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31 May 2021

Tax Counsel Office
Inland Revenue Department
New Zealand

By email: Public.Consultation@ird.govt.nz

Your Reference: PUB00362

Dear Sir/Madam,

PUB00362: Deemed dividends – Exposure Draft Interpretation Statement

CPA Australia represents the diverse interests of more than 168,000 members, including over 2,700 members in New Zealand, working in over a 100 countries and regions supported by 19 offices around the world. We make this submission on behalf of our members and in the broader public interest.

The Inland Revenue's (**IRD**) **PUB00362: Deemed dividends Exposure Draft Interpretation Statement** (**the Draft Interpretation Statement**) updates and replaces the "Deemed Dividends" guidance contained in Public Information Bulletin 125 (**the Bulletin**) issued in March 1984 which sought to document the IRD's practices at that time. The Bulletin was an anti-avoidance commentary only and addressed only two specific situations with no further substantive comment or analysis.

In our view, the overall analysis and commentary in the Draft Interpretation Statement is a positive expansion of the IRD's guidance on deemed dividends with clear examples covering a variety of situations, circumstances and transactions. We identify the following points for IRD's consideration.

Amounts that are a dividend

Caused by a shareholding

The Draft Interpretation Statement notes the requirement that in order to be considered a dividend a transfer of company value must have been caused by a shareholding and includes simple examples to illustrate this point.

However, there is no significant commentary on the principles that are to be applied when considering what constitutes a dividend. This would be useful for less straightforward scenarios. For example, principles-based guidance would be useful when determining how to apply the 'caused-by-a-shareholding' test in situations where the employee may be a very senior employee with no comparable ranking with another employee.

Statement of principles

We submit the basic premise of the deemed dividend rules is to ensure that:

- the transfer of value, or
- distributions paid by a company disguised as something other than a dividend,

to its shareholders or their associates tax-free, is essentially treated as a dividend.

The objective of the deemed dividends rules is to treat certain transactions between companies, their shareholders and their associates, as dividends. The rules can apply to loans, payments, service or assets and debt forgiveness.

A statement of principles of this kind could be included after paragraph 3 of the Draft Interpretation Statement.

Money's worth, services and close companies

The guidance on money's worth, services and close companies is helpful in clarifying the IRD's approach to transfers of value in relation to the exclusions and carve-outs.

The IRD proposes that a dividend will not arise where the transfer of value involves services performed by a company for a shareholder. This reflects the section CD 5(3) exclusion from dividends where the money's worth provided by the company is only the provision of services (as per Example 4 of the Draft Interpretation Statement).

However, direct expenditure incurred by a company to give a benefit to shareholder of a close company will be considered a transfer of company value. This reflects the section CD 5(4) carve-out from the above exclusion from dividends where the money's worth provided by the company is for the benefit of expenditure of the company (as per Example 5 of the Draft Interpretation Statement).

We note that for dividend purposes, the provision of goods and the use of assets are not services.

Calculating the amount of a dividend

Dividend timing

The Draft Interpretation Statement states that dividends arising from making a property available to a shareholder are treated as being paid six months after the end of the company's income year (per Paragraph 24 of the Draft Interpretation Statement).

In practice, this can be problematic where shareholding changes occur between the date the property is made available and the date when the deemed dividend arises, namely six months later. As noted in the Draft Interpretation Statement, while that issue can be addressed by having the company give the shareholder earlier notice of the dividend, advisors may only be notified of shareholding changes after that date. Therefore, a more practical approach may be needed.

Imputation credits

Paragraphs 31 to 34 of the Draft Interpretation Statement recognises that deemed dividends can give rise to imputation credit issues but fails to adequately address those issues. Specifically, the inability to retrospectively attach imputation credits and the problems with a deemed dividend setting a benchmark imputation credit ratio that all other dividends in an income year must follow creates difficulties. While a ratio change declaration can be completed, this can only be done within certain timeframes which may not always be practical.

In our experience, this matter is often overlooked by taxpayers and the IRD. Therefore, the opportunity to include an amendment to achieve a practical and reasonable solution should be taken.

Including a reference to the general anti-avoidance rules

For clarity, we suggest that the Draft Interpretation Statement include a general statement about the application of the general anti-avoidance rules where attempts to subvert the deemed dividend rules are made.

If you have any queries about this submission, contact Rick Jones, Country Head, New Zealand on +64 21 190 1039 or **rick.jones@cpaaustralia.com.au** or Elinor Kasapidis, Senior Manager Tax Policy on +61 3 9606 9666 or **elinor.kasapidis@cpaaustralia.com.au**.

Yours sincerely,

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