrimonial parties to enter into an agreement concerning the division of property on breakdown of a marriage, amongst other things. Such agreements are termed 'financial agreements'.

117. Where certain formalities are satisfied, financial agreements are binding not only on the parties but also the Courts and are termed 'binding financial agreements'.

118. Amongst other provisions, subsection 90C(1) in Part VIIIA of the FLA 1975 was amended by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* to enable third parties to be covered by financial agreements. The Explanatory Memorandum relevantly states:

> A binding financial agreement enables persons intending to marry and married couples to provide in writing for how property will be distributed between them on marriage breakdown, and can be made to give effect to a property settlement on separation or divorce.
>
> The amendments in Part 1 of Schedule 3 clarify that:
>
> - binding financial agreements between spouses can include another person (a third party) as a party to the agreement, and
> - a binding financial agreement can make provision on other matters beyond those incidental or ancillary to property settlement or maintenance issues between the spouses.
>
> Financial agreements can be made in contemplation of a marriage, during a marriage, or after a divorce order is made.
>
> The amendments address issues that occasionally arise when the financial affairs of married couples are intermingled with other family members, including where family assets are held within a corporate or tax structure.

119. It is argued the alternate hypothesis required for paragraph 109J(b) of the ITAA 1936 to operate might be found in what might reasonably be expected to be settled as a 'financial agreement'.

120. Financial agreements are contractual.[43] It follows the necessary *indicia* of contract must be present, namely: offer, acceptance, consideration, intention to create legal relations, etcetera. The settling of such a contract thus requires a bargain to be struck between the parties and therefore, it is said, a 'dealing' in the context required by paragraph 109J(b) of the ITAA 1936.

121. It is further argued that in the same sense that a potential litigant may be best served in achieving an out of court settlement, it is in the commercial best interests of the private company to also seek to settle what might otherwise be a larger exposure under a section 79 of the FLA 1975 order by participating in a financial agreement. Similarly, it is argued it is in the commercial best interests of the private company to minimise legal costs by avoiding formal court proceedings. That is, the private company will bargain on commercial arm's length terms to achieve the best possible outcome for the private company.

122. It is thus concluded under this alternative view that the necessary ingredients for the alternate hypothesis required under paragraph 109J(b) of the ITAA 1936 are present, that is:

- an obligation is imposed in contract on the private company pursuant to the financial agreement;
- the obligation is for the payment of money; and
- the obligation would be bargained for on arm's length terms.

Not arm's length

123. The Commissioner is of the view that a financial agreement made by the private company is only explicable by reference to a special relationship between the parties rather than as a result of commercial and market considerations, ordinary commercial dealings or any real bargaining outside of that relationship. It is not itself a dealing between parties dealing at arm's length, and does not satisfy the hypothesis required by section 109J.

[43] See section 90KA of the FLA 1975 and *Australian Securities and Investments Commission v. Rich* (2003) 181 FLR 181 at 197-198 and 203-204; [2003] FLC 93-171 at 746-778 and 751-752.

No binding obligation

124. Moreover, the Commissioner notes that to the extent that financial agreements involve a mere promise by a private company to make a payment of money or transfer of property to a non-shareholder without consideration passing in return, they will be as a matter of contract law gratuitous and unenforceable.[44] Such promises create no binding obligation in contract or under the FLA 1975[45] as against the private company.

125. Although forbearance to pursue a cause of action may amount to sufficient consideration,[46] a non-shareholder has no cause of action against the private company under section 79 of the FLA 1975.[47]

126. Whilst the private company may be estopped from failing to fulfil its gratuitous promise,[48] it is not under any contractual obligation to make the gratuitous payment.

127. There is also the even more fundamental question of whether the private company might be empowered to agree to make such an appropriation of profits to a non-shareholder.[49]

128. In any event, to the extent to which it is capable of arising, the Commissioner is of the view that the fulfilment of a promise included in a financial agreement to make a payment of money or transfer of property to a non-shareholder involves no discharge of any *obligation* to pay money on the part of the private company that arises from a *dealing* between the private company and non-shareholder in the sense required by section 109J of the ITAA 1936.[50]

129. Moreover, the alternative view disregards the purposive construction of section 109J favoured by the Commissioner, and available on the words of the provision.

130. The Commissioner therefore disagrees with this alternative view for these reasons.

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[44] For general principle, see Carter, JW and Harland, DJ 1996, *Contract Law in Australia*, 3rd edn, LexisNexis Butterworths, Sydney at [302].
[45] See section 90KA of the FLA 1975.
[46] *McDermott v. Black* (1940) 63 CLR 161 at 183-5.
[47] Under paragraph (ca) of the subsection 4(1) definition of 'matrimonial cause', such proceedings may only be initiated between the parties to the marriage.
[48] For general principle, see Seddon, NC and Ellinghaus, MP 2002, *Cheshire and Fifoot's Law of Contract*, 8th edn, LexisNexis Butterworths, Chatswood at page 65.
[49] See paragraph 101 of this Ruling.
[50] See discussion at paragraphs 86 to 96 of this Ruling.

Appendix 3 – Your comments

131. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

132. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**8 January 2014**
Contact officer:	**David Newland**
Email address:	**David.Newland@ato.gov.au**
Telephone:	**(03) 6221 0625**
Facsimile:	**(03) 6221 0460**
Address:	**GPO Box 9990** **Hobart Tas 7001**

Appendix 4 – Detailed contents list

133. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2008/14; TR 2003/8

Subject references:

- court orders
- deemed dividends
- dividends
- family Law
- franked dividends
- private company distributions
- profits

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 102AG(3)
- ITAA 1936 Div 7A
- ITAA 1936 Subdiv D of Div 7A of Pt III
- ITAA 1936 109C
- ITAA 1936 109C(1)
- ITAA 1936 109C(1)(a)
- ITAA 1936 109C(1)(b)
- ITAA 1936 109C(3)
- ITAA 1936 109C(3)(a)
- ITAA 1936 109C(3)(c)
- ITAA 1936 109C(3)(c)
- ITAA 1936 109J
- ITAA 1936 109J(a)
- ITAA 1936 109J(b)
- ITAA 1936 109L
- ITAA 1936 109RC
- ITAA 1936 109Y
- ITAA 1936 109ZD
- ITAA 1936 273(7)(b)
- ITAA 1936 318
- ITAA 1936 318(1)(a)
- ITAA 1936 318(7)
- ITAA 1997
- Corporations Act 2001
- Corporations Act 2001 181
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- Corporations Act 2001 Ch 2E
- Corporations Act 2001 588FE
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- FLA 1975
- FLA 1975 Pt VIIIA
- FLA 1975 4
- FLA 1975 4(1)
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- FLA 1975 79
- FLA 1975 79A(1)
- FLA 1975 90AE
- FLA 1975 90AE(2)(b)
- FLA 1975 90AE(4)
- FLA 1975 90AE(4)(f)
- FLA 1975 90C(1)
- FLA 1975 90KA
- FLA 1975 112AD
- Industry Research & Development Act 1936 39C

Case references:

- Allen & Anor (As trustees for Allen's Asphalt Staff Superannuation Fund) v. Federal Commissioner of Taxation [2010] FCA 1276; 2010 ATC 20-225; 80 ATR 849
- Allen & Anor (As trustees for Allen's Asphalt Staff Superannuation Fund) v. Federal Commissioner of Taxation [2011] FCAFC 118; 2011 ATC 20-277; 84 ATR 853
- Australian Security and Investments Commission v. Rich [2003] FLC 78
- Commissioner of Taxation (Vic) v. Nicholas (1938) 59 CLR 230 (1938); 1 AITR 266; (1938) 4 ATD 484
- Davis Investments Pty Ltd v. CSD (NSW) (1958) 100 CLR 392
- Deputy Federal Commissioner of Taxation v. Black (1990) 25 FCR 274; (1990) 21 ATR 701; 90 ATC 4699
- Di Lorenzo Ceramics Pty Ltd & Anor v. FCT [2007] FCA 1006; (2007) 67 ATR 42; 2007 ATC 4662
- Federal Commissioner of Taxation v. McPhai (1968) 117 CLR 111
- Federal Commissioner of Taxation v. Slater Holdings Ltd

(1984) 59 ALJR 89; (1984) 56 ALR 306; 84 ATC 4883; (1984) 15 ATR 1299; (1984) 156 CLR 447
- Federal Commissioner of Taxation v. Stevenson (1937) 59 CLR 80
- Granby Pty Ltd v. FC of T 95 ATC 4240; 30 ATR 400
- Harris v. Caladine (1991) 172 CLR 84
- In the Marriage of Harris (1991) FLC 92-254; (1991) 104 FLR 458
- In the Marriage of Prince (1984) FLC 91-501; (1984) 69 FLR 150
- Industry Research & Development Board v. Bridgestone Australia Ltd [2004] FCAFC 56; 2004 ATC 4240; (2004) 55 ATR 142
- Industry Research & Development Board v. Bridgestone Australia Ltd [2001] FCA 954; 2001 ATC 4448; (2001) 47 ATR 469
- Leary v. Federal Commissioner of Taxation 80 ATC 4438; 11 ATR 145
- McDermott v. Black (1940) 63 CLR 161
- MacFarlane v. Federal Commissioner of Taxation 86 ATC 4477; (1986) 17 ATR 808; (1986) 67 ALR 624; (1986) 13 FCR 356
- Masterman v. FCT 85 ATC 4015; (1984) 16 ATR 77; (1984) 81 FLR 1
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- The Trustee for the Estate of the late AW Furse No 5 Will Trust v. FC of T (1990) 21 ATR 1123; 91 ATC 4007

Other references:
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- The Explanatory Memorandum to the Family Law Amendment Bill 2003
- The Explanatory Memorandum to Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008
- The Explanatory Memorandum to Taxation Laws Amendment Bill (No. 3) 1998
- The Explanatory Memorandum to Taxation Laws Amendment (2007 Measures No. 3) Bill 2007
- The Explanatory Memorandum to Tax Laws Amendment (2010 Measures No. 2) Bill 2010

ATO references

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