TD 2009/5EC - Compendium

Ruling Compendium – TD 2009/5

This is a compendium of responses to the issues raised by external parties to draft TD 2008/D19 – Income tax: Division 7A: in exercising the discretion under subsection 109Y(2) of Division 7A of Part III of the *Income Tax Assessment Act 1936* to substitute an appropriate value for a private company's assets, can the Commissioner take into account the value of the company's assets not shown in the company's accounting records?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1	Lacks clarity – paragraphs 3, 4 & 5 appear to have contradictory comments.	Clarifying words have been added to paragraph 4 to eliminate perceived contradictions.
2	Rewrite the example in paragraph 5 to explain the situation envisaged and ease confusion.	The example in paragraph 5 has been rewritten using more detail.
3	Include a mock balance sheet in the example to assist clarity.	It is considered that the statements of principle provided, along with the further explanation in the example are a more reliable way of expressing the Commissioner's view, rather than a mock balance sheet.
4	More examples are required, particularly one where the discretion would not be used.	Another example has been added. However, it is considered unnecessary to add a particular example of where the discretion would not be used as the examples and discussion adequately explain the relevant principles.
5	Lack of guidance as to the word 'significantly'.	The word 'significantly' takes on its ordinary meaning in the context used. As noted by the commentator, the draft TD gives some general explanation, but any further definition of the term is outside the scope of this ruling.
6	Address where an asset has been overvalued.	While the draft TD focuses on undervaluation of assets, principles in the ruling (for example paragraph 2) can be applied to overvaluation situations.

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7	The fact that the value of goodwill needs to be included to give the company a distributable surplus implies that the Commissioner is seeking to tax unrealised gains.	As the commentator notes, this is not beyond the ambit of Division 7A. In fact, the Explanatory Memorandum to the Taxation Laws Amendments Bill (No 3) 1998 which inserted Division 7A (including section 109Y) says: 9.11 … the new measures will operate automatically to deem advances, loans and amounts otherwise credited by private companies to shareholders (and their associates) to be assessable dividends to the extent that there are realised or unrealised profits in the company. … Further, cases such as *MacFarlane* in relation to section 44 distributions emphasise the appropriateness of taxing unrealised gains.
8	Deductibility of interest.	This was not addressed as it is outside the scope of the draft TD.