

29 April 2022

Mr Peter Glindemann
Australian Taxation Office

By email: peter.glindemann@ato.gov.au

Dear Peter

Draft Tax Determination TD 2022/D1

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to provide feedback to the Australian Taxation Office (ATO) on the draft Tax Determination TD 2022/D1 (Draft Determination).

CA ANZ represents more than 128,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live. Around the world, Chartered Accountants (CAs) are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

Based on feedback received, some CAs have questioned whether the timing of the ATO's review of [TR 2010/3](#) *Income tax: Division 7A loans: trust entitlements* and [PS LA 2010/4](#) *Division 7A: trust entitlements* and the change of view were appropriate. Given the Government has made several Federal Budget announcements to legislatively amend Division 7A, including making changes for unpaid present entitlements (UPEs) to come within the scope of Division 7A, some CAs queried whether the ATO should have waited for the legislative changes to be made.

Furthermore, CAs have flagged that their clients would have financial difficulty switching from the arrangements under PS LA 2010/4, where only interest payments must be paid, to Division 7A complying loans, where principal and interest payments must be paid. In view of the impact of COVID-19 on many small and medium enterprises, CAs have questioned the appropriateness of the timing of the release of the Draft Determination.

Nevertheless, CA ANZ commends the ATO on its deferral of the release of the Draft Determination from last year to early this year to allow tax professionals some time to assist their clients navigate through the various COVID-19 business support. Also, CA ANZ welcomes the ATO's decision to defer the application date of the Determination from the 2022 income year to the 2023 income year.

CA ANZ's comments on the Draft Determination are outlined in Appendix A attached.

If you have any queries, please contact Karen Liew at the first instance on (02) 8078 5483 or karen.liew@charteredaccountantsanz.com

Yours sincerely,



Michael Croker
Tax Leader Australia

Appendix A

CA ANZ comments

Timing of the provision of financial accommodation

The current approach whereby the Division 7A loan is made in either the year of the present entitlement (where a specific amount is distributed to the company) or the year following the present entitlement (where a proportion or percentage of income is distributed to the company) creates unnecessary complexity and uncertainty.

For example, a trustee may resolve to distribute an amount up to a cap to a corporate beneficiary with the remainder of the trust income to the default beneficiary. In this situation there is a cap of a specified amount to be distributed to one beneficiary and an unknown amount to be distributed to the default beneficiary. If the trust net income amount is not yet finalised as at 30 June 2023 but is substantial enough that there is a probability that the corporate beneficiary will be entitled to the capped amount, is this level of knowledge enough for the corporate beneficiary to be able to demand immediate payment from the trustee?

Another example of unnecessary complexity is where the trustee resolves to distribute a fixed amount to one corporate beneficiary and the remainder of the distributable income to a different corporate beneficiary. The trustee would have to keep track of two different timelines for the Division 7A complying loans that replace the two trust entitlements which arose from the same trust distributable income for the one income year.

CA ANZ recommends the ATO should adopt a practical approach regarding the timing of the provision of financial accommodation. A uniform approach to timing should be adopted consistent with PS LA 2010/4 whereby the financial accommodation was taken to be provided in the year following the present entitlement.

Implementing the complying loan agreement in Appendix 2

If the written Division 7A complying loan agreement is treated for tax purposes as not a new loan agreement but simply documenting the 'financial accommodation' in writing, then the term of complying loan agreements in the examples look like they are slightly longer than seven years. That is, the term of the loan exceeds the maximum term allowable for a complying loan under section 109N. We recommend that further commentary be included to address the timing of the financial accommodation and the complying loan agreement maturity term of seven years. Are we looking at seven years from the end of the income year in which the financial accommodation arose or seven calendar years?

Use of asset held in Sub-trust

The Draft Determination suggests that where amounts are set aside on sub-trust, the use of the funds by a shareholder/associate with the private company's knowledge/acquiescence amounts to the provision of financial accommodation by the company. However, what happens when an asset, that is not cash, is set aside on sub-trust? Further clarification is required to deal with the situation where what is set aside in the sub-trust is a non-cash asset (e.g. real property) as it is unclear if use of the asset by the shareholder/associate with the company's knowledge amounts

to the provision of financial accommodation or something else (such as a section 109CA payment).

Maturing sub-trusts under PSLA 2010/4 in the 2022 income year.

The ATO will need to address whether PCG 2017/13 will be amended to apply for PS LA 2010/4 sub-trust arrangements that mature in the income year ended 30 June 2022. There is a time gap between the application of PCG 2017/13 and the application of TD 2022/D1.

Suggested examples for inclusion in the final version

The Draft Determination commentary on the timing of when financial accommodation is provided, refers to the trust distribution minute of resolution without referring to the terms of the deed. In light of this commentary, the Draft Determination states that where the resolution references a fixed amount the date of provision of financial accommodation is the date of the resolution.

- Can another example be included to deal with the situation where the terms of the trust deed provides for a delayed payment of the trust distribution in the trustee resolution, similar to that for dividends. For example, a trust distribution amount is declared but it is not due to be paid until three months later. In this instance the beneficiary cannot call for payment until that later date.
- Can another example be included to illustrate the timing of when the financial accommodation is provided to cover the situation where a private company beneficiary will receive a fixed entitlement only if other beneficiaries' entitlements are satisfied.