



Interim Decision impact statement

Commissioner of Taxation v Bendel [2025] FCAFC 15

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Table of Contents	Paragraph
Summary of decision	1
Overview of facts	5
Issues decided	13
<i>Issue 1 – making a loan within the meaning of subsection 109D(3)</i>	14
<i>Issue 2 – including a deemed dividend in assessable income</i>	17
ATO view of this decision	19
Administrative treatment	24

Venue:	Full Federal Court
Venue reference No:	VID 903 of 2023
Judgment date:	19 February 2025

Summary of decision

1. This Decision impact statement outlines the ATO's response to this case, which concerns whether a private company's failure to call for payment of entitlements to income of an associated trust was the provision of 'financial accommodation' and, therefore, a loan for the purposes of section 109D of the *Income Tax Assessment Act 1936*.
2. This decision is currently subject to a special leave application to the High Court.
3. All legislative references in this Decision impact statement are to the *Income Tax Assessment Act 1936* unless otherwise indicated.
4. All judgment references in this Decision impact statement are to the judgment of *Commissioner of Taxation v Bendel* [2025] FCAFC 15 unless otherwise indicated.

Interim decision impact statement

Overview of facts

5. The Steven Bendel 2005 Discretionary Trust (Trust) was a discretionary trust. Its trustee was Gleewin Pty. Ltd. (Trustee).
6. The beneficiaries of the Trust included Mr Bendel and Gleewin Investments Pty Ltd (Gleewin) (together, the Respondents).
7. Mr Bendel was the sole shareholder and director of the Trustee and Gleewin.
8. Mr Bendel and Gleewin were made presently entitled to income of the Trust for each of the 2013 to 2016 income years.
9. In each of the 2013 to 2017 income years, the Trust made some payments for, or on behalf of, Gleewin that had the effect of reducing Gleewin's entitlements to trust income. However, those entitlements remained substantially unpaid by Gleewin's lodgment day¹ for each of its 2013 to 2016 income year income tax returns.
10. The accounting records of the Trust also showed that in the 2014 to 2017 income years, it made significant payments to Mr Bendel, recorded as an amount owing to the Trust in its accounts.
11. The Commissioner issued amended assessments to the Respondents for each of the 2014 to 2017 income years. Those assessments reflected additional amounts included in their assessable income under section 97, on the basis that:
 - The outstanding amounts represented loans from Gleewin to the Trust within the meaning of subsection 109D(3) that were taken to be dividends paid to the Trust under subsection 109D(1).
 - The beneficiaries entitled to the Trust's income had a corresponding proportion of each deemed dividend included in their assessable income by section 97.
12. The Commissioner appealed the decision made by the Administrative Appeals Tribunal's on 28 September 2023 that Gleewin's unpaid present entitlements to trust income were not loans for the purpose of section 109D.

Issues decided

13. The issues on appeal before the Full Federal Court are set out below.

Issue 1 – making a loan within the meaning of subsection 109D(3)

14. The primary issue was whether Gleewin made a loan within the meaning of subsection 109D(3) to the Trust during each of the 2014 to 2017 years on account of Gleewin's unpaid present entitlement (UPE) to trust income of the previous year.
15. The Court decided that Gleewin did not make a loan to the trustee of the Trust within the meaning of subsection 109D(3). There was therefore no deemed dividend paid by Gleewin to the Trust under subsection 109D(1).
16. In reaching its decision, the Court considered that subsection 109D(3) requires an obligation to repay and not merely an obligation to pay. While it was conceded that a debtor-creditor relationship had arisen in respect of Gleewin's UPE², the Court considered

¹ As defined in subsection 109D(6), being the earlier of the due date for lodgment of the private company's income tax return or the date on which that return is lodged.

² At [92].

Interim decision impact statement

there was no loan or creation of an obligation to repay an amount, as opposed to an obligation to pay. The Court found that section 109D was not satisfied.³

Issue 2 – including a deemed dividend in assessable income

17. The second issue being considered was whether section 6-25 of the *Income Tax Assessment Act 1997* prevents a deemed dividend from being included in the Trust's assessable income or, alternatively, the Applicant's assessable incomes on the basis that the same amount has already been included in assessable income.

18. Consistent with its conclusion for the primary issue (that is, section 109D was not engaged by the circumstances of Gleewin and the Trust), the Court found it unnecessary to decide this issue.⁴

ATO view of this decision

19. The Commissioner has filed a special leave application with the High Court in respect of the Full Federal Court's decision.

20. Until the appeal process is finalised, we do not intend to revise the current views relating to private company entitlements to trust income, as set out in Taxation Determination TD 2022/11: *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*

21. In addition to the application of section 109D, the basis on which private company beneficiaries deal with unpaid entitlements to trust income may have implications under other taxation laws, such as section 100A.

22. Regarding section 100A, a commonly referred to exception to this provision applying is the arrangement being entered into as part of ordinary commercial dealing. In Practical Compliance Guideline PCG 2022/2 *Section 100A reimbursement agreements – ATO compliance approach* (broadly stated), we explain that:

- Where a corporate beneficiary is made entitled to income from a related trust, and the trustee retains those funds by way of a loan on 'commercial terms' for working capital, we will not typically seek to apply compliance resources to consider the application of section 100A.
- For these purposes, we accept that loans on Division 7A complying terms are sufficiently commercial. (See subparagraph 25(e) of PCG 2022/2.)

23. If instead, a trustee retains funds that a corporate beneficiary has been made entitled to without converting that entitlement to a loan at least as commercial as the terms set out in Division 7A, the arrangement would fall outside the green zone described in PCG 2022/2. In situations such as this, we may engage with you to better understand your arrangement, including the risk of section 100A applying.

Administrative treatment

24. Pending the outcome of the appeal process, we are administering the law in accordance with the published views relating to private company entitlements and trust income in TD 2022/11.

³ At [93–94].

⁴ At [95].

Interim decision impact statement

25. Until the appeal process is finalised, where a decision turns on whether or not a UPE is a subsection 109D(3) loan, we do not propose to seek to finalise:

- decisions on issuing amending assessments
- decisions on private ruling applications that go directly to this issue, or
- objection decisions in relation to objections to past-year assessments (for which no settlement was reached).

26. However, if a decision is required to be made (for example, because the taxpayer's period of review will elapse or a taxpayer gives notice requiring the Commissioner to make an objection decision), our decisions will be based on the existing ATO view of the law.

Commissioner of Taxation

19 March 2025

Interim decision impact statement

References

Related Rulings/Determinations:

TD 2022/11

- ITAA 1936 109D(1)
- ITAA 1936 109D(3)
- ITAA 1997 6-25

Legislative references:

- ITAA 1936 Div 7A
- ITAA 1936 97
- ITAA 1936 100A
- ITAA 1936 109D

Other references:

PCG 2022/2

ATO references

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