



***TD 2015/D3 - Income tax: consolidation: Division 7A: what is the lodgment day for a private company that is a subsidiary member of a consolidated group for the purposes of subsection 109D(6) of Division 7A of Part III of the Income Tax Assessment Act 1936 ?***

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This document has been finalised by TD 2015/18.

 There is a Compendium for this document: **TD 2015/18EC** .



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## Draft Taxation Determination

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Income tax: consolidation: Division 7A: what is the lodgment day for a private company that is a subsidiary member of a consolidated group for the purposes of subsection 109D(6) of Division 7A of Part III of the *Income Tax Assessment Act 1936*?

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### Ruling

1. The lodgment day for a private company that is a subsidiary member of a consolidated group, for the purposes of subsection 109D(6) of Part III of Division 7A of the *Income Tax Assessment Act 1936* (ITAA 1936),<sup>1</sup> will be taken to be the lodgment day<sup>2</sup> of the head company of the consolidated group.

### Example 1

2. On 1 July 2012, Head Co Pty Ltd (HCo) formed a consolidated group, of which Sub Co Pty Ltd (SCo) is a subsidiary member. The due date for lodgment by HCo of the consolidated income tax return was 15 January 2014. HCo was diligent and lodged the consolidated income tax return on 31 October 2013.

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<sup>1</sup> All references are to the ITAA 1936 unless otherwise stated.

<sup>2</sup> The lodgment day for a year of income for the head company of a consolidated group is the earlier of the due date for lodgment and the actual date of lodgment.

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3. On 1 May 2013, SCo lent \$5,000 to Alfred. The loan was not made under a written agreement and was not repaid by 31 October 2013 and no other exception or exclusion to section 109D applied. At all relevant times, Alfred was a shareholder in HCo and, therefore, an associate of a shareholder of SCo.

4. The lodgment day for SCo, for the purposes of subsection 109D(6), is the date of lodgment of the consolidated income tax return of HCo (31 October). Therefore, SCo is taken under subsection 109D(1) to have paid a dividend of \$5,000 to Alfred at the end of the 2012-13 income year.

## Example 2

5. Assume the same facts as in Example 1. However SCo left the consolidated group on 1 June 2013.

6. The lodgment day for the purposes of subsection 109D(6), is the earlier of the due date for lodgment or the actual date of lodgment of the income tax return of SCo. This is because SCo has left the consolidated group and now has to meet its own lodgment obligations.

## Date of effect

7. When the final Determination is issued, it is proposed to apply 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 to 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

3 June 2015

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## Appendix 1 – Explanation

**❶** *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.*

8. Division 7A of Part III of the ITAA 1936 (Division 7A) was enacted in 1998 as a specific anti-avoidance provision to ensure that private companies are not able to make tax-free distributions of profits to shareholders (or their associates) in the form of payments, loans or forgiven debts. The Explanatory Memorandum to the Taxation Laws Amendment Bill (No 7) 1997 makes it clear that Division 7A is intended to have broad application, and apply to 'all' transactions that constitute a disguised or informal distribution of profits; its application is limited only to the extent of specific exceptions and exclusions.<sup>3</sup>

9. In this context, the Commissioner is of the view that the deeming provisions contained within Subdivision B of Division 7A should be read broadly, to give effect to the explicit policy of ensuring that distributions of profits to shareholders (or their associates) of private companies are taxed. Subsection 109D(1) is one of the deeming provisions in Subdivision B of Division 7A.

10. Subsection 109D(1) provides that a private company is taken to pay a dividend to a shareholder (or an associate of such a shareholder) at the end of the year of income if:

- (a) the private company makes a loan to the entity during the year of income
- (b) the loan is not fully repaid before the lodgment day for the current year, and
- (c) Subdivision D does not prevent the treatment of the loan as a dividend.

11. For the purposes of Division 7A, subsection 109D(6) defines 'lodgment day', for a private company's year of income, as the earlier of:

- (a) the due date for lodgment of the private company's return of income for the year of income, and
- (b) the date of lodgment of the private company's return of income for the year of income.

12. The term 'return of income' is defined in subsection 6(1) as 'a return of income, or of profits or gains of a capital nature, or of both income and such profits or gains'.

13. The due date for lodgment of a company's return for a year of income is the date that the Commissioner has required the company to lodge a return of income by notice published in the *Gazette*.<sup>4</sup> The Commissioner may, in the notice published in the *Gazette*, exempt certain classes of persons from the liability to furnish returns for a year of income.<sup>5</sup>

<sup>3</sup> See paragraphs 9.1 and 9.2 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 7) 1997.

<sup>4</sup> See section 161. The Commissioner satisfies the requirement to publish a Gazette notice by registering a legislative instrument on the Federal Register of Legislative Instruments (section 56 of the *Legislative Instruments Act 2003*). Guidance for ATO officers is provided in Practice Statement Law Administration PS LA 2011/15 *Lodgment obligations, due dates and deferrals*.

<sup>5</sup> Subsection 161(1A).

14. A subsidiary member of a consolidated group is not required to lodge an income tax return.<sup>6</sup> However, a company that is a head company of a consolidated group is required to lodge a return for a year of income within the period specified in the notice published in the *Gazette*.

15. The Commissioner is of the view that the introduction in 2002 of the tax consolidations measure in Part 3-90 of the *Income Tax Assessment Act 1997* (ITAA 1997) was not intended to alter or disturb the application of Division 7A in so far as it applied to deem a dividend to an entity outside of a consolidated group.

16. In this respect, principles of statutory construction dictate that a later provision must be read subject to an earlier provision, unless a clear contrary intention exists. As observed by Gaudron J in *Saraswati v. The Queen*:<sup>7</sup>

It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other.

17. Further, the preferred contextual approach to statutory interpretation was relevantly described by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v. Australian Broadcasting Authority*,<sup>8</sup> where they noted:

69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v. Agalinos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

71. Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v. Baume* Griffith CJ cited *R v. Berchet* to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'.

<sup>6</sup> See, for example, Table O of the following legislative instrument: Lodgment of returns for the year of income ended 30 June 2014 in accordance with the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Taxation Administration Act 1953*, the *Superannuation Industry (Supervision) Act 1993* and the *Income Tax (Transitional Provisions) Act 1997*

<sup>7</sup> (1991) 172 CLR 1 at 17; [1991] HCA 21 at paragraph 4.

<sup>8</sup> (1998) 194 CLR 355 at 381-382; [1998] HCA 28 at paragraphs 69 to 71 (footnotes omitted).

18. This approach accords with the requirement in section 15AA of the *Acts Interpretation Act 1901* that a 'purposive approach' is preferred when interpreting Commonwealth legislation:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

19. The view that a subsidiary private company has no relevant lodgment day for the purposes of subsection 109D(6), arguably renders subsection 109D(6) redundant in the circumstances described in this draft Taxation Determination. Accordingly, such construction is not preferred.<sup>9</sup> Conversely, an interpretation that causes fairness by way of consistent treatment of entities within the same class of taxpayer, while maintaining the harmonious operation of conflicting legislative provisions is favoured.

20. Accordingly, in order to give effect to the purpose of Division 7A, and meaning to every word in section 109D in the context of subsidiary private companies, while ensuring consistency and fairness in terms of taxation outcomes amongst the same class of taxpayer, the Commissioner considers that a broad approach to the interpretation of 'return of income' in section 109D is appropriate. Taking this interpretative approach, the Commissioner considers that the reference to 'a private company's return of income for the year of income' in subsection 109D(6) encompasses amounts attributed to and subsumed within the lodgment obligations of another entity; in the context of this draft Taxation Determination, for example, a head company of a consolidated group.<sup>10</sup>

21. A head company's return of income requires the head company to disclose consolidated group information; comprising details of the subsidiary member's income, or of its profits or gains of a capital nature, or both.

22. The lodgment of the return of income by a head company is the mechanism by which the combined tax liability of the head company and a subsidiary member are worked out for the income year. Each subsidiary member's assessable income or gains and allowable deductions or losses are subsumed into the consolidated return that is lodged by the head company.

23. Support for this view is found in the Full Federal Court judgment in *Channel Pastoral Holdings Pty Ltd v. Commissioner of Taxation*<sup>11</sup> (*Pastoral Holdings*), where it was recognised that a subsidiary member of a consolidated group does not cease to exist,<sup>12</sup> nor does it stop generating assessable income or gains, upon consolidation.

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<sup>9</sup> See Pearce, DC and Geddes, RS 2006, *Statutory interpretation in Australia*, 6th edn, Butterworths, Australia at 2.22 and 2.33.

<sup>10</sup> It is observed that, in attempting to identify the proper interpretation of legislative provisions, including in relation to the interaction of the tax consolidations measure in Part 3-90 of the ITAA 1997 with other parts of the Act, different conclusions are capable of being drawn – even when applying the same principles of statutory interpretation (see, for example, the views of Emmett J in *Federal Commissioner of Taxation v. Macquarie Bank Ltd* (2013) 210 FCR 164; [2013] FCAFC 13 (*Macquarie Bank*)).

<sup>11</sup> [2015] FCAFC 57.

<sup>12</sup> *Pastoral Holdings* at paragraph 8, per Allsop CJ.

24. The effect of consolidation was articulated by Pagone J in *Pastoral Holdings* in the context of whether a determination for Part IVA could be issued to a subsidiary company (in minority, but in agreement with the majority in relation to this point):

The head company, for its part, is no longer to be treated as if it were a separate company because it must, for the mechanical purposes of working out liability and losses, be taken to include all of the parts of the consolidated group...

The function of the individual group members in the working out required by Div 701 is for their individual fiscal amounts to be taken into account in the calculation of the one final composite liability or loss of the whole through the head company.<sup>13</sup>

25. In this context, and to give proper effect to Division 7A, a head company of a consolidated group's return of income is taken to be, for the purposes of subsection 109D(6), a return of income of a subsidiary member of the consolidated group.

26. Accordingly, it is the due date for lodgment, and actual date of lodgment, of the head company of a consolidated group's return of income for the year of income that are relevant for determining the lodgment day, for the purposes of Division 7A, for a private company's year of income that is a subsidiary member of the consolidated group.

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<sup>13</sup> At paragraph 119.

## **Appendix 2 – Alternative views**

**❶** *This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.*

### **Commissioner’s preliminary view inappropriately relies on the Single Entity Rule**

27. Proponents of this view correctly note that the single entity rule in section 701-1 of the ITAA 1997 (which treats a subsidiary member of a consolidated group as being a part of the head company of the group, rather than a separate entity) only applies for limited purposes. The Commissioner acknowledges this, but notes that the preliminary view set out in this draft Taxation Determination does not rely on that rule in concluding that as a matter of fact, relevant ‘income, ... profits or gains of a capital nature’ of the subsidiary are (and are required to be) included in the return of income of the head company of a consolidated group.

28. Moreover, whilst the Commissioner considers that it is not necessary to rely on the single entity rule to reach the views expressed in this draft Taxation Determination, the Commissioner notes that one of the limited purposes for which the single entity rule applies is for ‘working out the amount of the head company’s liability for income tax’.

29. Lodgment of the return of income by a head company is the mechanism by which the amount of the head company’s liability for income tax is ascertained. Similarly, lodgment (or a due date for lodgment) of a return of income by a head company subsumes and includes the same obligations of each of the subsidiary entities- which go to make up the ascertainment of the head company’s liability for income tax. Treating the return of income of the head company of the consolidated group as being the relevant return of income (with a relevant lodgment date) for all entities within that group for Division 7A purposes is required to give effect to the legislative purpose of Division 7A in the context of its application to a private company that is a member of a consolidated group.<sup>14</sup>

### **A subsidiary member of a consolidated group has no lodgment day for Division 7A purposes**

30. Proponents of this view point out that the subsidiary itself is neither required to lodge a return of income in its own right, nor does so. They consider, contrary to the view of the Commissioner set out in this draft Taxation Determination, that this is fatal to any view that the subsidiary can be taken to have a relevant ‘lodgment day’ for the purposes of Division 7A.

31. For the reasons given above, the Commissioner disagrees with this position, and considers the subsidiary to have a lodgment day by reference to the head company’s lodgment day that includes details of the subsidiary’s relevant income and profits.

32. Moreover, the Commissioner notes that this view fails to give effect to the intended operation of Division 7A. In particular, it fails to give paragraph 109D(1)(b) or the limitation in subsection 109D(1AA) any practical work to do. This is because a loan can never be said to be ‘fully repaid before the lodgment day’, nor can any part of the loan be said to be ‘repaid before the lodgment day’, if there is no lodgment day. Accordingly, this view would have the unintended and disadvantageous outcome that relevant repayments would not be able to be taken into account in determining the amount of a dividend taken to be paid by the subsidiary member of a consolidated group under section 109D.

<sup>14</sup> Compare *Macquarie Bank* per Middleton and Robertson JJ at FCR 199-201 and FCAFC paragraphs 130-141 and note section 701-85 of the ITAA 1997.



## Appendix 3 – Your comments

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33. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

|                         |   |
|-------------------------|---|
| <b>Due date:</b>        | <b>10 July 2015</b>   |
| <b>Contact officer:</b> | <b>Richard Mold</b>   |
| <b>Email address:</b>   | <b><a href="mailto:Richard.Mold@ato.gov.au">Richard.Mold@ato.gov.au</a></b> |
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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- dividend income
- deemed dividends
- shareholder loans
- consolidated group

*Legislative references:*

- ITAA 1936
- ITAA 1936 Div 7A
- ITAA 1936 109D
- ITAA 1936 109D(1)
- ITAA 1936 109D(1)(b)
- ITAA 1936 109D(1AA)
- ITAA 1936 109D(6)
- ITAA 1936 6(1)
- ITAA 1936 161
- ITAA 1936 161(1A)
- ITAA 1936 Pt IVA
- ITAA 1997
- ITAA 1997 Pt 3-90
- ITAA 1997 701-1
- ITAA 1997 701-85
- Acts Interpretation Act 1901 15AA

- Legislative Instruments Act 2003 56

*Case references:*

- Channel Pastoral Holdings Pty Ltd v. Commissioner of Taxation [2015] FCAFC 57
- Federal Commissioner of Taxation v. Macquarie Bank Ltd (2013) 210 FCR 164; [2013] FCAFC 13
- Project Blue Sky v. ABA (1998) 194 CLR 355; [1998] HCA 28
- Saraswati v. The Queen (1991) 172 CLR 1; [1991] HCA 21

*Other references:*

- Explanatory Memorandum to the Taxation Laws Amendment Bill (No 7) 1997
- Lodgment of returns for the year of income ended 30 June 2014 in accordance with the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Taxation Administration Act 1953*, the *Superannuation Industry (Supervision) Act 1993* and the *Income Tax (Transitional Provisions) Act 1997*
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ATO references

NO: 1-67ECNP7

ISSN: 1038-8982

ATOLaw topic: Income tax ~~ Consolidation ~~ Other

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