TR 2010/8EC - Compendium

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Ruling Compendium – TR 2010/8

This is a compendium of responses to the issues raised by external parties to Draft Taxation Ruling TR 2010/D3 – Income tax: application of subsection 109RB(1) of the *Income Tax Assessment Act 1936.*

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	ATO Response/Action taken
1	**Qualification of comments** 1. In the absence of any draft Practice Statement as to how the ATO intends to exercise the discretion complete and final comments cannot be provided. 2. Without having reviewed the final practice statement on the administration of Taxation Ruling TR 2010/3: Income tax: Division 7A trust entitlements complete and final comments on the Draft Ruling cannot be provided.	Draft Taxation Ruling TR 2010/D3 only deals with the interpretative issues. The Practice Statement will deal with evidentiary issues which are beyond the scope of the TR. The Commissioner does not consider it necessary to provide a direct link to TR 2010/3 in the final ruling as the issue is covered by the paragraphs relating to common errors.
2	**General comments** 1. It was intended that the requirements under subsection 109RB(1) would cover a wide range of mistakes or omissions. Accordingly, it is imperative that the ATO should not take an unduly restrictive approach to applying subsection 109RB(1). 2. Division 7A is a complex area of law and constantly changing. In view of the most recent developments (that is, TR 2010/3 and *Tax Laws Amendment (2010 Measures No. 2) Act 2010* it is all the more essential that the ATO does not	The draft ruling has already confirmed that subsection 109RB(1)(b) of the *Income Tax Assessment Act 1936* (ITAA 1936) can apply to a wide range of mistakes or omissions. They can arise from a factual error from carrying out the activity to a misinterpretation or ignorance of a provision of Division 7A. The draft ruling already makes it clear that section 109RB(1)(b) of the ITAA 1936 can apply to a wide range of mistakes or omissions. The restrictive vs. broad approach distinction is not relevant as it is essentially a factual inquiry.

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	take an unduly restrictive approach as to whether an honest mistake or inadvertent omission caused the result produced by Division 7A.	
	3. A fundamental revision of the current ATO approach to the discretion it has been provided with (in section 109RB) is justified by the extensive changes to not only Division 7A itself (that is, in *Tax Laws Amendment (2010 Measures No.2) Act 2010* but also in the ATO views on unpaid present entitlements in TR 2010/3. Taxpayers will now not only be playing on a new playing field but also with totally different goal posts. Taxpayers will not longer 'feel more confident they are acting within the law' (ATO's 2010/11 Compliance Program, page 37)	A fundamental revision is not necessary because the legislative amendments and TR 2010/3 have not changed the ATO approach taken to the exercise of the discretion. The draft ruling already makes it clear that what constitutes an honest mistake or inadvertent omission is essentially a question of fact and that it can encompass a wide range of circumstances. A Practice Statement will outline how a taxpayer is to provide the necessary evidence to demonstrate that a honest mistake or inadvertent omission has occurred.
	4. Applying an open approach to interpreting subsection 109RB(1) rather than a restrictive approach is consistent with the ATO's strategic direction to 'champion the promotion of voluntary compliance' and reduce taxpayer anxiety at having to comply with the division (see page 36 of the ATO Compliance Program 2010-11).	Rulings set out the Commissioner's view about the way in which a relevant provision applies. The option of providing a voluntary disclosure to correct matters with reduced penalties is encouraged in relation to all taxation matters. TR 2010/D3 deals with what constitutes an 'honest mistake' and 'inadvertent omission'. The ruling makes it clear that this is a question of fact and can cover a wide range of circumstances. The restrictive vs. broad approach distinction is not relevant as it is essentially a factual inquiry.
	5. Taxpayers will not make voluntary disclosures and as a result the ATO will not be able to receive the correct amount of tax for preceding years without the need for expensive audits if taxpayers know that there is no scope for leniency and they will pay the maximum amount of tax possible even if	Rulings set out the Commissioner's view about the way in which a relevant provision applies. The option of providing a voluntary disclosure to correct matters with reduced penalties is encouraged in relation to all taxation obligations.

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	they make a voluntary disclosure. Taxpayers will simply not make voluntary disclosures.	
	6. To reduce taxpayer anxiety at having to comply with Division 7A and avoid the need for the ATO to undertake expensive audit action the ATO should go back to administering section 109RB in a way that allows taxpayers to self-assess and apply the discretion themselves, as in the first year of operation of the section.	Rulings are interpretative products which set out the Commissioner's view about the way in which a relevant provision applies. How the ATO will administer that provision is not a matter to be dealt with in a ruling.
	7. Section 109RB has an important interaction with TR 2010/3. The Ruling Compendium TR 2010/3EC provides linkages to the use of section 109RB for unpaid present entitlements (UPEs). The first is contained in Part B – item 4, where the ATO encourages taxpayers to apply for the Commissioner's discretion in relation to a Section two loan. The second is contained in Part I – item 5, where the ATO indicates that it will also provide administrative guidance on the application of section 109RB to UPEs. It is critical that the ATO deliver on what was contained in the ruling compendium. It is imperative that this is done by: • Providing a direct link to TR 2010/3 in the final subsection 109RB(1) ruling. The ATO should make it clear that the incorrect treatment of a UPE (including a Section 2 loan) is an example of a technical issue that should be within the scope of subsection 109RB(1). • Providing taxpayers with a draft practice statement on the application of section 109RB for UPEs, as promised by the ruling compendium. The practice statement should (very broadly) outline instances where the ATO	The draft ruling has already confirmed that mistakes of law can qualify as an honest mistake or inadvertent omission within the meaning of subsection 109RB(1). The position taken by the draft ruling does not preclude UPEs from qualifying as an honest mistake or inadvertent omission. TR 2010/D3 does cover a mistake or omission that commonly occurs. In the absence of direct evidence, the fact that an error is common may support the conclusion that it was an honest mistake or inadvertent omission but it does not necessarily establish that an honest mistake or inadvertent error occurred in the taxpayer's circumstances. The Commissioner does not consider it necessary to provide a direct link to TR 2010/3 in the final ruling as the issue is covered by the paragraphs relating to common errors. Over time the nature and extent of common errors will change.

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	would expect the discretion to be applied in relation to UPEs (especially around Section two loans).	
3	**Taxpayer assertions** Based on the approach advocated in the draft ruling it will be rare that a taxpayer will be able to apply for the exercise of the discretion in section 109RB. In particular: A taxpayer cannot simply assert that: 1 a mistake or an omission has taken place – sufficient evidence must exist to be able to convince the ATO that a mistake or an omission has occurred. 2. a mistake was honest or an omission in advertent – sufficient evidence must exist to be able to prove to the ATO that an honest mistake or inadvertent omission has occurred. 3. Division 7A applied because of the mistake or omission – sufficient evidence must exist to be able to show the ATO that the honest mistake or inadvertent omission caused Division 7A to apply. Sufficient evidence will only exist if there is contemporaneous material to explain why there was a failure to comply with Division 7A.	The ATO disagrees with the statement made that 'it will be rare that a taxpayer will be able to apply for the exercise of the discretion in section 109RB'. Paragraph 9 of TD 2010/D3 makes the following points: 1. the taxpayer must demonstrate on the balance of probabilities that an honest mistake or inadvertent omission has occurred. 2. the facts and circumstances must be sufficiently detailed to demonstrate that the existence of the honest mistake or inadvertent omission that is relevant to Division 7A. Paragraph 9 of TR 2010/D3 also stated: 3. Evidence must be consistent and support such a finding. This statement is deleted from the final Ruling as a Law Administration Practice Statement will issue and will consider the evidentiary aspects. It should be noted that paragraph 1.33 in the Explanatory Memorandum to Tax Laws Amendment (2007 Measures No. 3) Bill 2007 states: 1.33 Whether or not there is an honest mistake or inadvertent omission is an objective question to be determined by reference to all the circumstances surrounding the failure to satisfy the requirements of Division 7A. In practice, the taxpayer will need to demonstrate to the Commissioner that the failure was the result of an honest mistake or inadvertent omission. At paragraph 60 of TR 2010/D3 it is stated that the circumstances must be sufficiently particularised to establish a finding of honest mistake or inadvertent omission on the material provided. Taxpayers should be able to set out the facts and circumstances

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		relating to the failure to comply with Division 7A.
4	**Ability to satisfy both definitions** The examples could demonstrate more clearly the application of the terms 'honest mistake' or 'inadvertent omission' as there may be instances where both terms are satisfied. The examples should clearly explain whether the error can be classified as a mistake or omission, or both. Whether this 'caused' the Division 7A result in paragraph 109RB(1)(a) is a secondary question. To illustrate, in the Example 1, the brothers fail to make a minimum loan repayment under section 109N. The example states that this was due to 'the lack of knowledge of section 109N'. In our view, the lack of knowledge results in an incorrect application of section 109N (that is, a mistake in the application of the law by applying a 5% interest rate rather than the benchmark interest rate and the repayment of principal under section 109N). Then later at paragraph 61, the Draft Ruling states that a 'mistake or omission can be the result of ignorance'. Accordingly, it is possible that the lack of knowledge can constitute both a mistake and omission as there was an ignorance of the way in which section 109N applied.	Subsection 109RB(1) only requires there to be an honest mistake or inadvertent omission. It does not require the existence of both. Whether a particular circumstance constitutes one of the elements or both is not fatal to meeting the requirements of subsection 109RB(1).
5	**Honesty** 1. Paragraph 69 of TR 2010/D3 states: 69. It has been suggested that anything that is not dishonest must be honest. However, such an assertion cannot be accepted in the context of section 109RB as the statutory test is one of whether the mistake relevant to the result under	The ATO does not agree with this comment. The test inserted by the legislature in subsection 109RB(1) is a positive one, namely, an honest mistake. To substitute honest mistake with a dishonesty test is to ignore the clear legislative words, the statutory test. Furthermore, the case cited looks to determine what is

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	Division 7A is an honest one. The fact that something is not dishonest is not the relevant test. The converse would also be true. It would not follow from the mere fact that a taxpayer is unable to establish that an honest mistake has occurred that the taxpayer has been dishonest. It may mean that the taxpayer has simply unable to discharge the onus of proof required due to insufficient evidence to satisfy the requisite elements of subsection 109RB(1). The conclusion in paragraph 69 of the Draft Ruling is incorrect and is inconsistent with the case reference provided at paragraph 76 of the Draft Ruling. The Privy Council decision of *Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming* [1995] 2 AC 378 provides significant commentary on how one establishes, objectively, whether they have acted dishonestly. Paragraphs 28 to 30 are provided below. Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, R v Ghosh [1982] QB 1053 ; [1982] 2 All ER 689; [1982] 3 WLR 110), in the context of the accessory liability principle, acting dishonestly or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not	dishonesty. The paragraph in the final Ruling will be amended to make it clear that although the suggestion may be true in some other context the question does not arise in the present context.

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	dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. [our emphasis] However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. In most situations, there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless. However, in the situations now under consideration the position is not always so straightforward. This can best be illustrated by considering one particular area: the taking of risks. The case clearly states that the meaning of 'dishonesty' is simply not acting as an honest person. It follows, if one is to establish objectively that they had not acted dishonestly, they will also objectively establish that one has acted honestly (by definition). It is agreed that the test is not one of dishonesty. However, the definition of dishonesty relies on objectively looking at	

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	whether the taxpayer has been honest. Accordingly, the converse is also true. Objectively, it is clear that one can therefore demonstrate honesty by objectively showing that they have acted honestly or by providing objective evidence that they have not acted dishonestly. 2. The case reference makes it clear that honesty and dishonesty effectively require advertent actions. Where the taxpayer has been 'careless' the case states that 'carelessness is not dishonesty'. Thus, in our opinion acting carelessly means that a taxpayer has still acted honestly. This is clearly established in the case referred to in the Draft Ruling. It is therefore both incorrect and inconsistent to come to the conclusion contained in paragraph 69.	In relation to the comments relating to carelessness, the ATO considers that the relevant test is not one about carelessness. The test is still one of honesty.
6	**Taxpayers' Charter – acting honestly** In the Taxpayers' Charter there is an ATO assumption that taxpayers generally act honestly without evidence to the contrary. While this is an administrative issue, it is inconsistent to state in the Taxpayers' Charter that the ATO will treat taxpayers as acting honestly, yet then state in a ruling that a high level of objective evidence is required for subsection 109RB(1) purposes. The following Taxpayers' Charter extract is provided: **Treating you as being honest in your affairs** Generally, you prepare the information you need to claim your entitlements and meet your obligations, then you give the information to us. Based on this information you either make or receive a payment. We presume you are trying to meet your obligations. We	Whether or not objective evidence can be provided easily and how the ATO would administer those cases is more appropriate for the Practice Statement. The ruling deals with interpretative issues only and it takes the view that an honest mistake or inadvertent omission can encompass a wide range of circumstances.

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	accept that you tell us the truth and the information you provide is complete and accurate, unless we have reason to think otherwise. We know people can make mistakes. Therefore, we will continue to believe you are trying to be honest in your affairs even if you make a mistake, unless we find evidence of: • carelessness • recklessness • intentional disregard of the law. If the ATO is going to clarify this in a practice statement, this issue should be referred to in the final ruling and properly clarified in a practice statement. That is, the final ruling should acknowledge the evidentiary issue that objective evidence may be difficult to provide, with such an issue being further explored in an administrative practice statement	
7	**Real life examples** The draft ruling does not deal with 'real life' examples like those encountered in the middle market.	During the consultation process the point was made that the scope of the engagement to provide taxation services can vary considerably between clients. In addition, the records and information received will vary both in terms of what is received and quality. These are all primarily evidentiary matters which is to be addressed in the Practice Statement. TR 2010/D3 provides examples illustrating specific points of law as opposed to matters directed towards the level of evidence required to establish the existence of an honest mistake or inadvertent omission. As explained in the ruling, whether a particular circumstance constitutes an honest mistake or inadvertent omission is a question of fact. The examples provided in the ruling already address a range of

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		mistakes and omissions that are capable of arising in different situations.
8	**Inconclusive and inadequate examples**	
	1. All examples are inconclusive as these examples state that it would need to be further established that the honest mistake/inadvertent omission caused the result produced by Division 7A in order to satisfy the requirements of subsection 109RB(1). The examples should not include of these statements. Based on the facts provided, the examples should state whether or not subsection 109RB(1) is satisfied and if the ATO is of the view that more facts are needed to reach a conclusion, then the ATO should include them. To illustrate, Example 1 states 'the lack of knowledge of section 109N was the reason that the private company was taken to have paid a dividend' [our emphasis]. In effect, this statement merges both paragraphs109RB(1)(a) and (1)(b). The application of the law to the example should be set out more appropriately in line with the legislation. That is, the example should clearly set out the application of the tests in paragraphs109RB(1)(a) and (1)(b). It follows: • The non-compliance with section 109N is the 'error' giving rise to the deemed dividend referred to in paragraph 109RB(1)(a) • A 'lack of knowledge of section 109N' is capable of being an honest mistake or inadvertent omission for the purpose of paragraph 109RB(1)(b) • The taxpayer must demonstrate that the lack of knowledge caused the error.	The Commissioner disagrees that that the examples are inconclusive and inadequate. Whether or not an honest mistake or inadvertent omission exists is essentially a question of fact. In making that finding of fact, it is necessary to weigh up all the evidence available including direct and indirect evidence. These are matters more appropriate for the Practice Statement. It is not appropriate for the ruling to be making statements in relation to the weight to be attached to particular evidence. The examples can only be based on a particular conclusion of facts. The statements in the example that a causal link would need to be established between the honest mistake/inadvertent omission and the Div 7A result merely serves to highlight that there are other requirements of subsection 109RB(1) that need to be satisfied. The example is intended to only illustrate types of mistakes and omissions that are capable of qualifying as an honest mistake or inadvertent omission. Example 1 has been deleted.

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	When set out in the manner above, it is difficult to come to a conclusion that the lack of knowledge was not the cause of the Division 7A result – especially since we assume an absence of 'other contributing factors'.	
	2. Furthermore, in Example 1, the Draft Ruling states '[i]t was established that the lack of knowledge of section 109N was the reason that the private company was taken to have paid a dividend' [our emphasis]. However, this is inconsistent with the conclusion that says '[i]t would need to be further established that the inadvertent omission caused the result produced by Division 7A in order to satisfy the requirements of subsection 109RB(1)' [our emphasis]. The conclusion in the example appears contradictory to the analysis. The conclusion does not require an administrative application of the law but rather needs to provide a clear view as to how the words are to be interpreted in respect of the example and facts provided. If the taxpayer can demonstrate that it was ignorant of section 109N, has been honest (that is, the taxpayers tried to separate private and business items), and that the error resulted in a deemed dividend, the Draft Ruling example should conclude that, on those facts, the conditions in subsection 109RB(1) can be satisfied.	Example 1 has been deleted.
	3. The examples should be updated to clearly demonstrate the way in which subsection 109RB(1) is applied. A conclusion that states '[i]t would need to be further established that the inadvertent omission caused the result produced by Division 7A in order to satisfy the requirements of subsection 109RB(1)' where the facts show that the mistake or omission caused the error would create confusion	TR 2010/D3 covers mistakes and omissions that commonly occur. The Commissioner does not consider that a specific example is necessary as common mistakes/omissions will change over time.

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	amongst taxpayers and tax practitioners attempting to follow the ruling. 4. If there are other factors that have caused the error, which would not amount to an honest mistake or inadvertent omission, the ATO should clearly outline the alternative cause. The taxpayer must then prove that the error was due to the mistake or omission and not the alternative cause. 5. The examples fail to address one of the most common instances in which relief under section 109RB is likely to be sought – 'business to business' transactions, where a loan or payment has been made by a company to a related trust and there was a genuine but mistaken belief that Division 7A did not apply. Such a mistake is clearly contemplated by paragraphs 5 and 8 of the Draft Ruling. For the final ruling to be truly of assistance, this aspect should be dealt with.	
9	**Tax agents – need for contrasting example** Example 2, on its own, could be misleading. Example 2 suggests that the tax agent did not consider Division 7A even though it should have been within his scope of work and he had knowledge of the provisions. An additional example with the same facts but instead the tax agent makes inquiries and then applies Division 7A incorrectly is needed. The example is required to demonstrate the difference between a tax agent that has made a mistake and a tax agent that has not considered the application of the provisions. This additional example is important as Example 2 is difficult to understand without context or another appropriate example to which it can be compared. The second example could include:	It is agreed that consideration of Division 7A should have been within the scope of the work and that the tax agent should have knowledge of section 109D. However, during the consultation process the point was made that scope of the engagement to provide taxation services can vary considerably between clients and the records and information received will vary both in terms of what is received and quality. Example 2 focuses on the conduct of the tax agent in circumstances where the client relied on the tax agent to ensure that the taxation obligations were satisfied but the agent has not undertaken all work necessary to ensure that Division 7A has been complied with. The Commissioner does not consider that an additional contrasting example is required.

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	The tax agent enquires into the loans and discovers these are loans to the shareholders. However, the taxpayer indicates that the loans are under a loan agreement and are used for income producing purposes. Accordingly, the tax agent mistakenly believes that such loans should be excluded from Division 7A.	
10	**Examples in Draft Ruling**	
	1. In Example 1, experience is that the directors/shareholders of a private company are unlikely to prepare the company's tax return. They are also unlikely, in the absence of any knowledge of Division 7A, to be aware of the need to account for business and private transactions separately (and thus, enter into any arrangements for charging interest/repaying loans).	See comments for 7. Real life examples. The ATO is aware of cases where they do in fact prepare the tax return. Example 1 has been deleted.
	2. Example 2 infers that the tax agent only received information from the taxpayer about its income and expenses for the income year – that is, that no information was provided by the taxpayer in the form of financial statements (and in particular, that no balance sheet information was available). It would be expected that the vast majority of tax agents would not prepare a tax return for a corporate client without at least reviewing it financial statements (even if it did not prepare them). A tax agent could not be satisfied that a tax return for a company was prepared correctly without receiving this information.	See comments for 7. Real life examples. Example 2 introduces a tax agent and focuses on the conduct of the tax agent in the preparation of the tax returns. It makes the point that this is one of the circumstances where an honest mistake or inadvertent omission by the tax agent could not be established.
	3. In example 4, it is not understand how a company tax return can be prepared (let alone lodged) without first	See comments for 7. Real life examples There is no reference to a tax agent in the example. However,

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	reviewing each of the transactions in the company's cheque book for the relevant tax year. That is, it is unlikely that the transactions in the company's cheque book would be reviewed after the company tax return was lodged as reviewing the cheque book is simply part and part of the normal process of identifying and correctly characterising expenditure in order to prepare a company's tax return.	example 4, as the heading suggests, was included to introduce mistakes made in the carrying out of the activities. In the example, it involved the use of the wrong cheque book and the consequences that followed. Example 4 has been altered to state that during the year the company refurbished the business premises including the office, the amount paid for the private furniture was similar to amounts paid for office furniture, the review of the general ledger did not highlight the error and the reason for the subsequent review of records was a dispute with the supplier of the office furniture.
11	**Examples commonly encountered**	
	1. An example (Example A) of the types of situations more usually encountered Dominic and Gabriella are the directors and shareholders of a private company that operates a profitable business. The private company uses: (i) a bookkeeper to maintain the financial records of the company; and (ii) a tax agent to prepare and lodge the private company's tax return. During the year ended 30 June 2007 Dominic and Gabriella borrowed $500,000 from the private company to finance the acquisition of their home. The private company sought advice from its tax agent in relation to the tax consequences of the $500,000 loan. As a result of that advice the private company, Dominic and Gabriella executed a written loan agreement before the private company's lodgment day for its 2007 income tax return. This written Loan Agreement was structured in a facility style to cover all loans made by the	Examples in the draft ruling were inserted to illustrate certain principles stated in the ruling. The ATO does not consider this example to illuminate any particular point. The draft ruling accepts that a mistake of law can qualify as an honest mistake or inadvertent omission. It is also not considered to be appropriate to be dealing with other interpretative issues that is the subject of another ruling such as TD 2008/8.

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	private company to Dominic and Gabriella in the year ended 30 June 2007 and all future income years. Given the facility style of the written Loan Agreement, the actual amount of the loans made by the private company to Dominic and Gabriella is not specified in that agreement. There was no written evidence of acknowledgement of the amounts of the loans made by the private company to Dominic and Gabriella by the lodgment day of the private company's 2007 tax return. Further, the financial statements were not finalised and signed off by the directors until six weeks after the private company's lodgment day for the 2007 income year being 15 May 2008. The reasons for the late finalisation of the financial were delays caused by: (a) the private company's external bookkeeper; and (b) the failure of third parties to confirm balance sheet items in a timely manner. Dominic and Gabriella have fully satisfied their section 109N minimum yearly repayment obligations to the private company in respect of the 2007 loans. All of the relevant parties being the private company, Dominic, Gabriella, the bookkeeper and the private company's tax agent believed that there was not requirement that the actual amounts of the loans be specified in the written loan agreement for the purposes of section 109N. The relevant parties believed that all of the requisite loan terms were specified in the written loan agreement and therefore satisfied the requirements in section 109N. Upon commencement of an ATO Risk Review, the tax agent became aware of the ATO's views in Taxation Determination TD 2008/8 including the requirement that the requisite loans terms include a reference to the amount of the relevant loans	

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	and the date that such loans are drawn. The company's 2006/7 financial statements properly recorded all relevant loans and all necessary disclosures were made in the company's 2007 tax return. The written acknowledgement of the loans was effectively made when the directors signed the 2006/7 financial statements – which was six weeks after the private company's lodgment date for the 2007 year. After reviewing the TD 2008/8 the tax agent and the private company: • made a voluntary disclosure of the technical breach of section 109N; and • requested the ATO to exercise its discretion under section 109RB to disregard any deemed dividends. It is clear that all of the relevant parties made an honest mistake in not acknowledging the amount of the loans before the lodgment day of the private company's 2007 tax return. The mistake made can only be seen to be made honestly having regard to all the facts and circumstances described above. There has been no evidence of any dishonest behaviour on the part of any of the parties or any reckless behaviour or intentional disregard of the law.	
	2. An example (Example B) of the types of situations more usually encountered. Assume the same facts as per Example A above but that the company made further loans to Dominic and Gabriella during the year ended 30 June 2008 totalling $250,000. The borrowed funds were applied to Dominic and Gabriella to fund renovations to their home. The parties relied upon the	See comments for Example A. For recurring mistakes or omissions Ruling TR 2010/D3 states at paragraph 18 that a 'mistake or omission that is recurring will qualify as an honest mistake or inadvertent omission if it recurs for the same reason and the original mistake or omission qualified as an honest mistake or inadvertent omission'.

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	pre-existing Division 7A facility written Loan Agreement. Further, there was no written evidence of acknowledgement of the 2008 loans totalling $250,000 until the private company's financial statements were finalised and signed-off. This sign-off occurred two weeks after the lodgement date of the private company's income tax return. The repetition of the mistake/omission to acknowledge the loan amount in respect of the 2008 loans arose for the same reasons applicable to the 2007 loans – as the facts and circumstances are virtually identical we submit that this should be an honest mistake or an inadvertent omission.	