IT 2267 - Income tax : payments to superannuation funds and insurance policies from unappropriated profits of companies

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TAXATION RULING NO. IT 2267

INCOME TAX : PAYMENTS TO SUPERANNUATION FUNDS AND INSURANCE POLICIES FROM UNAPPROPRIATED PROFITS OF COMPANIES

F.O.I. EMBARGO: May be released

REF H.O. REF: 82/3581-3 DATE OF EFFECT:

B.O. REF: BRIS. 5/IT/COR.2000 DATE ORIG. MEMO ISSUED:

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1075343	PAYMENTS FROM UNAPPROPRIATED PROFITS TO SUPERANNUATION FUND OR FOR INSURANCE PREMIUMS	44 47 108 Part IVA

OTHER RULINGS ON TOPIC : IT 155 IT 2147

PREAMBLE A number of enquiries have been received in this office seeking advice about the income tax implications of arrangements by which distributions are made out of the accumulated profits of private companies in a manner which seeks to avoid income tax liability that might otherwise exist if the distributions were made directly to shareholders.

2. The enquiries have generally been set against the background of private companies which are proposing to go into liquidation. They are not, however, limited to liquidation cases. The arrangements fall into two broad categories.

3. Under one type of arrangement payments, purportedly representing accumulated profits of a company, would be made on behalf of shareholder employees to superannuation funds subject to liability under section l2lDA. The trustees of the superannuation fund may be the shareholders of the company. Some short time later the amounts would be paid from the superannuation fund to the shareholder employees.

4. The rationale for this type of arrangement appears to lie in the belief that it is quite proper for a shareholder employee of a company to be a member of a section l2lDA superannuation fund while at the same time being a member of another fund to which section 23F of the Income Tax Assessment Act applies. Because benefits receivable from a section l2lDA superannuation fund are not taken into account for the purposes of section 23F, shareholder employees could obtain the maximum benefits permitted under the section 23F guidelines issued by this office and, in addition, receive a virtually unlimited sum from the section 121DA fund. Furthermore, it is claimed that the payment from the section 121DA fund is a capital receipt in the hands of the shareholder employees upon which there is no

liability to tax.

5. Another type of arrangement proposes the use of unappropriated profits for the purchase of life assurance policies for the benefit of the shareholder employees. In some instances the concept of "keyman" insurance has been employed. The enquiries have covered policies to be retained by the companies for the benefit of shareholder employees, policies assigned to shareholder employees and policies to be transferred to section 121DA funds for their benefit. In all cases, the object appears to be to convert the accumulated profits into amounts which are free from tax.

RULING

6. The arrangements are not accepted by this office as having their intended result, i.e. the conversion of what otherwise would be taxable distributions out of accumulated company profits into tax free capital amounts. On their face they fall into the category of blatant, artificial schemes to which Part IVA was directed and no assurance can be given that Part IVA would not apply to them.

7. Quite apart from the operation of Part IVA, and without limiting in any way arguments which may be advanced in any litigation which may arise in relation to the arrangements, there is considerable room for the view that the purported distributions of accumulated profits to section 121DA superannuation funds or in payment of life assurance policies represent the receipt of a dividend by the shareholder employees assessable to them in terms of sections 44 or 47. There will also be the question whether section 108 applies.

8. Any enquiries received in branch offices should be answered in terms of this Ruling.

COMMISSIONER OF TAXATION
14 March 1986