

***Bendel and Commissioner of Taxation -***

# Interim decision impact statement

## Bendel and Commissioner of Taxation

The decision of the Administrative Appeals Tribunal in *Bendel and Commissioner of Taxation* [2023] AATA 3074 is the subject of an appeal.

<b>Court citation:</b>	[2023] AATA 3074
<b>Venue:</b>	Administrative Appeals Tribunal
<b>Venue reference no:</b>	2021/3330-3331 and 2021/3324-3327
<b>AAT member names:</b>	Deputy President F D O'Loughlin KC Senior Member K James
<b>Decision date:</b>	28 September 2023
<b>Appeals on foot:</b>	Yes
<b>Decision outcome:</b>	Partly favourable to the Commissioner

## Impacted advice

- Taxation Ruling TR 2022/4 *Income tax: section 100A reimbursement agreements*
- Taxation Ruling TR 2015/4 *Income tax: CGT small business concessions: unpaid present entitlements and the maximum net asset value test*
- Taxation Ruling TR 2010/3 *Income tax: Division 7A loans: trust entitlements* (Withdrawn)
- Taxation Determination TD 2022/11 *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*
- Taxation Determination TD 2015/20 *Income tax: Division 7A: is a release by a private company of its unpaid present entitlement a 'payment' within the meaning of Division 7A of Part III of the Income Tax Assessment Act 1936?*
- Taxation Determination TD 2011/15 *Income tax: Division 7A – unpaid present entitlements – factors the Commissioner will take into account in determining the amount of any deemed entitlement arising under section 109XI of the Income Tax Assessment Act 1936*
- Practical Compliance Guideline PCG 2022/2 *Section 100A reimbursement agreements – ATO compliance approach*
- Practical Compliance Guideline PCG 2017/13 *Division 7A – PS LA 2010/4 sub-trust arrangements maturing in or after the 2016–17 income year*

- Law Administration Practice Statement PS LA 2010/4 *Division 7A: trust entitlements* (Withdrawn)

## Summary

This Interim decision impact statement outlines the ATO's response to this case which concerns whether a private company's failure to call for payment of entitlements to income of an associated trust was the provision of 'financial accommodation' and, therefore, a loan for the purposes of section 109D of the *Income Tax Assessment Act 1936*.

All legislative references in this Interim decision impact statement are to the *Income Tax Assessment Act 1936*, unless otherwise indicated.

## Brief summary of facts

The Steven Bendel 2005 Discretionary Trust (Trust) was a discretionary trust. Its trustee was Gleewin Pty Ltd (the Trustee).

The beneficiaries of the Trust included Mr Bendel and Gleewin Investments Pty Ltd (Gleewin) (together, the Applicants).

Mr Bendel was the sole shareholder and director of the Trustee and Gleewin.

Mr Bendel and Gleewin were made presently entitled to income of the Trust for each of the 2013 to 2016 income years.

In each of the 2013 to 2017 income years, the Trust made some payments for, or on behalf of, Gleewin that had the effect of reducing Gleewin's entitlements to trust income. However, those entitlements remained substantially unpaid by Gleewin's lodgment day<sup>1</sup> for each of its 2013 to 2016 income year tax returns.

The accounting records of the Trust also showed that in the 2014 to 2017 income years, it made significant payments to Mr Bendel, recorded as an amount owing to the Trust in its accounts.

The Commissioner issued amended assessments to the Applicants for each of the 2014 to 2017 income years. Those assessments reflected additional amounts included in their assessable income under section 97, on the basis that:

- the outstanding amounts represented loans from Gleewin to the Trust within the meaning of subsection 109D(3) that were taken to be dividends paid to the Trust under subsection 109D(1), and
- the beneficiaries entitled to the Trust's income had a corresponding proportion of each deemed dividend included in their assessable income by section 97.

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<sup>1</sup> As defined in subsection 109D(6), being the earlier of the due date for lodgment of the private company's income tax return or the date on which that return is lodged.

## Issues decided by the Tribunal

The issues before the Tribunal are set out below.

### **Issue 1: did Gleewin make a loan within the meaning of subsection 109D(3) to the Trust during each of the 2014 to 2017 years on account of Gleewin's unpaid present entitlements to trust income of the previous year? (the Primary Issue)?**

The Tribunal decided that Gleewin did not make a loan to the trustee of the Trust within the meaning of subsection 109D(3). There was therefore no deemed dividend paid by Gleewin to the Trust under subsection 109D(1).

In reaching its decision, the Tribunal reasoned that a loan within the meaning of subsection 109D(3) did not reach so far as to embrace the rights in equity created when entitlements to trust income (or capital) were created but not satisfied and remained unpaid. The balance of an outstanding or unpaid entitlement of a corporate beneficiary of a trust, whether held on a separate trust or otherwise, was not a loan to the trustee of the trust.

### **Issue 2: does section 6-25 of the *Income Tax Assessment Act 1997* prevent a deemed dividend from being included in the Trust's assessable income or, alternatively, the Applicant's assessable incomes on the basis that the same amount has already been included in assessable income?**

Consistent with its conclusion for the Primary Issue (that is, section 109D was not engaged by the circumstances of Gleewin and the Trust), the Tribunal found it unnecessary to decide this issue. Nonetheless, it observed that any deemed dividend would not be the 'same amount' as the amount previously included in Gleewin's assessable income in respect of the unpaid present entitlement (UPE).

### **Issue 3: will the Tribunal exercise the section 109RB discretion (subject to the answers to the preceding issues)?**

The Tribunal found that, for the years in issue, loans (within the ordinary meaning of that term) of \$41,252 and \$9,431 had been made by Gleewin to the Trust<sup>2</sup>. It considered no basis had been advanced for the exercise of the section 109RB discretion in respect of those amounts.

### **Issue 4: have penalties been imposed correctly and, if so, will the Tribunal remit them?**

Based on the Tribunal's decision regarding the application of section 109D to the UPEs, this issue was only relevant to the \$41,252 and \$9,431 ordinary loans. In that regard, the Tribunal observed that 'Mr Bendel is a registered tax agent to whom the outcome of retaining amounts belonging to a company should have been obvious'. It therefore considered penalties in respect of those amounts should be recalculated at the same rate and not remitted.

## ATO view of decision

The Commissioner has appealed the Tribunal's decision in respect of the Primary Issue.

Until the appeal process is finalised, the Commissioner does not intend to revise the current ATO views relating to private company entitlements to trust income, as set out in Taxation Determination TD 2022/11 *Income tax: Division 7A: when will an*

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<sup>2</sup> In respect of tax refunds due to Gleewin that were deposited to the Trust's bank account.

*unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*

In addition to the application of section 109D, the basis on which private company beneficiaries deal with unpaid entitlements to trust income may have implications under other taxation laws, such as section 100A.

## **Administrative treatment**

Pending the outcome of the appeal process, the ATO is administering the law in accordance with the published views relating to private company entitlements and trust income in TD 2022/11.

Until the appeal process is finalised, the Commissioner does not propose to finalise objection decisions in relation to objections to past year assessments (for which no settlement was reached) where the decision turns on whether or not a UPE was a subsection 109D(3) loan. However, if a decision is required to be made (for example, because a taxpayer gives notice requiring the Commissioner to make an objection decision), any objection decisions made will be based on the existing ATO view of the law.

**Date issued:** 15 November 2023

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### ***Legislative references***

ITAA 1936 97

ITAA 1936 100A

ITAA 1936 109D

ITAA 1936 109D(1)

ITAA 1936 109D(3)

ITAA 1936 109D(6)

ITAA 1936 109RB

ITAA 1997 6-25

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