

# ***TD 2008/28 - 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 ruling is being reviewed as a result of a recent court/tribunal decision. Refer to Decision Impact Statement: [Commissioner of Taxation v H \(Published 21 February 2011\)](#).

⚠ There is a Compendium for this document: [TD 2008/28EC](#) .

⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *10 December 2008*



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## Taxation Determination

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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 publication (excluding appendices) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

### Ruling

1. If 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), and the end of the instalment quarter has occurred and some or all of the instalment is unpaid as at 30 June then the unpaid amount of the instalment is a 'present legal obligation' for the purposes of the distributable surplus calculation worked out at that time.

2. If a private company which is a full self assessment taxpayer has an amount due and payable by reason of subsection 204(1A) of the *Income Tax Assessment Act 1936* (ITAA 1936), then this amount 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. This is because the tax is due on the day the return is lodged which is after the end of the year of income. However, to the extent that amount remains unpaid at 30 June of the following income year, it will be a present legal obligation for the purposes of the distributable surplus calculation worked out at that time.

3. If a private company which was an instalment taxpayer has a liability to pay an instalment by reason of the former subsection 221AZK(2) of the ITAA 1936,<sup>1</sup> and some or all of the instalment is unpaid as at 30 June of an income year then the unpaid amount is a present legal obligation of the private company for the purposes of the distributable surplus calculation worked out at that time.

4. If the Commissioner issues a private company with an amended assessment for any income year, then 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 before 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.*

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<sup>1</sup> This provision ceased to apply after the 2000 year of income.

**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.

# TD 2008/28

## **Date of effect**

14. This Determination applies 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 18 June 2008 which was the date of issue of the draft of this Taxation Determination (see draft Taxation Determination TD 2008/D8).

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**Commissioner of Taxation**

10 December 2008

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## Appendix 1 – Explanation

**①** *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

#### Division 7A

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 entitlement.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

<sup>2</sup> Subdivision EA of Division 7A of Part III of the ITAA 1936.

<sup>3</sup> Section 109Z of the ITAA 1936.

<sup>4</sup> 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.

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 enforceable by legal action be presently existing. The company must be bound by the legal obligation, whether or not it can be sued for immediately in a court of law.

20. Division 7A is an anti-avoidance or 'integrity' provision, directed to ensuring that disguised or informal distribution of company profits to shareholders or their associates should be included in the assessable income of the shareholders or associates.

### ***Distributable surplus not the same as book profits***

21. In section 109Y a statutory conception of 'distributable surplus' is introduced to replace the less precise notion of 'profit' in section 44. Section 109Y takes the value of the company's assets disclosed by its accounting records and subtracts the amount of present legal obligations, certain specified provisions, and the paid-up capital to arrive at the distributable surplus. That is, it adopts the book value of assets but does not adopt the book value of liabilities. The substitution of present legal obligations, with the addition of only four specified provisions, for book values of liabilities leaves the accounts less open to understatement by taxpayers and increases certainty (because it substitutes the actual amount of liabilities as they accrue for an earlier estimate of them by way of provision). However, this means that timing differences will result between 'profits' as ascertained in accordance with accounting standards and the 'distributable surplus' ascertained under the statutory formula (because the recognition of liabilities is deferred). These differences might either increase or decrease the distributable surplus for a particular year.

### ***Assessments of income tax***

22. The link between the liability to income tax and the making of an assessment is a fundamental part of the structure of the income tax Acts. The purpose of section 166 of the ITAA 1936 is the ascertainment of the tax payable on the taxable income. The purpose of assessment is the definite quantification of the sum of tax due by the taxpayer. The purpose of section 170 of the ITAA 1936 is to limit the circumstances in which the tax due may be altered, by limiting the circumstances in which an assessment may be altered. The purpose of providing for objections against assessments is to allow a means to contest the sum of tax due. The purpose of providing a notice of assessment to a taxpayer is to inform him or her of the definite sum he or she must pay by way of tax. The purpose of section 177 of the ITAA 1936 is to foreclose contests about the amount of tax outside of the assessment system. Consequently it can be concluded that under an assessment system of taxation, (subject to the instalment system described below) there is no imposition of tax in a definite sum payable as a debt due to the Commonwealth in the absence of an assessment notice which has been served upon the taxpayer.

23. This conclusion is in accordance with the decisions and reasoning reached by the High Court in a long line of cases which considered the question as to when a liability for income tax arises (the most relevant of these cases are discussed below).

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<sup>5</sup> 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.

24. In *Deputy Commissioner of Taxation (NSW) v. Brown* (1958) 100 CLR 32 Dixon J stated at 40:

The general machinery for assessment [in the *Income Tax and Social Services Contribution Assessment Act 1936-1952*] is only too familiar. It is unnecessary to refer to it except for the following points, viz: (1) that tax is not due and payable until assessed; (2) that it then becomes a debt due to the Crown payable on the date specified in the notice of assessment or, if there is none, on the thirtieth day after service of the notice; (3) that the assessment of liability is conclusive except upon the process of review and appeal.<sup>6</sup>

25. In *Batagol v. Federal Commissioner of Taxation* (1963) 109 CLR 243, Owen J stated at 255 in relation to the definition of 'assessment' in section 6(1) and the effect of sections 170 and 174 of the ITAA 1936:

... the mere ascertainment by the Commissioner or his officers of the amount of a taxpayer's taxable income and of the tax payable thereon itself imposes no liability on the taxpayer to pay the tax so ascertained. It is merely a step towards that end. Section 174 requires written notice of the assessment to be given to the taxpayer and, under s 204, the amount of the tax so notified becomes due and payable only after the notice has been given and the date for payment specified in it has arrived or, if no such date is specified, on the thirtieth day after service of the notice. ...

These provisions all show that the assessment of which s 170(1) to (6) speak is something more than the completion inside the Taxation Department of the routines and processes necessary for the purpose of deciding whether or not in a particular case there is a taxable income and tax payable thereon. It includes the taking of all such further steps as are necessary to create a liability to pay the tax so calculated.<sup>7</sup>

26. 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 JJ concurred, with Brennan J also agreeing on this 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. Dixon CJ, McTiernan, Williams, Webb and Fullager JJ in *George v. FCT* (:1952) 86 CLR 183 at 207 said that 'tax is only due after it is 'assessed' (see, for example s 204)'. I recognise that on other occasions members of this Court have said that 'tax is a debt due and owing', although not payable, notwithstanding that no assessment has been made in the words of Gibbs J in *Re Mendonca*. This approach can be traced back to the majority decision of this Court in *Commissioner of Stamps (WA) v. Western Australia Trustee Executor & Agency Co. Ltd. (Mortimer Kelly's case)* (1925) 36 C.L.R. 98, especially at 105, 116 and 118. I think that the decision is to be explained on the footing that it was held that a debt for income tax not assessed until after the deceased's death was a 'debt due by the deceased' for the purposes of Acts imposing death and probate duties.'

(emphasis added)<sup>8</sup>

<sup>6</sup> See also Kitto J at 56 and 58.

<sup>7</sup> See also Kitto J at 251 to 253.

<sup>8</sup> See also: *Deputy Commissioner of Taxation (NSW) v. Brown* (1958) 100 CLR 32 at 40 per Dixon CJ; *Taylor v. Deputy Federal Commissioner of Taxation* (1987) 16 FCR 212 at 218 per Woodward and Northropp JJ; and *Deputy Commissioner of Taxation v. Kavich & Official Trustee in Bankruptcy* (1996) 68 FCR 519; 96 ATC 4752; (1996) 33 ATR 273, Full Federal Court (Lockhart, Lee & Tamberlin JJ).

27. The view that income tax only becomes due, in the sense of that the taxpayer comes under a legal obligation to pay it, upon an assessment being made and served, is also supported in the decision of the High Court in *Deputy Commissioner of Taxation v. Broadbeach Properties Pty Ltd and Neutral Bay Pty Ltd* [2008] HCA 41; (2008) 69 ATR 357 (*Broadbeach Properties Pty Ltd and Neutral Bay Pty Ltd*) (per Gummow ACJ, Heydon, Crennan and Kiefel JJ).

28. The amendments made to the operation of section 204 of the ITAA 1936 over the past decade<sup>9</sup> do not change the fundamental structure of the assessing and collection provisions, at least in respect of the requirement that there must be service of an assessment upon the taxpayer before a liability to income tax arises. For example, in relation to the amendments to section 204 made by *A New Tax System (Tax Administration) Act 1999*, which inserted section 204(1A) dealing with full self assessment taxpayers, the High Court in *Broadbeach Properties Pty Ltd* stated:

The respondents fixed upon the apparent importance given in the scheme of the taxation legislation to the consequences of assessments (and GST declarations), which is indicated by s 177(1) of the Assessment Act and by s 105-100 in Schedule 1 to the Administration Act. Reference was then made to the position of Broadbeach as a 'full self-assessment taxpayer' to whom s 204(1A) of the Assessment Act applied.

This provision makes special temporal provision for the tax payable by such taxpayers which, at first blush, does not depend upon the giving of a notice of assessment. That may be thought to depart from the scheme of s 204. But s 166A(3) of the Assessment Act **deems an assessment to have been made by the Commissioner on the day the return by the self-assessed taxpayer is lodged and the return is then taken to be the notice of assessment.** No relevant consequence follows in these appeals from the status of Broadbeach as a full self-assessment taxpayer.

(Emphasis added)

That is, the need for the service of an assessment upon the taxpayer is satisfied by the operation of the deeming provisions within section 166A(3) of the ITAA 1936.

29. It is also clear from an examination of the Explanatory Memorandum to *A New Tax System (Tax Administration) Bill (No. 2) 2000* that Parliament did not have any purpose by the amendment to section 204 effected by this Act of altering the fundamental principle that liability to income tax is created by the assessment. Therefore the Explanatory Memorandum speaks of 'tax due *under* amended assessments'. (Emphasis added) This statement is consistent with the view that the intended effect of the new section 204 was to make the amended assessed tax retroactively due from the original lodgment date once it was assessed, but would make no sense if liability to tax were intended to be divorced from assessment.

30. It should be noted that the Full Federal Court decision in *Layala Enterprises Pty Ltd (in liq) v. Commissioner of Taxation (1998)* 86 FCR 348; 98 ATC 4858; (1998) 39 ATR 502, is not relevant in the present context. That case concerned the question of when liability to payroll tax was incurred for the purposes of section 51(1) of the ITAA 1936, and was decided by reference to the particular provisions in the *Pay-roll Tax Assessment Act 1971 (WA)*. The criterion for pay-roll tax liability was the payment of taxable wages by a person with the pay-roll tax payable within seven days after the close of the month in which the taxable wages were paid by the employer: it did not depend on the making of an assessment to pay-roll tax. The time at which liability to pay a tax arises will turn on the construction of specific provisions of the Act under which tax is imposed. In the case of income tax, that time is the making and serving of an assessment to income tax.

<sup>9</sup> By Acts such as *A New Tax System (Tax Administration) Act (No. 2) 2000*.

31. Finally, the Administrative Appeals Tribunal's decision in *Re Fresta and Commissioner of Taxation* [2002] AATA 337; 49 ATR 1212; 2002 ATC 2061 is of no assistance in the present context. The decision is inconsistent with the general legislative purpose and context of Division 7A, and with the High Court's decisions in *Clyne* and *Neutral Bay*. Additionally the facts as set out in the Administrative Appeal Tribunal's decision do not record when the Commissioner worked out the company's distributable surplus, nor whether an income tax return for the year ended 30 June 1999 had been lodged, nor if an assessment had been made and served.

### **Deemed Assessments**

32. 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 at the start date of Division 7A of Part III of the ITAA 1936.<sup>10</sup>

33. 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.

### **PAYG Instalments**

34. 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)

35. For an annual payer, there is a liability to pay the instalment at the end of the relevant income year (subsection 45-50(3) of Schedule 1 to the TAA ) and that 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).

36. For a quarterly payer, there is a liability to pay the quarterly instalment at the end of each quarter (subsections 45-50(1) and (2) of Schedule 1 to the TAA) and that 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).

37. 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 which was 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.

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<sup>10</sup> Being 4 December 1997.

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

39. 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.

40. These private companies which do not have an instalment rate have no present legal obligation by reason of Part 2-10 of Schedule 1 to the TAA.

### ***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.

<b>Tax Level of company</b>	<b>Instalment due</b>	<b>Due date</b>
'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. The due dates specified by subsection 221AZK(2) of the ITAA 1936 would in all cases be on or before the deemed assessment under section 166A of the ITAA 1936.

45. 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.

46. 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 which was 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.

47. 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 which was 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**

48. 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'.

49. Under the Act amended assessments are to be treated in the same way as original assessments. Therefore, for an amended assessment, there will be an obligation in respect of the additional amount of income tax to which the private company is bound 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.

## References

*Previous draft:*

TD 2008/D8

*Related Rulings/Determinations:*

TR 2006/10; TD 2007/28; TD 2007/D9

*Subject references:*

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

*Legislative references:*

- ITAA 1936 44
- ITAA 1936 51(1)
- 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 166
- ITAA 1936 166A
- ITAA 1936 166A(1)(a)
- ITAA 1936 166A(3)
- ITAA 1936 170
- ITAA 1936 170(1)
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- ITAA 1936 170(3)
- ITAA 1936 170(4)
- ITAA 1936 170(5)
- ITAA 1936 170(6)
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- TAA 1953 Sch 1 45-15(2)
- TAA 1953 Sch 1 45-50(1)
- TAA 1953 Sch 1 45-50(2)
- TAA 1953 Sch 1 45-50(3)
- TAA 1953 Sch 1 45-61(1)
- TAA 1953 Sch 1 45-61(2)
- TAA 1953 Sch 1 45-70
- TAA 1953 Sch 1 105-100
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