

Bendel's case – Unpaid Present Entitlements are not Division 7A Loans

Pursuant to Division 7A of the ITAA 1936, a "loan" that is made by a private company to its shareholder or an associate of that shareholder may be deemed to be a dividend (subject to various exceptions). For this purpose, the Commissioner has held a long-standing view that an unpaid present entitlement ("UPE") by a trust to a corporate beneficiary is regarded as the provision of financial accommodation by the corporate beneficiary to the trust, and hence a "loan" from a private company for Division 7A purposes.

On 19 February 2025, the Full Federal Court in [*Commissioner of Taxation v Bendel* \[2025\] FCAFC 15](#) found that UPEs owed by a trustee to a corporate beneficiary are not "loans" for the purposes of Division 7A, displacing the Commissioner's long-standing position in [TD 2022/11](#).

The key issue in the *Bendel* case was whether a private company can be considered to have made a "loan" for the purposes of s109D(1) in circumstances where:

- It is a beneficiary of a trust and is presently entitled to an amount of trust income;
- That amount remains unpaid (i.e. it is a UPE); and
- It consents to the trustee retaining the amount of the UPE.

Under s109D(3), a "loan" is defined to include:

- (a) An advance of money; and
- (b) A provision of credit or any other form of financial accommodation; and
- (c) A payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and
- (d) A transaction (whatever its terms or form) which in substance effects a loan of money.

The Full Federal Court found that:

- Each of the paragraphs in s109D encapsulated a concept of repayment. In particular, s109D(3)(b) was to be construed as referring to a provision of credit or any other form of financial accommodation that involved an obligation to repay an identifiable principal sum, rather than simply an obligation to pay.
- The creation of an obligation to pay an amount to a private company that did not result from the transfer of an amount from or at the direction of the private company was not a "loan" within the meaning of s109D(3).
- Although a debtor-creditor relationship was created by the trustee resolution and the entry in the trust accounts, there was no "loan" or creation of an obligation to repay an amount as opposed to an obligation to pay.
- The concept of "debt" is not to be equated to the concept of a "loan". In particular, the concept of a "loan" is narrower than a "debt".

Because of the statutory context in Division 7A, the court disagreed with the perceived mischief within the Commissioner's position, being the creation of a present entitlement that is not paid to a corporate beneficiary and remains in the trust, but which benefits from taxation at the corporate beneficiary's corporate tax rate.

The impact and considerations from the judgement in *Bendel* include:

- It is likely that the Commissioner will seek special leave to appeal to the High Court (within 28 days of the decision). It is also possible that there may be a future legislative amendment to the current law (e.g., if there is no appeal or if any appeal is dismissed), though given the upcoming federal election, any such amendment may not be possible in the short term. A decision impact statement from the Commissioner is also expected. This gives rise to some uncertainty for taxpayers.
- There is an opportunity for taxpayers to consider amending prior period returns if a taxpayer applied the Commissioner's views and included a deemed dividend in their assessable income as a result of an existing UPE.
- Private company beneficiaries of trusts should seek tax advice on the impact of the decision on their current distribution strategies and historical arrangements, pending outcome of the Commissioner's response.

Thin Capitalisation – 2024 Third Party Debt Test Choice

The ATO has updated its [guidance](#) in respect of the approved form to make a choice to use the Third Party Debt Test for thin capitalisation purposes.

For the 2024 income year, a taxpayer may:

- (a) revoke an otherwise irrevocable choice to apply the Third Party Debt Test; or
- (b) seek an extension of time to apply the Third Party Debt Test.

This concession has been provided by the Commissioner given that Draft Taxation Ruling [TR 2024/D3](#) and Schedules 3 and 4 of Draft Practical Compliance Guideline [PCG 2024/D3](#) will not be finalised by the time most taxpayers lodge their 2024 income tax return.

For a revocation scenario, the administrative relief only applies if:

- The taxpayer has made a valid choice to apply the Third Party Debt Test;
- A taxpayer has relied on preliminary views of the ATO in the draft ruling and compliance guideline;
- This preliminary view changes in the final version of the ruling or guideline; and
- The change in the final ruling or guideline produces an adverse outcome for the taxpayer under the Third Party Debt Test.

For an extension of time scenario, the administrative relief only applies if:

- A taxpayer did not make a choice to apply the Third Party Debt Test based on the draft ruling and guidance;
- The preliminary view changes in the final version of the ruling or guideline; and
- The changes result in an increase in the taxpayer's third party earnings limit under the Third Party Debt Test for the year.

Under both scenarios, a submission will need to be made to the Commissioner within six months of the final ruling or guideline being issued, noting the change to the Commissioner's preliminary views relevant to the taxpayer's circumstances.

The Commissioner will shortly release the approved form for the above concessions, as well as guidance on how to submit a request under the concessions.

Effective record keeping for Next 5,000 private groups

The ATO has released commentary on its expectations for effective record keeping for taxpayers within the Next 5,000 private groups tax performance program, which covers Australian resident individuals who, together with their associates, control wealth of more than \$50 million. This follows the regular and ongoing engagement with private groups which reveal that basic record keeping, including the substantiation of income and expenses, is not always well maintained.

The ATO expects taxpayers to keep up-to-date and accurate records for tax returns and business activity statements, guidance on which is provided in the [Record keeping for business guide](#), otherwise, taxpayers can expect lengthy and costly audits potentially denying deductions and input tax credits. Although the ATO commentary is in relation to taxpayers within the Next 5,000 private groups, the guide is applicable to all taxpayers in meeting their tax, superannuation and employer obligations.

Contact

For more information and other updates, please visit our website at www.omnitax.com.au. Should you wish to discuss any matter or require any additional information, please email us on contact@omnitax.com.au.