



Taxation Determination

Income tax: is there a deemed assessment under section 166A of the *Income Tax Assessment Act 1936* when a company lodges a 'non-taxable return' for a year of income?

Preamble

*This document does not rule on the application of a tax law (as defined) and is, therefore, not a 'public ruling' for the purposes of Part IVAAA of the **Taxation Administration Act 1953**. The document is, however, administratively binding on the Commissioner of Taxation. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

1. No. Section 166A of the *Income Tax Assessment Act 1936* (ITAA 1936) does not operate to create a deemed assessment where the return specifies that no amount of tax is payable.
2. **Note:** In this determination a '**non-taxable return**' means an income tax return lodged by a company that, under the full self-assessment regime, has determined and specified in its tax return it has no liability for income tax in respect of the year of income. This may occur where the company has no taxable income for the year of income or where the tax otherwise payable is extinguished by tax offsets (rebates).¹ Most tax offsets under provisions of the *Income Tax Assessment Act 1997* (ITAA 1997) are taken to be rebates for the purposes of the ITAA 1936: sections 160ADA and 160AHA of the ITAA 1936.²
3. In subsection 6(1) of the ITAA 1936, the term 'assessment' is defined to mean the ascertainment of the amount of taxable income and of the tax payable on that taxable income.
4. For an income tax assessment to exist, the tax payable must be an amount that is capable of constituting a debt due and payable, the recovery of which can be sued for under normal legal processes: *Batagol v. Commissioner of Taxation* (1963) 109 CLR 243; *Commissioner of Taxation v. Ryan* (2000) 201 CLR 109; 2000 ATC 4079; (2000) 43 ATR 694. While zero may be a numeric integer, a zero amount cannot constitute a debt due and

¹ Rebates arise as part of the process of ascertaining 'tax payable' within an assessment. However, a determination by the Commissioner of a claim for a foreign tax credit does not form part of an assessment: sub-section 160AI(2) of the ITAA 1936.

² Refer paragraphs 10.26 to 10.28 of the Explanatory Memorandum to the *Taxation Laws Amendment (No. 3) Act 1998*. See also Division 13 of the ITAA 1997 for a list of tax offsets.

payable. The amount ascertained as the tax payable must be represented by a positive integer as one of the elements necessary for an assessment to exist.

5. A precondition for an assessment to be deemed to have been made under section 166A of the ITAA 1936 is for the taxpayer to specify in its tax return the amount of its taxable income and the tax payable upon that income. Where a company determines that it has no income tax liability for the year of income, no amount of income tax capable of constituting a debt due and payable can be specified in the return form. Accordingly, the lodgement of a 'non-taxable return' cannot result in a deemed assessment under section 166A of the ITAA 1936.

6. If at a later date the Commissioner issues an assessment to the company increasing its tax payable for the income year, for example, following an audit of the company's affairs, that assessment would be an *original* assessment and not an *amended* assessment. The Commissioner's power to issue the assessment would not be restricted by the time limits contained in section 170 of the ITAA 1936.

7. In a recent decision, *Re BCD Technologies Pty Ltd and Commissioner of Taxation* [2004] AATA 496, the Administrative Appeals Tribunal held that section 166A of the ITAA 1936 deemed an assessment to be made in a case where the tax return specified no taxable income and no tax payable. With respect, the Commissioner disagrees with the decision of the AAT in this case and has lodged an appeal against the decision to the Federal Court.

Example 1 – Inter-corporate dividend rebate

8. *A company specifies in its return lodged for the income year ended 30 June 2002 that it has a taxable income of \$10,000 and claims an entitlement to a rebate under subsection 46(2) of the ITAA 1936 of \$3,000. The company's basic tax of \$3,000 (calculated at the rate of 30%) is fully offset by the rebate amount and a deemed assessment under section 166A does not arise. As there is no assessment for that year, the Commissioner's power to issue an assessment would not be restricted by the time limits contained in section 170 of the ITAA 1936.*

Example 2 – Foreign tax credit

9. *A company specifies in its return lodged for the income year ended 30 June 2002 that it has a taxable income of \$10,000 which it has derived from foreign sources. The company has paid \$3,000 foreign tax on that income. It makes a self-determination under section 160AIA of the ITAA 1936 and pursuant to section 160AF of the ITAA 1936 it claims a foreign tax credit in the amount of \$3,000. In these circumstances the company has a deemed assessment under section 166A for \$3,000 tax payable (calculated at the rate of 30%) and the Commissioner's power to issue a later assessment would be subject to the time limits under section 170 of the ITAA 1936. The foreign tax credit claimed does not form part of the assessment: 160AI(2). However, the credit is applied by the Commissioner in the manner provided for by section 160AN to discharge the company's liability to pay the amount of the income tax assessment.*

Date of effect

10. This Determination applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation30 June 2004

Previous draft:

TD 2004/D2

Related Rulings/Determinations:

TR 92/1; TR 92/20 ; TR 96/12; TR 97/16; TD 93/156

Subject references:

- amended assessment
- assessment
- credit
- deemed assessment
- dividend rebate
- foreign tax credit
- rebate
- tax offset
- tax payable

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 46(2)
- ITAA 1936 160ADA
- ITAA 1936 160AHA
- ITAA 1936 160AF
- ITAA 1936 160AI(2)
- ITAA 1936 160AIA
- ITAA 1936 160AN
- ITAA 1936 166A
- ITAA 1936 170
- ITAA 1997 Div 13
- TAA 1953 Pt IVA

Case references:

- Batagol v. Commissioner of Taxation (1963) 109 CLR 243
- Commissioner of Taxation v. Ryan (2000) 201 CLR 109; 2000 ATC 4079; (2000) 43 ATR 694
- Re BCD Technologies Pty Ltd and Commissioner of Taxation [2004] AATA 496

Other references:

- Explanatory Memorandum to the Taxation Laws Amendment (No. 3) Act 1998
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ATO references

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