

Tax EOFY issues 2020 – ATO responses

ISSUE RAISED	ATO RESPONSE
<p>Trust resolutions</p> <p>1. Has the ATO considered extending the time for making trust resolutions for the 2020 income year given the impact of the COVID-19 crisis on tax professionals?</p> <p>For example, would the ATO consider a one-off administrative concession allowing trustees of discretionary trusts to provide their resolutions by 31 August 2020, and to not apply compliance resources during the period 30 June 2020 to 31 August 2020. A similar concession was provided to trustees a few years ago.</p>	<p>An administrative concession to extend the time for making trustee income resolutions for the 2020 year is not open under the law, notwithstanding the disruption caused by COVID-19.</p> <p>A present entitlement to the income of the trust estate for section 97 purposes needs to be validly created in a beneficiary by 30 June (or any earlier date specified in the deed in relation to the creation of income entitlements).</p> <p>Income Tax Ruling IT 329W contained an administrative approach allowing trustee resolutions to be made within 2 months after the end of the income year for the purposes of Division 6. However, IT329 was withdrawn in 2011 as it was contrary to the decision in Colonial First State Investments Ltd v. Federal Commissioner of Taxation [2011] FCA 16 and principles articulated in the earlier decisions.</p> <p>Most trust deeds also contain a default income clause which would come into play in the event the trustee fails to make a valid appointment of income by the relevant time specified in the deed. So any administrative concession, even if it were open to consideration, would be of little practical effect.</p> <p>Advisors and trustees should consider their trust deeds to ensure trustee resolutions to appoint income to beneficiaries are completed by the appropriate time, which for many trusts will be by 30 June 2020. See the Trustee resolutions checklist available on the Trusts Tax Time Toolkit page.</p>
<p>UPE put on hold by bank</p>	<p>Where a present entitlement has already arisen in circumstances that were not a reimbursement agreement, subsequent arrangements made in response to the requirements of a financial institution as a result of the</p>

<p>2. Can the ATO clarify it won't seek to argue a distribution is invalid simply because a bank places a restriction on cash repayments of a UPE (new or existing) to beneficiaries.</p> <p>A present entitlement is a present legal right of a beneficiary to demand and receive payment of the income. Restrictions may be imposed by financial institutions which (effectively) results in the UPE being subordinated to bank debt. Adding restrictions to a present entitlement may give rise to issues of the validity of a trust distribution for income tax purposes.</p>	<p>COVID-19 situation will not invalidate that entitlement or cause section 100A to apply in relation to it.</p> <p>Where a present entitlement had not already arisen, the operation of the law will depend on the facts.</p> <p>Where a trustee's capacity to satisfy a beneficiary's entitlement has been significantly diminished by liquidity issues attributed to COVID-19, this will not prompt the Commissioner to dedicate compliance resources to considering the validity of the entitlement or the application of section 100A to the entitlement. However, trustees are reminded of the importance of complying with the terms of their trust deeds and, in cases under review, the Commissioner will continue to apply the law.</p> <p>This approach is intended to provide comfort and certainty to those trustees and associated private groups who experience genuine liquidity difficulties as a result of COVID 19. The Commissioner will monitor behaviour to ensure the approach works as intended.</p>
<p>UPE that is refinanced due to bank requirement</p> <p>3. We would like comfort from the ATO that it will not seek to apply section 100A where a UPE is paid and then lent back to the trust (as a loan). The loan may then be put on terms that require it to be a subordinated debt.</p>	<p>As above.</p>
<p>Loans put on hold during COVID-19</p> <p>4. We are seeking clarity that the ATO will not seek to argue that there would be an 'in-substance' debt forgiveness caused by entering into</p>	<p>Generally, for a debt to be considered forgiven for tax purposes, the debtor must somehow be relieved from the legal obligation to repay the debt, or there may be evidence that the creditor will not insist on repayment or will not rely on the obligation for repayment.</p>

<p>arrangements that may result in debts not being called upon in the immediate future due to COVID-19.</p> <p>We are seeking to rely on <i>Tasman Group Services Pty Ltd v FC of T [2009] FCAFC 148</i> that such arrangements should not of themselves be regarded as a debt forgiveness. An in-substance debt forgiveness could give rise to significant issues under Division 243, Division 245 and Division 7A.</p>	<p>Where a creditor allows for nothing else than postponement of an amount payable, and the debtor acknowledges the debt, a debt will not be considered forgiven, unless there is evidence that the creditor no longer will rely on the obligation for repayment.</p>
<p>Division 7A – deferral of loans</p> <p>5. ATO to confirm that where a private company agrees to defer repayment of all or part its Division 7A loan beyond 30 June 2020, subsection 109F(6) will not apply?</p>	<p>Subsection 109F(6) applies if the creditor will not insist on payment or rely on the borrower’s obligation to pay.</p> <p>Without more, allowing more time for repayment will not result in the debt being treated as forgiven.</p> <p>A deemed dividend may arise if the debtor does not make a minimum yearly repayment as required by section 109E. The Commissioner has a discretion under section 109RD to disregard that deemed dividend if the borrower was unable to make the minimum yearly repayment and the Commissioner is satisfied that the failure occurred because of circumstances beyond the borrower’s control.</p> <p>The Commissioner has provided guidance explaining how he will administer section 109RD for creditors affected by COVID-19. https://www.ato.gov.au/Forms/Request-to-extend-time-to-make-minimum-yearly-repayments-for-COVID-19-affected-borrowers-under-section-109RD/</p>
<p>Timing of derivation for Jobkeeper payments (to the entity)</p>	<p>JobKeeper payments are assessable income under section 6-5.</p> <p>For a business entity operating on an accruals accounting basis, JobKeeper payments for fortnights ending in June will be derived in the month in</p>

6. Confirm whether Jobkeeper payments are assessable income under section 6-5 or section 15-10. If payments are ordinary income, when will the income be derived?

which the entity provides a valid completed business monthly declaration for those fortnights in June. This will generally be in July (or a later month) and will be assessable in the 2020-21 income year. This is because the payments are derived when the entity has a legal entitlement to those payments. It is the ATO's receipt of the business monthly declaration that triggers an entity's entitlement to JobKeeper and payment of that entitlement.

For a business entity operating on a cash accounting basis, the payments for a JobKeeper fortnight are derived when the entity receives those payments. For JobKeeper fortnights ending in June, those payments will be made in July (or later), following receipt of the entity's business monthly declaration, and will be assessable in the 2020-21 income year.

We have updated our web content on the tax consequences of JobKeeper payments to reflect the above:
<https://www.ato.gov.au/General/JobKeeper-Payment/Employers/Paying-your-eligible-employees/#Taxconsequences>

Deductions for vacant land where business suspended due to COVID-19

7. Can the ATO confirm it will not seek to apply the provisions in section 26-102 to deny deductions for holding costs where the business use of the land has been suspended as a result of COVID?

If the land contains a permanent and substantial structure that remained in use or available for use during this period, then subsection 26-102(1) of the ITAA 1997 would not apply to deny deductions for holding costs where the business use of the land has been suspended as a result of COVID-19.