


TD 2008/D8 - Income tax: when is income tax of a private company a 'present legal obligation' for the purposes of the distributable surplus calculation under subsection 109Y(2) of Division 7A of Part III of the Income Tax Assessment Act 1936?

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This document has been finalised by TD 2008/28.



Draft Taxation Determination

Income tax: when is income tax of a private company a ‘present legal obligation’ for the purposes of the distributable surplus calculation under subsection 109Y(2) of Division 7A of Part III of the *Income Tax Assessment Act 1936*?

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Ruling

1. Where a private company has an instalment rate for an income year under Part 2-10 of Schedule 1 to the *Taxation Administration Act 1953* (TAA), the amount of any unpaid instalment at 30 June is a ‘present legal obligation’ for the purposes of the distributable surplus calculation worked out at that time.
2. Where a private company has an amount due and payable by reason of subsection 204(1A) of the *Income Tax Assessment Act 1936* (ITAA 1936), this is not a present legal obligation for the purposes of the distributable surplus calculation worked out at 30 June of the income year which is subject to the deemed assessment under section 166A of the ITAA 1936. However, to the extent that amount remains unpaid at 30 June of a following income year, it will be a present legal obligation for the purposes of the distributable surplus calculation worked out at that time.
3. Where a private company has an amount due and payable at 30 June of an income year by reason of the former subsection 221AZK(2) of the ITAA 1936, this is a present legal obligation of the private company for the purposes of the distributable surplus calculation worked out at that time.

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4. Where the Commissioner issues a private company with an amended assessment for any income year, the amount payable under the amended assessment will not be a present legal obligation for the purposes of the distributable surplus calculation worked out as at the end of the income year subject to the amended assessment. To the extent the amount payable under the amended assessment remains unpaid, it will be a present legal obligation for the purposes of the distributable surplus calculation worked out as at the end of the income year in which the amended assessment is made and served on the private company. This is so regardless of whether the former subsection 204(1) of the ITAA 1936 or the current subsection 204(2) of the ITAA 1936 applies.

Example 1

5. *A private company (A Pty Ltd) has correctly self assessed taxable income for the 2006 income year of \$100,000, and the fourth quarterly PAYG instalment of \$7,500, is unpaid as at the end of the income year (30 June 2006). The first three PAYG instalments totalling \$22,500 have already been paid on time. The amount unpaid at 30 June 2006 of \$7,500 is a present legal obligation of A Pty Ltd for the purposes of the distributable surplus calculation under subsection 109Y(2) of the ITAA 1936 at 30 June 2006.*

Example 2

6. *A private company (M Pty Ltd) is not registered for the GST and does not have an instalment rate for the 2007 income year for the purposes of Part 2-10 of Schedule 1 to the TAA. During the 2007 income year, M Pty Ltd made a \$5,000 loan to a shareholder Beth which was neither repaid nor put under a qualifying section 109N of the ITAA 1936 written agreement by M Pty Ltd's lodgment day for the 2007 income year. M Pty Ltd's 2007 income tax return was lodged on 28 February 2008 with the income tax due and payable of \$15,000.*

7. *In determining the amount of the deemed dividend taken to be paid to Beth under Division 7A of Part III of the ITAA 1936 in the 2007 income year, M Pty Ltd's 2007 income tax of \$15,000 is not taken into account for the purposes of the distributable surplus calculation under subsection 109Y(2) of the ITAA 1936 at 30 June 2007.*

Example 3

8. *For the 1999 income year, a private company (F Pty Ltd) was classified with a Tax Level of 'more than \$300,000' and its second instalment under Division 1C of Part VI of the ITAA 1936 of \$200,000 was due on 1 June 1999 but remained unpaid at 30 June 1999. The amount of \$200,000 is a presently legal obligation of the private company for the purposes of the distributable surplus calculation under subsection 109Y(2) of the ITAA 1936 at 30 June 1999.*

Example 4

9. *For the 1999 income year, a private company (G Pty Ltd) was classified with a Tax Level of 'Small with actual tax payable less than \$300,000'. The private company paid \$50,000 on 15 December 1999, as 100% of likely tax, and \$10,000 on 15 March 2000, being the balance of the tax liability. These two instalments under Division 1C of Part VI of the ITAA 1936 are not present legal obligations of the private company for the purposes of*

the distributable surplus calculation under subsection 109Y(2) of the ITAA 1936 at 30 June 1999.

Example 5

10. A private company (B Pty Ltd) derives assessable income during the 2000 income year of \$100,000 and income tax of \$30,000 is paid in full on 1 December 2000 with lodgement of the private company tax return. A loan of \$100,000 is also made by B Pty Ltd to the majority shareholder Max during the 2000 income year. The loan was not made under a written agreement that met the criteria of section 109N of the ITAA 1936.

11. On completion of an audit in the 2003 year, the Commissioner issued an amended assessment to Max for the 2000 year to include an amount taken to be a dividend under Division 7A of Part III of the ITAA 1936. In determining the amount taken to be a dividend, B Pty Ltd's income tax for the 2000 year (that is, \$30,000) is not a present legal obligation for the purposes of the distributable surplus calculation under subsection 109Y(2) of the ITAA 1936 at 30 June 2000.

Example 6

12. A private company (C Pty Ltd) derives assessable income during the 2008 income year of \$100,000 which is taken as a loan by the majority shareholder (Sam) and not returned as assessable income by C Pty Ltd. The loan was not made under a written agreement that met the criteria of section 109N of the ITAA 1936. On completion of an audit in the 2010 income year, an amended assessment issued to C Pty Ltd increasing assessable income for the 2008 year by \$100,000 and resulting in additional tax payable of \$30,000. This was paid by C Pty Ltd on 30 September 2010.

13. As a result of the audit, the Commissioner also issued an amended assessment to Sam to include an amount taken to be a dividend under Division 7A of Part III of the ITAA 1936 in his assessable income for the 2008 income year. In determining the amount taken to be a dividend, the income tax paid by C Pty Ltd on 30 September 2010 is not a present legal obligation for the purposes of the distributable surplus calculation under subsection 109Y(2) of the ITAA 1936 at 30 June 2008.

Date of effect

14. When the final Determination is issued, it is proposed to apply to years of income commencing both before and after its date of issue. However, the Determination 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 Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

15. The Tax Office has changed its view since draft Taxation Determination TD 2007/D9 issued. Where taxpayers have relied upon TD 2007/D9 and it provides a more favourable outcome than the view outlined in this Determination they will be entitled to rely on the view in TD 2007/D9 up until the date of issue of this draft Determination.

Appendix 1 – Explanation

❶ *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

16. Division 7A of Part III of the ITAA 1936 treats:

- (i) certain payments and loans made by a private company to a shareholder or a shareholder's associate;
- (ii) certain debts owed by a shareholder or a shareholder's associate forgiven by the private company; and
- (iii) certain trustee payments, loans and debt forgiveness made to a shareholder (or their associate) of a private company with unpaid present entitlement¹.

as dividends taken to have been paid by the private company out of the company's profits to the shareholder or shareholder's associate, in their capacity as shareholder.²

Accordingly, those dividends are included in the assessable income of the shareholder or associate under section 44 of the ITAA 1936.

17. The total amount taken to have been paid as dividends under Division 7A of Part III of the ITAA 1936 is limited to a private company's distributable surplus.³

18. The formula for calculating a private company's distributable surplus is contained in subsection 109Y(2) of the ITAA 1936, being 'Net assets – non-commercial loans – paid-up share value – repayments of non-commercial loans' (the 'distributable surplus formula'). A key element in the distributable surplus formula is the private company's net assets. Net assets are defined as follows:

the amount (if any), at the end of the company's year of income, by which the company's assets (according to the company's accounting records) exceed the sum of:

- (a) the present legal obligations of the company to persons other than the company; and
- (b) the following provisions (according to the company's accounting records):
 - (i) provisions for depreciation;
 - (ii) provisions for annual leave and long service leave;
 - (iii) provisions for amortisation of intellectual property and trademarks;
 - (iv) other provisions prescribed under regulation made for the purposes of this subparagraph.

If the Commissioner considers that the company's accounting records significantly undervalue or overvalue its assets or undervalue or overvalue its provisions, the Commissioner may substitute a value that the Commissioner considers is appropriate.⁴

¹ Subdivision EA of Division 7A of Part III of the ITAA 1936.

² Section 109Z of the ITAA 1936.

³ Subsection 109C(2), subsection 109D(1AA), subsection 109E(2), subsection 109F(2) and subsection 109XB(2) of the ITAA 1936 in conjunction with section 109Y of the ITAA 1936 respectively.

⁴ For income years prior to the year in which 1 July 2006 occurred, the Commissioner could only substitute a value where he considered the company's accounting records significantly undervalued its assets or overvalued its provisions.

19. As explained in Taxation Determination TD 2007/28, the technical legal meaning of the word 'obligation' is an obligation which is enforceable by legal action. The phrase 'present legal obligation' requires that the obligation etcetera enforceable by legal action be presently existing. The company must be bound by the legal obligation and completely subjected to it, whether or not it can be sued for immediately in a court of law.

20. Section 166A of the ITAA 1936 was inserted by *Taxation Laws Amendment Act (No. 5) 1989* with a start date of 17 January 1990. Paragraph 166A(1)(a) of the ITAA 1936 was substituted by *Taxation Laws Amendment Act (No. 1) 1995* and amended by *Taxation Laws Amendment (Repeal of Inoperative Provisions) Act 2006*. Section 166A of the ITAA 1936 was therefore operative on commencement of Division 7A of Part III of the ITAA 1936.⁵

21. Section 166A of the ITAA 1936 in its present form provides (effectively in relation to: (i) companies; and (ii) full self-assessment taxpayers) that where a taxpayer gives a return in respect of a year of income, the Commissioner is deemed to have made an assessment of the taxable income or net income and the tax payable on that income, equal to those respective amounts specified in the return, on the day on which the return was lodged, and the return is taken to be a notice of assessment which has been served on the day it was taken to have been made.

22. Section 173 of the ITAA 1936 states that 'Except as otherwise provided every amended assessment shall be an assessment for the purposes of the Act'.

23. Section 250-10 of Schedule 1 to the TAA provides *inter alia*:

- annual and quarterly PAYG instalments; and
- an income tax liability under section 204 of the ITAA 1936,

are tax-related liabilities, and section 255-1 of Schedule 1 to the TAA provides that a tax-related liability is a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable).

24. Section 255-5 of Schedule 1 to the TAA provides that an amount of a tax-related liability that is due and payable is a debt due to the Commonwealth and is payable to the Commissioner; and a Commissioner, Second Commissioner or Deputy Commissioner may sue in his or her official name in a court of competent jurisdiction to recover an amount of a tax-related liability that remains unpaid after it has become due and payable.

PAYG Instalments

25. The PAYG instalment regime is contained in Part 2-10 of Schedule 1 to the TAA. That regime prescribes when liability arises and when the instalments are due. In particular, subsection 45-15(2) of Schedule 1 to the TAA provides:

You are **liable** to pay instalments under this Division if the Commissioner has given you an instalment rate.

(emphasis added)

26. For an annual payer, the instalment is due on, or before, the 21st day of the fourth month following the end of the income year (section 45-70 of Schedule 1 to the TAA).

⁵ Being 4 December 1997.

27. For a quarterly payer, a quarterly instalment is due on, or before, the 21st or 28th day of the month after the end of the quarter depending on whether the private company is a 'deferred BAS payer' (subsections 45-61(1) and 45-61(2) of Schedule 1 to the TAA).

28. Therefore, where a private company has an instalment rate under Part 2-10 of Schedule 1 to the TAA and an instalment is outstanding at 30 June of an income year, there is an obligation to which the private company is bound, completely subjected and enforceable by legal action in due course. It is therefore a present legal obligation of the private company for the purposes of Division 7A of Part III of the ITAA 1936.

29. Part 2-10 of Schedule 1 to the TAA, however, imposes no obligation on the Commissioner to issue an instalment rate.

30. At the time of issue of this Determination the following private companies may not have an instalment rate for an income year under Part 2-10 of Schedule 1 to the TAA:

- a private company that has commenced business and whose first income tax assessment is yet to issue;
- a private company whose assessable income has always consisted entirely of withholding payments;
- a private company whose instalment rate has been withdrawn;
- a private company whose gross business and/or investment income (excluding any capital gains) in its last income tax return is less than \$1 million; and
- a private company which is not registered for GST.

31. These private companies have no present legal obligation by reason of Part 2-10 of Schedule 1 to the TAA.

The difference between PAYG instalments paid and the self assessed amount for an income year (the wash up payment)

32. Subsection 204(1A) of the ITAA 1936 was inserted by *A New Tax System (Tax Administration) Act 1999* and has application to the 2001 and later years of income. Subsection 204(1A) of the ITAA 1936 provides:

[Self assessment taxpayer] Subject to the provisions of this Part, the tax payable by a full self assessment taxpayer for a year of income becomes ***due and payable*** as follows:

- (a) if the taxpayer's year of income ends on 30 June – on 1 December of the following year of income or on such later date as the Commissioner allows by notice published in the *Gazette*;
- (b) if the taxpayer's year of income ends on a day other than 30 June – on the first day of the sixth month of the following year of income, or on such later date as the Commissioner allows by notice published in the *Gazette*.

(emphasis added)

33. Subsection 204(1A) of the ITAA 1936 specifies on its terms when an amount⁶ is due and payable. As a practical matter this is when lodgement of the return is due. This means the earliest point in time there can an obligation to which the private company is bound, completely subjected and enforceable by legal action in due course is the date contemplated by subsection 204(1A) of the ITAA 1936. Hence, no present legal obligation can arise in respect of the 'wash up payment' at an earlier time such as 30 June of the income year subject to the section 166A of the ITAA 1936 deemed assessment.

Amended assessments

34. Subsection 204(2) of the ITAA 1936 provides:

An amount of tax that a taxpayer is liable to pay because the Commissioner amends the taxpayer's assessment is due and payable on the 21st day after the day on which the Commissioner gives the taxpayer notice of the amended assessment.

35. For amended assessments to which subsection 204(2) of the ITAA 1936 applies, the amount due and payable is therefore tied to the issue of the assessment notice, as it was in the pre-self assessment era.

36. *Re Mendonca; Ex parte Federal Commissioner of Taxation* [1970] ALR 337; (1969) 15 FLR 256; (1969) 1 ATR 571 (*Mendonca*) (Federal Court of Bankruptcy) concerned a petition for bankruptcy brought against the taxpayer by the Commissioner. It was decided prior to the introduction of the self assessment system. After referring to sections 17, 204, 208 and 209 of the ITAA 1936, Gibbs J stated at 259-260:

It is now settled that the effect of these and similar provisions is that the liability to income tax is imposed by the statute itself and that assessment is only a method of ascertaining the extent of the liability, so that the tax is a debt due and owing, although not payable, notwithstanding that no assessment has been made. ... At the dates of the acts of bankruptcy [13 & 14 December 1968] in the present case the tax in respect of the years 1962 to 1967 was therefore due and owing, and since, at those dates, the notices of assessment had been issued [25 November 1968], fixing both the time for payment [30 December 1968] and the amount payable, the debt was for a liquidated sum payable at a certain future time. ...

In the case of the tax in respect of the year 1968, no assessment had been issued at the dates of the acts of bankruptcy, and it seems to me that, although the tax was owing at those dates, it was then neither liquidated nor payable either immediately or at a certain future time.

37. The view of Gibbs J in *Mendonca* was contrary to earlier authority, and has since been rejected by the High Court. In *Clyne v. Deputy Commissioner of Taxation* (1981) 150 CLR 1; 81 ATC 4429; (1981) 12 ATR 173 (*Clyne*), Mason J (with whom Aickin & Wilson concurred, with Brennan J also agreeing on point at 24) stated at 16:

However the correct view in my opinion is that income tax is due when it is assessed and notice is served of that assessment and that the tax does not become payable before the date fixed by s 204.

38. This means in terms of a liability arising under an income tax assessment, there is a distinction between a debt due and owing on the one hand and a debt due and payable on the other.

⁶ Being the difference between the self assessed amount and PAYG instalments already paid.

39. In the Commissioner's view, a debt due and owing is sufficient to satisfy the test of 'present legal obligation' for Division 7A of Part III of the ITAA 1936 purposes. This is because there is an obligation to which the private company is bound, completely subjected and enforceable by legal action in due course. In *Clyne*, the High Court held a debt due and owing arises when the income tax assessment issues. Therefore, a debt due and owing will arise when the amended assessment is made and served.

40. Therefore, for an amended assessment, there will be an obligation to which the private company is bound, completely subjected and enforceable by legal action in due course on the date the amended assessment notice is made and served. This means there will be a present legal obligation to the extent the additional amount payable remains unpaid at 30 June of the income year in which the assessment notice is made and served. Conversely, no present legal obligation can arise in respect of the additional amount payable under an amended assessment for the distributable surplus calculation worked out at 30 June of any earlier income year including the income year subject to the amended assessment.

The former company instalment regime

41. Section 221AZK of the ITAA 1936 was inserted by *Taxation Laws Amendment Act (No. 2) 1993* and had application from the 1995 year of income for small and medium taxpayers and from the 1996 year for large taxpayers. Section 221AZK of the ITAA 1936 ceased to have effect following the 2000 year of income.

42. Subsection 221AZK(1) of the ITAA 1936 provided *inter alia* that a company was an instalment taxpayer for a year of income.

43. Subsection 221AZK(2) of the ITAA 1936 set out a table which specified when an instalment taxpayer was liable to pay instalments for the current year. The following is a summary of the table for the 1999 year of income.

Tax Level of company	Instalment due	Due date
'Small', that is, less than \$8,000 and actual tax payable for current year exceeds \$300,000	One single payment of 100% of total tax liability	1 December 1999
'Small', that is, less than \$8,000 and actual tax payable for current year is less than \$300,000	100% of likely tax	15 December 1999
	Balance of tax liability	15 March 2000
\$8,000 to \$300,000	25% of likely tax	1 June 1999
	25% of likely tax	1 September 1999
	25% of likely tax	1 December 1999
	Balance of total tax liability	1 March 2000
More than \$300,000	25% of likely tax	1 March 1999
	25% of likely tax	1 June 1999
	25% of likely tax	1 September 1999
	Balance of total tax liability	1 December 1999

44. As a practical matter, the balance of the total tax liability was due on the same date the company was required to lodge its income tax return although a disparity could arise where the Commissioner granted an extension of time to lodge. Transitional provisions operated for the 2000 year as part of the changeover to the PAYG instalment regime.

45. Subsection 221AZK(2) of the ITAA 1936, therefore specified on its terms when a company instalment was due and payable and in all cases this would be on or before the deemed assessment under section 166A of the ITAA 1936.

46. Further, subsections 221AZK(5), 208(1) and 209(1) of the ITAA 1936 provided:

221AZK(5) [Treatment of instalments]

Instalments are to be treated as tax for the purposes of section 206, 207, 207A, 208, 209, 214, 254, 255, 258 and 259....

208(1) [Effect of tax becoming due and payable]

Income tax when it becomes due and payable shall be a debt due to the Commonwealth, and payable to the Commissioner in the manner and at the place prescribed.

209(1) [Suit for recovery]

Any tax unpaid may be sued for and recovered in any Court of competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his official name.

47. Therefore, where a private company had an instalment outstanding at 30 June of an income year, there was an obligation to which the private company was bound, completely subjected and enforceable by legal action in due course. It was therefore a present legal obligation of the private company for the purposes of Division 7A of Part III of the ITAA 1936.

48. Conversely, instalments which were due after 30 June could not be a present legal obligation of the private company for the purposes of the distributable surplus worked out at 30 June as no obligation to which the private company was bound, completely subjected and enforceable by legal action in due course arose under former Division 1C of Part VI of the ITAA 1936 until a later time.

Amended assessments for income years to which the former subsection 204(1) of the ITAA 1936 applied

49. Subsection 204(1) of the ITAA 1936 in its previous form, applied to the years ended 30 June 2000 and earlier years. Subsection 204(1) provided:

Subject to the provisions of this part, any income tax assessed shall be due and payable by the person liable to pay the tax on the date specified in the notice as the date upon which tax is due and payable, not being less than 30 days after service of the notice, or, if no date is specified, on the thirtieth day after the service of the notice.

50. Therefore, as is the case under the present subsection 204(2) of the ITAA 1936, the amount due and payable is tied to the issue of the assessment notice. Therefore, for the same reasons as explained in relation to income years to which subsection 204(2) of the ITAA 1936 applies, an amount payable under an amended assessment, will not be a 'present legal obligation' for the purposes of the distributable surplus calculation performed at 30 June of the income year subject to the amended assessment. If the amount payable under the amended assessment remains unpaid at 30 June of the income year in which the assessment is made and served, the amount unpaid will be a present legal obligation for the purposes of the distributable surplus calculation performed at 30 June of that income year.

Appendix 2 – Your comments

51. 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 or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

Due date:	18 July 2008
Contact officer:	David Newland
Email address:	David.Newland@ato.gov.au
Telephone:	(03) 6221 0625
Facsimile:	(03) 6221 0640
Address:	PO Box 9977 Hobart, TAS, 7001

References

Previous draft:

TD 2007/D9

Related Rulings/Determinations:

TR 2006/10; TD 2007/28

Subject references:

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

Legislative references:

- ITAA 1936 17
- ITAA 1936 44
- ITAA 1936 Pt III Div 7A
- ITAA 1936 109C(2)
- ITAA 1936 109D(1AA)
- ITAA 1936 109E(2)
- ITAA 1936 109F(2)
- ITAA 1936 109N
- ITAA 1936 Pt III Div 7A Subdiv EA
- ITAA 1936 109XB(2)
- ITAA 1936 109Y
- ITAA 1936 109Y(2)
- ITAA 1936 109Z
- ITAA 1936 166A
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- ITAA 1936 173
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- ITAA 1936 208
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- ITAA 1936 209
- ITAA 1936 209(1)
- ITAA 1936 Pt VI Div 1C
- ITAA 1936 221AZK
- ITAA 1936 221AZK(1)
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- ITAA 1936 221AZK(5)
- TAA 1953 Sch 1 Pt 2-10
- TAA 1953 Sch 1 45-15(2)
- TAA 1953 Sch 1 45-61(1)
- TAA 1953 Sch 1 45-61(2)
- TAA 1953 Sch 1 45-70
- TAA 1953 Sch 1 250-10
- TAA 1953 Sch 1 255-1
- TAA 1953 Sch 1 255-5
- Taxation Laws Amendment Act (No. 5) 1989
- Taxation Laws Amendment Act (No. 2) 1993
- Taxation Laws Amendment Act (No. 1) 1995
- A New Tax System (Tax Administration) Act 1999
- Taxation Laws Amendment (Repeal of Inoperative Provisions) Act 2006)

Case references:

- Clyne v. Deputy Commissioner of Taxation (1981) 150 CLR 1; 81 ATC 4429; (1981) 12 ATR 173
- Re Mendonca; Ex parte Federal Commissioner of Taxation [1970] ALR 337; (1969) 15 FLR 256; (1969) 1 ATR 571

ATO references

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