TD 94/D110 - Income tax: capital gains: does the exclusion of capital losses in subparagraph 47(1A)(b)(ii) of the Income Tax Assessment Act 1936 (the Act) affect the application of the Archer Brothers principle?*

This cover sheet is provided for information only. It does not form part of *TD 94/D110 - Income tax: capital gains: does the exclusion of capital losses in subparagraph 47(1A)(b)(ii) of the Income Tax Assessment Act 1936 (the Act) affect the application of the Archer Brothers principle*?*

This document has been finalised by TD 95/11.

Australian Taxation Office

Taxation Determination **TD 94/D110**

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: capital gains: does the exclusion of capital losses in subparagraph 47(1A)(b)(ii) of the *Income Tax Assessment Act 1936* (the Act) affect the application of the *Archer Brothers* principle*?

1. No. If a liquidator makes a distribution in accordance with the *Archer Brothers* principle, subsections 47(1A) and 47(1) of the Act can only apply to a distribution appropriated by the liquidator from 'income' derived by the company.

2. We recognise, for example, that where a capital loss results in a loss of distributable funds, there may be insufficient funds to distribute a notional capital gain calculated under paragraph 47(1A)(b). In this case, the exclusion of capital losses in subparagraph 47(1A)(b)(ii) may have no practical effect because the subsection 47(1) deemed dividend cannot exceed the amount of distributable funds.

3. The wording of subsection 47(1) limits the deeming of dividends to amounts actually distributed by the liquidator. Thus, if the recalculated subsection 47(1A) amount exceeds the distributable funds, the excess cannot be deemed a dividend under subsection 47(1).

* The *Archer Brothers* principle is discussed in TD94/D109.

Examples:

Three possible sets of company accounts for XYZ Ltd (in liquidation) are illustrated in column one of the following table. Assume in relation to each alternative set of accounts that Ms Jones, the appointed liquidator, makes distributions in accordance with the Archer Brothers *principle. The subsection 47(1) implications of those distributions are shown in column two. If distributions are not made in accordance with the* Archer Brothers *principle, the subsection 47(1) implications are shown in column three.*

In the table:

(i) it is assumed that the liquidator distributes all the available funds as one final distribution; and
(ii) the following abbreviations are used:

- ***PUC*** *the paid-up capital of XYZ Ltd*

- ***CG/CL*** *a capital gain (loss) made by the company on the disposal of an asset acquired after 19 September 1985 (after allowing for tax where relevant but, in the case of gains, ignoring indexation)*
- ***Pre CG*** *a non-assessable capital gain on the disposal of an asset acquired before 20 September 1985*
- ***DF*** *distributable funds.*

Items shown in the Company Accounts	***Appropriations made from specific funds/profits - (applying the* Archer Bros *principle)***	***No specific appropriations made***
PUC.....$1,000 *CG.....$100* *CL.....$(75)* *DF.....$1,025*	*If the liquidator appropriates $1,000 from PUC, this is not a deemed dividend under subsection 47(1). Although the notional subsection 47(1A) amount is $100, there is only $25 DF remaining and the deemed s47(1) dividend is limited to this amount.*	*The notional subsection 47(1A) amount is $100. The deemed dividend under subsection 47(1) is $100, with the balance of $925 treated as a non-dividend return of PUC.*
PUC.....$1,000 *Pre CG.....$100* *CG.....$100* *CL.....$(75)* *DF.....$1,125*	*If the liquidator appropriates $1,000 from PUC and $100 from Pre CG, these amounts will not be deemed dividends under subsection 47(1). Again, because of a shortfall in DF, the deemed dividend is limited to $25.*	*Again, the notional subsection 47(1A) amount is $100. The deemed dividend under subsection 47(1) is $100. The balance of $1,025 must relate to the Pre CG and PUC and is not a deemed dividend.*
PUC.....$1,000 *CG.....$3,000* *CL.....$(3,000)* *DF.....$1,000*	*If the liquidator appropriates the $1,000 from PUC, there is no deemed subsection 47(1) dividend in this case.*	*The notional subsection 47(1A) amount is $3,000. The deemed dividend under subsection 47(1) is $1,000.*

Commissioner of Taxation
8/12/94

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