TD 2012/12EC - Compendium

Ruling Compendium – TD 2012/12

This is a compendium of responses to the issues raised by external parties to Draft Taxation Determination TD 2011/D7 – Income tax: Division 7A: do the exclusion rules in Subdivision D of Division 7A of Part III of the *Income Tax Assessment Act 1936* necessarily impact on the deemed circumstances arising from Subdivision E of Division 7A of that Act and the consequent operation of Subdivision B of Division 7A of that Act?

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

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	The current draft determination does not make it clear when section 109T will apply, in particular in situations where one or more of the payments or loans involved in the relevant arrangement involve aspects akin to those considered by Subdivision D. Further clarification and examples are required.	The issue addressed in the draft Determination and also the final Determination is the application of the exclusion rules in Subdivision D to deemed payments and notional loans. The final Determination (as with the draft Determination) is therefore premised on the fact that the conditions in section 109T have been satisfied and the deemed payment or notional loan has been determined. It does not set out the Commissioner's views on when section 109T may apply in the first place. It is noted however; that TD 2011/16 already sets out certain factors the Commissioner will take into account when determining the amount of any deemed payment or notional loan arising under section 109T. The factors set out in that Determination are not exhaustive, and other considerations will be taken into account as relevant. Notwithstanding this, the ATO will review this situation to see if additional guidance on these factors can be published

This edited version of the Compendium of Comments is not intended to be relied upon. It provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law.

Issue No.	Issue raised	ATO Response/Action taken
2	The current drafting of paragraphs 11 to 14 is confusing and ambiguous - they thus, need to be revised and rewritten in a more easily understood manner. In particular, it is difficult to understand the basis of the comment in paragraph 14 that it is 'difficult to imagine a situation where there is any interplay between Subdivision D and Subdivision E in cases of the payment of genuine debts'.	These paragraphs, now contained in the Explanation section of the final Determination, have been revised and rewritten in response to this comment. Section 109J basically provides that section 109C does not apply to payments which discharge a pecuniary obligation (provided certain conditions are satisfied). For section 109J to apply the deemed payment must: (a) discharge an obligation that the private company has to pay money to the target entity; and (b) the payment is not more than would have been required to discharge the obligation had the parties been dealing at arm's length. Because in Subdivision E the relevant payment is a deemed payment from the private company to the target entity it cannot in fact be a payment to discharge a pecuniary obligation. Therefore, it is difficult to imagine a situation where there is any interplay between Subdivision D and Subdivision E in cases of the payment of genuine debts. Paragraph 14 has been rewritten and replaced in the final Determination. It will be stated that a deemed payment cannot in fact be a payment to discharge a pecuniary obligation. By way of background, it is further noted that for another Subdivision D provision to have application to a notional transaction the law had to be amended (see subsections 109X(2) to (4) in respect of section 109N). Subsection 109X(2) was substituted and formerly read: **109X(2) Some provisions preventing loan giving rise to dividend do not apply to notional loan.** Sections 109M and 109N do not apply to a notional loan under section 109W (so it must generally be taken into account for the purposes of working out whether the private company is taken under section 109D to have paid a dividend).

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		That is not to say however that the payment of a pecuniary obligation will not be relevant to a determination of whether there is an amount of a deemed payment or notional loan under section 109T (via section 109V or 109W) in the first place.
		As already mentioned, Taxation Determination TD 2011/16 sets out some of the factors that the Commissioner will take into account in determining the amount of any deemed payment or notional loan arising under section 109T. To clarify, in the final Determination it will be stated that the extent to which a payment made under the arrangement being considered is in fact consideration for anything may also be a relevant factor to take into account.
3	While the actual wording of subsection 109T(1)(b) is not concerned with whether there was a purpose of circumventing Division 7A, the EM required the company to have a <u>purpose</u> of paying funds to enable a payment or loan to be made to the target entity. While this Determination may not need to elaborate further on this issue, the ATO needs to provide its view on the operation of section 109T through the issue of a taxation ruling, as previously requested by the professional associations on numerous occasions.	As mentioned above, both the draft Determination and final Determination are premised on the fact that the conditions in section 109T have been satisfied. The Commissioner has already set out his views on the relevance of purpose for determining whether a deemed payment or notional loan arises under section 109T, in Taxation Determination TD 2011/16. There it is stated, at paragraph 34: Paragraph 109T(1)(b) makes no reference to there being any purpose or intent of avoiding Division 7A. It merely refers to the need for a payment or loan from the private company to the interposed entity that a reasonable person would conclude was made as part of an arrangement involving a payment or loan to the target entity, that is, a back to back arrangement. Nonetheless, such a purpose or intent may help establish such a reasonable conclusion. The Commissioner acknowledges that the professional bodies have previously raised section 109T as an issue to be dealt with as part of the law clarification problem. The ATO will endeavour to provide further guidance on this issue.

Issue No.	Issue raised	ATO Response/Action taken
4	**Neither Subdivisions EA nor EB should apply in the case of the payment of genuine debts** The Determination should not be limited to interposed entities covered by Subdivision E. For example, neither Subdivisions EA nor EB should apply in the case of the payment of genuine debts. –That is, if the application of section 109T is to be restricted so that it does not apply in the case of the payment of genuine debts, then the application of sections 109XF and 109XG must be similarly restricted.	As Determinations are 'short form' rulings on a specific issue this issue cannot be confirmed in the finalised version of the draft Determination. The Commissioner will provide guidance in a future product.