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AUSTRALIAN TAX ADVISER

Issue 2508 / April 2025

In This Issue

Continued

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In This Issue

Section 1 – Professional Developments

UNPAID PRESENT ENTITLEMENTS: TAXPAYER WINS APPEAL

To explain the significance of this case and unpaid present entitlements (UPEs) generally, we need to briefly review the history of s 109UB (later replaced by ss109XA and 109XB of the ITAA36[1]).

¶8.1 Tax minimisation strategy

As a tax minimisation strategy, it used to be common to include a corporate beneficiary within trust structures if the individual beneficiaries had annual incomes above $135,000[2]. Rather than make further distributions to those high-income individuals, trustees would instead resolve to distribute (but not pay) trust income to a corporate beneficiary, thereby limiting tax on the overall distribution to 30%[3].

Although the corporate beneficiary became presently entitled to that distribution, the trustee would not physically pay the amount to the company, instead using the funds to make interest-free loans to the individual beneficiaries. Section 109UB was introduced to defeat such measures. It did this by including the amount of any such loan in the assessable income of the individual beneficiary as a deemed dividend[4].

¶8.2 UPE as a 'Loan' and deemed dividends – TR 2010/3

That plan worked until 2009, when the ATO tumbled onto the realisation that the UPE may itself constitute a 'loan' from the company to the trust. If it was, then the trust (as an automatic associate of the company) would be an associate of the shareholder(s) (or associates) of the company. The unpaid present entitlement would (as a loan from the company to an associate of a shareholder) become a deemed dividend under s 109D of the ITAA36.

Following the release of Taxation Ruling TR 2010/3[5], the Commissioner has applied Division 7A on the basis that any UPE owing to a corporate beneficiary, if left unpaid, could amount to 'financial accommodation' or a 'transaction (whatever its terms or form) which in substance effects a loan', would be a 'loan' as defined in s 109D(3). That is, until now.

1 The effect of these provisions is to tax loans advanced by a trust to human beneficiaries in the same way as if they had been loans made by the company to its shareholders.
2 Readers will be aware that the marginal tax on incomes below this level are taxed at the same rate as companies.
3 The company tax rate.
4 As this was unfrankable, the recipients would receive no tax relief from franking credits.
5 Since replaced by TR 2022/11 from 1 July 2022.