

PS LA 2011/29 - Exercising the discretion under section 109RB of Division 7A

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⚠ This document has changed over time. This version was published on *20 August 2018*



This Law Administration Practice Statement provides guidance on the process to be followed when considering the exercise of the Commissioner's discretion under section 109RB.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What is this practice statement about?

Section 109RB of Division 7A of the *Income Tax Assessment Act 1936*¹ provides relief for taxpayers who trigger a deemed dividend as a result of an honest mistake or inadvertent omission. Under section 109RB, the Commissioner has the discretion to either disregard a deemed dividend, or allow it to be franked.

2. Who is authorised to exercise the discretion on behalf of the Commissioner?

The following officers are authorised to exercise the discretion:

- For decisions made about an objection:
 - Executive Level 2 (EL2) and Executive Level 1 (EL1) officers in the Review and Dispute Resolution (RDR) business line.This applies to a review of a previous discretion decision or a new request made on objection.
- For all other decisions – the following officers in the Private Groups & High Wealth Individuals (PGH) business line:
 - all EL2 officers
 - EL1 officers in Engagement & Assurance Services
 - EL1 officers in Technical Excellence Services.

If you are an officer in the RDR business line, you must refer requests for a decision in the course of an objection via email to [RDR Private Groups Advice](#).

You should refer all other requests to PGH by engaging a specialist from [Technical Excellence Services](#) (internal link).

¹ All legislative references are to the *Income Tax Assessment Act 1936* (ITAA 1936), unless otherwise stated.

3. When should I consider the discretion?

You should consider the discretion when it is requested by the taxpayer (the recipient), the private company or an authorised representative; or, where you become aware that Division 7A applies during a review or audit.

A request does not need to be in a particular form, but it should contain enough information and evidence to enable a decision to be made.

4. What is the prerequisite for the discretion to be considered?

Division 7A must apply to a transaction with the result that:

- the private company is taken to have paid a deemed dividend to a shareholder or shareholder's associate (which is included in their assessable income under section 44), or
- an amount is included in the assessable income of the shareholder or their associate as if it were a dividend by reason of Subdivision EA of Division 7A.²

Where there are multiple triggers of Division 7A, you must consider the facts and circumstances of each and make a separate decision in relation to each trigger.

5. I have identified that the prerequisites are met – what's next?

The decision whether or not to exercise the discretion is a **two-step process**.

Step 1: Was Division 7A triggered because of an honest mistake or inadvertent omission?

² Subdivision EA of Division 7A deals with deemed dividends arising in relation to unpaid present entitlements of a company.

Only if the answer at Step 1 is YES can you proceed to step 2.

Step 2: Do the facts and circumstances support the exercise of the discretion - to either disregard a deemed dividend, or allow it to be franked?

The guidelines relating to this process must not be applied in a rigid or inflexible way.

When considering the discretion, the decision maker must:

- consider each case on its merits, having regard to the object of section 109RB and Division 7A generally
- make the decision in good faith and without bias, and
- make the decision independently and not at the direction of another person.

STEP 1

6. Was Division 7A triggered because of an honest mistake or inadvertent omission?

The discretion can only be exercised where Division 7A is triggered due to an honest mistake or inadvertent omission.³

The thing that was mistaken or omitted must have triggered Division 7A. If Division 7A applies regardless of the mistake or omission, then the discretion cannot be exercised.

The honest mistake or inadvertent omission may be made by the recipient, the private company, or any other entity (the relevant entity) whose conduct contributed to the application of Division 7A.

You should first consider the conduct of the private company and the recipient to determine if there was an honest mistake or inadvertent omission.

³ Taxation Ruling TR 2010/8 *Income tax: application of subsection 109RB(1) of the Income Tax Assessment Act 1936* contains detailed guidance on the meaning of honest mistake and inadvertent omission.

7. What if there is insufficient evidence to establish the cause of the trigger?

The onus is on the entity seeking the exercise of the discretion to provide sufficient evidence to demonstrate an honest mistake or inadvertent omission. However, you should make appropriate attempts to obtain sufficient evidence. You should discuss the evidence required with the applicant and give them a reasonable opportunity to provide more.

If there is not enough evidence to establish an inadvertent omission or honest mistake, the Commissioner cannot exercise the discretion. This should be communicated to the applicant when advising of this decision. The decision may also be communicated in a position paper or reasons for decision to a taxpayer, where relevant.

8. What types of mistakes and omissions may result in Division 7A being triggered?

An honest mistake or inadvertent omission may be a mistake of law, a mistake of fact or a mixed mistake of law and fact. Where a mistake of law occurs, you should have regard to the level of knowledge and expertise of the person who made the mistake.

What is a mistake or omission?

The following are examples of mistakes made in relation to Division 7A:

- an incorrect view or misunderstanding of what the laws is
 - the meaning of a provision of Division 7A
 - the definition of 'associate' in section 318
 - the interaction of Division 7A with other areas of tax law, for example, Fringe Benefits Tax (FBT), or
 - the operation of contract law (which may affect whether a loan agreement is validly made).
- a mistake or omission in relation to a fact
 - using a company cheque book or credit card believing that you are using a personal cheque book or credit card
 - mistakes in the recording of transactions, for example transposition errors, miscoding, or
 - errors made in calculating the minimum yearly repayment.

- a mistake or omission that involves both a misunderstanding about what the law is together with a mistake in relation to a fact, including
 - errors made when drafting loan agreements, such as in the term/interest rate of the loan
 - loan agreements that are incorrectly executed
 - making a late repayment on a loan, or
 - failure to make minimum repayments.

9. What facts and circumstances do I take into account in determining whether a mistake was honest, or an omission inadvertent?

You must consider all of the following factors equally. A mistake or omission needs only to be honest or inadvertent.

Relevant facts and circumstances that support honest mistake or inadvertent omission

The following circumstances may indicate the making of an honest mistake or an inadvertent omission:

- the relevant transactions were commercial (that is, accurately and completely recorded, independently audited)
- the relevant entities involved in the arrangement can demonstrate a good Division 7A compliance history (that is, genuine past attempts to comply with Division 7A both in general and in respect of the specific matter)
- the recipient or company has reasonably relied on professional advice, or has adopted a position that is a common mistake or omission
- other contributing factors may include
 - the complexity of the facts
 - novel or contentious issues of law, or
 - a lack of ATO advice or guidance covering the facts or the law.⁴

Ignorance of the law is not in itself sufficient evidence to establish *honest* mistake or *inadvertent* omission. The reason for that ignorance is equally important.

⁴ A precedential ATO view is the ATO's documented interpretation of the tax laws administered by the Commissioner in relation to a particular interpretive issue, see Law Administration Practice Statement PS LA 2003/3 *Precedential ATO view*. The types of documents which set out ATO views are listed at paragraph 3 of PS LA 2003/3 and in the Schedule of documents containing precedential ATO views.

Relevant facts and circumstances which weigh against honest mistake or inadvertent omission?

The following circumstances may indicate that Division 7A applies for reasons other than because of an honest mistake or inadvertent omission:

- the relevant transactions were uncommercial (that is, the arrangement had a purpose of avoiding tax or involved fraud or evasion; the transaction was artificial, not accurately or completely recorded or was not subject to independent review)
- the behaviour and knowledge of relevant entities involved in the arrangement does not support a conclusion of honest mistake or inadvertent omission (that is, an entity had the relevant knowledge of Division 7A; Division 7A had previously applied in similar circumstances to an entity or a relevant entity has a poor compliance history)
- the entities involved consciously or unreasonably avoided obtaining advice in relation to the relevant application of Division 7A or unreasonably relied on or ignored professional advice
- other contributing factors may include
 - the trigger for Division 7A and associated transactions are straight forward or involve a straightforward application of the law, and
 - the trigger for Division 7A involved transactions that are identified in publicly available and relevant ATO advice⁵, or ATO advice provided to the entity.

What if the transaction was intended to avoid the application of Division 7A?

Actions or omissions made to circumvent Division 7A cannot satisfy the requirements of honest mistake or inadvertent omission. Evidence that there has been a deliberate indifference or wilful blindness would not satisfy the requirement of honesty and would not constitute an honest mistake.

⁵ ATO advice includes ATO education activities, such as webcasts, bulk mail outs and fact sheets, Public Rulings, Private Rulings, Law Administration Practice Statements, Taxpayer Alerts and any other relevant advice published by the ATO.

What if the entity has relied on professional advice?

You must carefully consider:

- the underlying facts
- the disclosures made to the advisor
- the nature of the advice actually given
- the relationship between the entity and their advisor
- whether the advice was relied on, and
- whether reliance on that advice was reasonable.

Where an entity obtains and reasonably relies on advice from a professional advisor, any mistake or omission resulting from that reliance is likely to be honest or inadvertent.

Where a relevant entity has intentionally ignored professional advice this would tend to weigh against a conclusion that any resulting mistake is honest or omission inadvertent. This is particularly so if, had the entity followed the advice, Division 7A would not have applied.

Where an entity knew or ought to have known that the adviser was prepared to disregard Division 7A, reliance on that advice is not likely to be reasonable. This is so even if the entity made a full disclosure to the advisor.

What if the entity has not obtained professional advice?

Consider why the entity did not obtain professional advice. Relevant considerations include the size, complexity and nature of the transaction and the entity's knowledge of Division 7A.

If the entity did not seek advice due to wilful blindness, this would not constitute an honest mistake. Conversely an entity may not have obtained specific advice due to a genuine belief that they understood the law. Even though it might be reasonable to obtain advice in the circumstances, it can still be established that there was an honest mistake or inadvertent omission.

What if the trigger is the result of a lack of knowledge of Division 7A?

The application of Division 7A may result from a simple misunderstanding through to intentional ignorance.

You need to identify and assess the extent to which the lack of knowledge triggered Division 7A. Some relevant factors may be:

- the extent of and reasons for the lack of knowledge
- how the lack of knowledge contributed to Division 7A being triggered
- the recipient or company's attitude towards Division 7A generally
- the extent to which an advisor was engaged and briefed
- prior tax knowledge and experience of anyone involved in the transaction.

It is generally expected that a registered tax agent would be aware of the core provisions of Division 7A.

You should also consider if objective evidence in the form of a ruling request, correspondence or compliance activity indicates an awareness and knowledge of Division 7A. You must then consider this evidence in light of all the relevant circumstances.

What if the trigger for Division 7A was a common kind of mistake or practice?

Honest mistake or inadvertent omission is not always concluded in the case of a common mistake or industry practice. The applicant bears the onus of proving that in the particular circumstances there was an honest mistake or inadvertent omission.

10. What evidence do I need to consider?

You must have sufficient information and relevant evidence to determine:

- the particular provision that applies
- the deemed dividend arose because of an honest mistake or inadvertent omission
- who made the mistake or omission
- how, why and when the mistake or omission occurred
- how, when and who identified the application of Division 7A
- the use or application of the funds that resulted in Division 7A applying
- corrective action taken or proposed, and
- any other information or evidence that will help you to make a decision.

The following is a list of relevant evidence, which is not exhaustive:

- statements by relevant parties
- accounting records such as
 - ledger accounts recording transactions, and
 - journal entries and supporting documents.
- minutes of meetings
- correspondence
- loan agreements, trustee resolutions or director's minutes and resolutions
- Division 7A working papers
- tax return preparation and information
- invoices or other source documents
- advice
- evidence which goes to knowledge, awareness or intent.

How should I deal with undocumented assertions?

Given the record keeping obligations that apply to businesses, a finding of honest mistake or inadvertent omission should ordinarily be corroborated with documentary evidence. However, you should consider the size of the enterprise when considering the extent of the record keeping required.

What if there is incomplete or conflicting evidence?

Generally, contemporaneous evidence should hold greater weight than evidence generated and assertions made after the fact.

STEP 2

11. Should the Commissioner's discretion be exercised? If so, how?

Having established that Division 7A was triggered because of an honest mistake or inadvertent omission, this step requires you to consider whether you should exercise the discretion and if so, how, including whether to attach conditions to the decision.

There is no presumption to exercise the discretion until Step 2 has been fully undertaken.

12. What do I need to consider in making a decision whether to exercise the discretion?

You must consider all of the following factors:

- (a) the circumstances that led to the mistake or omission⁶
- (b) the extent to which any of the entities have taken corrective action, and if so, how quickly⁷
- (c) whether Division 7A has applied previously in relation to any of the relevant entities⁸, and
- (d) any other relevant matters.⁹

Generally, these can be the same factors to establish an honest mistake or inadvertent omission.

13. What were the circumstances in which the mistake or omission was made?

Subsection 109RB(3)(a) requires you to consider the circumstances in which the relevant mistake or omission was made.

- Did the entities involved in the transaction take reasonable care?¹⁰
- Did the relevant entity act in accordance with professional advice?
- Were there any unforeseen personal circumstances (such as sudden illness) that affected the ability to comply with Division 7A?
- Was ATO advice and guidance publicly available and widely publicised or provided directly to the relevant entities or their agents?
- Are the circumstances part of a broader behaviour that involved tax avoidance, fraud or evasion?
- Was the entity's application of a provision of Division 7A contentious or do they have a reasonably arguable position?¹¹

⁶ Paragraph 109RB(3)(a).

⁷ Paragraph 109RB(3)(b).

⁸ Paragraph 109RB(3)(c).

⁹ Paragraph 109RB(3)(d).

¹⁰ For a discussion on what is considered a reasonable care, see Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*.

¹¹ For a discussion on what is considered a reasonably arguable position, see Miscellaneous Taxation Ruling MT 2008/2 *Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable*.

- Given the complexity of the business and business records what is the likelihood of self detection of Division 7A applying?
- What attempts did the relevant entities make to comply with Division 7A?
- Are the transactions commercial in nature?
- To what extent were the relevant transactions recorded in the financial statements?
- What was the Division 7A knowledge of other relevant entities involved in the transaction?

14. To what extent, and when, has appropriate corrective action been taken?

Taking timely and appropriate corrective action will weigh in favour of exercise of the discretion.

What constitutes corrective action?

Appropriate corrective action should put the relevant parties in the position that they would have been in if Division 7A had been applied correctly.

Corrective action includes:

- converting the payment, loan or debt forgiveness to a loan that complies with section 109N, and
- making catch-up or shortfall minimum yearly repayments as if the transaction always complied with section 109N (plus interest compounded to reflect non-payment in earlier years).

The corrective actions required in different situations are contained in Appendix A of this practice statement.

What is the relevance of the time when corrective action is taken?

Where a relevant entity takes prompt corrective action after becoming aware that Division 7A had not been properly addressed, this will weigh in favour of exercise of the discretion.

What if there is a delay in taking corrective action or the relevant entities are only willing to take corrective action if the Commissioner's discretion is exercised?

Those seeking the exercise of the discretion to disregard the deemed dividends should have voluntarily and unilaterally implemented corrective action unless it was

unreasonable to do so (for example, the corrective action would have been costly or unduly inconvenient).

It may genuinely and reasonably be believed that taking corrective action should be conditional on the exercise of the discretion. For example, there may be circumstances where an entity has not yet implemented corrective action but is willing to do so as part of fulfilling the Commissioner's discretion conditions. This will not weigh against the exercise of the discretion where a timely application is made to the Commissioner for the discretion.

What if the relevant entities are unwilling to take corrective action?

Where it is reasonable for a relevant entity to have taken corrective action and they are unwilling to do so, this will weigh against exercise of the discretion.

A relevant entity may genuinely and reasonably believe that corrective action is not warranted. This will not weigh against the exercise of the discretion where a timely application is made to the Commissioner for the discretion.

15. Has Division 7A been triggered previously and if so, in what circumstances?

A relevant entity who has previously triggered Division 7A (whether or not the Commissioner exercised the discretion under section 109RB in relation to that earlier occurrence), would be expected to show greater vigilance. Where there has been no increase in the care taken in relation to the application of Division 7A, this will weigh against the exercise of the discretion.

Where the relevant entities were aware that substantially the same transactions had previously triggered Division 7A, this will generally weigh against exercise of the discretion.¹²

16. Any other relevant matters

The meaning of 'any other matters' is wide ranging.

A matter is relevant if:

- it provides further insight into circumstances surrounding the trigger of Division 7A including discovery of the matter and any corrective action, and

¹² This is also relevant to determining whether the breach is a result of an honest mistake or inadvertent omission, see TR 2010/8 at paragraph 98.

- whether the purpose of Division 7A as an integrity provision (to prevent the tax free distribution of company profits) will be met if you exercise the discretion.

It may be relevant to look more widely at the conduct and knowledge of all of those who were in any way involved in the mistake or omission.

Without a satisfactory explanation, the longer the period of inaction after having discovered Division 7A was triggered, the lesser the likelihood that the discretion will be exercised.

What if a relevant entity knew the transaction being undertaken would trigger Division 7A but did nothing to prevent that result?

If a relevant entity knew the transaction being undertaken would trigger Division 7A, then this would weigh against exercise of the discretion.

17. Making a decision to either disregard a deemed dividend or allow it to be franked

You need to consider which of the following two outcomes is the most appropriate¹³:

- the deemed dividend or the assessable amount under Subdivision EA to be disregarded, or
- the deemed dividend be franked in accordance with Part 3-6 of the *Income Tax Assessment Act 1997*.

Any decision to disregard a deemed dividend, or allow it to be franked, should reflect these outcomes, as relevant:

- the retained profits of the private company are restored to the private company
- the private company receives the correct repayments of principal and interest that it would have received under a section 109N loan agreement, and pays tax on the amount of interest income, or
- the recipient of the benefit is appropriately taxed.

The power of the Commissioner to allow franking does not apply to the amount included in the assessable income of a shareholder's associate under Division 7A (including Subdivision EA).

What factors do I need to consider to disregard the dividend or allow it to be franked?

Relevant factors include:

- the extent and nature of corrective action including the capacity of the entities to take the corrective action
- the effect of franking a deemed dividend on the franking account
- whether the franking of a deemed dividend will result in franking credit streaming, and
- the recipient's period of review.

Should I exercise the discretion subject to a condition?

The Commissioner may exercise the discretion subject to the following kinds of conditions¹⁴:

- a condition that the recipient or other entity must make specified payments to the private company or another entity within a specified time, or
- a condition that a specified requirement in Division 7A must be met within a specified time.

If the Commissioner exercises the discretion subject to a condition, the relevant deemed dividend **is not disregarded until such time as any conditions imposed by the Commissioner are satisfied**.¹⁵ Therefore, any amount assessable as a result of Division 7A remains assessable if the condition is never satisfied.

Where appropriate corrective action hasn't been taken, it is only in exceptional cases that you should exercise the discretion to disregard the dividend without imposing conditions requiring remediation.

Exercise of the discretion by allowing a deemed dividend to be franked does not require conditions.

What is a reasonable time to require the corrective action be taken?

Any corrective or remedial action should normally be required in the income year in which the Commissioner's discretion is exercised.

However you should consider:

- (a) circumstances that make it more appropriate to satisfy conditions in a later income year

¹³ Subsection 109RB(2).

¹⁴ Subsection 109RB(4).

¹⁵ Subsection 109RB(5).

- (b) the time reasonably required to undertake the corrective action, and
- (c) the period of review for the income year in which Division 7A is triggered.

Your decision must be made in writing (see Appendix B of this practice statement).

- [Section 109RB - Commissioner's discretion \(internal link\)](#)

18. What review rights are there in respect of a decision made under section 109RB?

If a taxpayer is dissatisfied with an assessment affected by a decision not to exercise the discretion, they may object¹⁶ to the assessment on the grounds of a failure to properly exercise the section 109RB discretion.

A taxpayer who is dissatisfied with the objection decision can either apply to the Administrative Appeals Tribunal (AAT) or to the Federal Court against the decision (section 14ZZ of the TAA). If any jurisdictional difficulty arises in the AAT or the Court, the Commissioner will co-operate with the taxpayer to have the issue properly tested.

19. Should I refer the tax agent to the Tax Practitioner's Board?

Where you become aware of a tax agent who has demonstrated a lack of competence, you should consider referring them to the Tax Practitioners Board in respect of a potential breach of the Code of Professional Conduct under section 30-10 of the *Tax Agent Services Act 2009*.

20. More information

Relevant examples can be accessed on the ATO website. As these examples will be updated from time to time, you should refer to them at each time you are considering the discretion. For more information, see:

- [Division 7A legislation on ATOLaw](#)
- [Section 109RB](#)
- [TR 2010/8 Income tax: application of subsection 109RB\(1\) of the Income Tax Assessment Act 1936](#)
- [The Commissioner's discretion under section 109RB – Examples](#)
- [Division 7A Portal on eLibrary Wiki \(internal link\)](#)

¹⁶ Under section 175A of the ITAA 1936 in the manner set out in Part IVC of the *Taxation Administration Act 1953* (TAA).

APPENDIX A

WHAT IS CORRECTIVE ACTION?

CATEGORY	APPROPRIATE CORRECTIVE ACTION
<p>1. The deemed dividend arose in respect of a payment under section 109C or a loan under section 109D</p>	<ul style="list-style-type: none"> • The full amount of the payment is converted to a loan, a loan agreement is executed that complies with section 109N at all times from the time the deemed dividend arose, and • the taxpayer makes 'catch up' minimum yearly repayments of interest and capital as if the loan existed from the time the deemed dividend arose.
<p>2. The deemed dividend arose in respect of section 109E and modified for Subdivision EA</p>	<p>The taxpayer makes 'catch up' minimum yearly repayments of interest and capital as if the loan existed from the time the deemed dividend arose.</p>
<p>3. The deemed dividend arose in respect of a debt forgiveness under section 109F</p>	<ul style="list-style-type: none"> • A loan agreement is entered into that complies with section 109N at all times from the time the deemed dividend arose, the principal of the loan equals the amount of the debt forgiven, and • the taxpayer makes 'catch up' minimum yearly repayments of interest and capital as if the loan existed from the time the deemed dividend arose.
<p>4. The deemed dividend arose in respect of an assessable amount under section 109XB</p>	<p><i>In the case of a subsection 109XA(1) payment:</i></p> <ul style="list-style-type: none"> • the subsection 109XA(4) amount involved in the actual transaction is converted to a loan and a loan agreement is entered into that complies with section 109N at all times from the time the deemed dividend arose, <p><i>In the case of a subsection 109XA(2) loan:</i></p> <ul style="list-style-type: none"> • a loan agreement between the taxpayer and the trustee is entered into for the subsection 109XA(4) amount that complies with section 109N at all times from the time the deemed dividend arose, <p><i>In the case of a subsection 109XA(3) forgiven debt:</i></p> <ul style="list-style-type: none"> • the subsection 109XA(4) amount involved in the actual transaction is treated as the principal of a loan and a loan agreement is entered into that complies with section 109N at all times from the time the deemed dividend arose, and • in any of the situations covered by the three preceding dot points the taxpayer makes 'catch up' minimum yearly repayments of interest and capital as if the loan existed from the time the deemed dividend arose.

APPENDIX B

WHAT SECTION 109RB DECISIONS ARE POSSIBLE?

Most section 109RB decisions will fall into one of the following five categories.

CATEGORY	STEP 1 Outcome	STEP 2 Outcome
1. Exercise the Commissioner's discretion without conditions	Pass	Exercise the discretion without conditions, because corrective action is not necessary or has already been taken
2. Exercise the Commissioner's discretion with conditions	Pass	Exercise the discretion, but with conditions attached because corrective action has not occurred and must be taken
3. Decision not to exercise the Commissioner's discretion	Fail, because the Commissioner is unable to establish that there is an honest mistake or inadvertent omission.	Cannot go to Step 2 because Step 1 failed
4. Decision not to exercise the Commissioner's discretion	Pass	Commissioner decides not to exercise his discretion having considered the factors in subsection 109RB(3)
5. Based on the evidence presented, the Commissioner is unable to make a decision	Fail because of insufficient or ambiguous evidence	Cannot go to Step 2 because Step 1 failed

Decisions 3 and 5 are similar. Decision 3 assumes that the applicant is not likely to have more evidence, whereas decision 5 enables the applicant to provide more evidence if available.

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