DIVISION 7A:

UPE CHECKLIST 2022

COMPANY TAX

RETURN PREPARATION

CHECKLIST 2019

This checklist will assist public practice members to determine whether Subdivision EA of Division 7A applies. The checklist needs to be completed for relevant entities each year.

The main focus of the checklist is on transactions undertaken by a trust that either directly or indirectly (e.g. via a chain of trusts) owes the Unpaid Present Entitlement (UPE) to the private company.

This checklist is designed to deal with a situation where:

* a private company is owed entitlement UPE of the income of a trust estate
* the trustee of a trust estate that either directly or indirectly\* owes the present entitlement to the private company undertakes one or more of the following transactions in favour of a shareholder or an associate of a shareholder of the private company (except a shareholder or associate that is a company)\*\*:
  + a loan
  + a payment or
  + a debt forgiveness.

\* An indirect UPE owing to a private company would encompass a situation where there are UPEs owing via a chain of trusts to a private company. For example, Trust A has a UPE owing to Trust B, which has a UPE owing to Private Company C. Rules in Division 7A deem Trust A in effect to have a UPE owing to Private Company C.

\*\* Division 7A also contains complex integrity rules to ensure that payments, loans and debt forgiveness through an interposed entity are also potentially caught as deemed dividends.

This checklist does not deal with UPEs formerly owed by a trust to a private company that has been subsequently discharged in that the entitlements have been converted into a loan. Refer to [CPA Australia’s standard 2022 Division 7A Checklist](https://www.cpaaustralia.com.au/-/media/project/cpa/corporate/documents/tools-and-resources/taxation/2022-year-end-tax-resources-au/2022-division7achecklistdetailedwithinstructions.docx?rev=ad61c240a6e74d46b0246867917dd29b) in these circumstances.

This information is based on legislation current as at 9 June 2022.

**PROPOSED AMENDMENTS TO DIVISION 7A**

Significant changes to Division 7A have been announced by the Federal Government. At the time of writing, the proposed start date for these changes has been deferred to the income year commencing on or after the date of Royal Assent of the enabling legislation. However, it is noted that an exposure draft has not been released, nor has a bill dealing with the changes been introduced into Parliament. Notwithstanding this, it is important to be aware of the proposed changes when undertaking tax planning with clients. Refer to the ATO website for more information.

**About the author**

This checklist was prepared by SW Accountants & Advisors on behalf of CPA Australia.

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| 1. Unpaid present entitlement and sub-trust arrangement | Yes | No |
| 1. Was a private company owed a present entitlement to the income of a trust estate as at the earlier of the due date for lodgement and the actual date of lodgement of the trust’s tax return for the current year? |  |  |
| If the answer is no, Subdivision EA does not apply to you. You have completed the checklist.  If the answer is yes, continue to question 1b. | | |
| 1. Has the UPE been converted into an actual loan? |  |  |
| If the answer is no, continue to question 1c.  If the answer is yes, please proceed [to CPA Australia’s standard 2022 Division 7A Checklist](https://www.cpaaustralia.com.au/-/media/project/cpa/corporate/documents/tools-and-resources/taxation/2022-year-end-tax-resources-au/2022-division7achecklistdetailedwithinstructions.docx?rev=ad61c240a6e74d46b0246867917dd29b). You have completed this checklist.  Taxation Ruling TR 2010/3 sets out circumstances in which certain UPEs made by a trustee of a trust to a private company beneficiary will be regarded as a loan under section 109D of the general provisions of Division 7A. The ATO contends that the ruling will potentially apply to certain UPEs that have been documented or accounted for as ‘actual loans’ whether made before or after 16 December 2009. However, where the UPE has not been documented or accounted for in this way, the ruling will only apply prospectively from 16 December 2009 to ‘deem’ post 16 December 2009 UPEs to be loans under section 109D in certain circumstances.  Note however that due to the release of draft Taxation Determination TD 2022/D1 and its significant departure from the positions set out in Taxation Ruling TR 2010/3 and Practice Statement PS LA 2010/4, both are proposed to be withdrawn with effect from 1 July 2022. When the final Determination is issued, it is proposed to apply to trust entitlements arising on or after 1 July 2022. Draft Taxation Determination TD 2022/D1 showcases the Commissioner’s shifted view on whether UPEs of a corporate beneficiary of a trust or amounts held on sub-trust is taken to be the provision of ‘financial accommodation’, and therefore a loan for Division 7A purposes. | | |
| 1. Was the UPE in existence before 16 December 2009? |  |  |
| If the answer is no, continue to question 1d.  If the answer is yes, continue to question 2. | | |
| 1. Has the UPE been put on a sub-trust arrangement (by the required deadline) for the sole benefit of the private company beneficiary? |  |  |
| If the answer is yes, continue to question 2.  If the answer is no, the unpaid entitlement will have converted into a deemed loan and Subdivision EA does not apply to you. Please proceed to [CPA Australia’s standard 2022 Division 7A Checklist](https://www.cpaaustralia.com.au/-/media/project/cpa/corporate/documents/tools-and-resources/taxation/2022-year-end-tax-resources-au/2022-division7achecklistdetailedwithinstructions.docx?rev=ad61c240a6e74d46b0246867917dd29b). You have completed this checklist.  The ATO has stated in Taxation Ruling TR 2010/3 that if a UPE has been treated as a loan under section 109D of the general provisions of Division 7A, Subdivision EA will also not apply to the loan made by the distributing trust. This statement ensures that the UPE is not subject to potential double taxation. However, where UPEs are held on sub-trust for the sole benefit of the private company, Subdivision EA may still apply in respect of transactions undertaken at the trust level.  Practice Statement Law Administration PS LA 2010/4 provides guidance on the administration of Taxation Ruling TR 2010/3 in relation to the UPE owed by a trust estate to a private company.  Note that Practice Statement Law Administration PS LA 2010/4 and Taxation Ruling TR 2010/3 are proposed to be withdrawn with effect from 1 July 2022. As such, the 2022 income year will be the final year that taxpayers can take advantage of complying sub-trust arrangements under PS 2010/4. However, the ATO has stated that compliance resources will not be allocated to arrangements involving pre-1 July 2022 trust entitlements and sub-trust arrangements that correspond to the guidance in Practice Statement Law Administration PS LA 2010/4 and Taxation Ruling TR 2010/3. For the avoidance of doubt, this would include a sub-trust arrangement commenced on or after 1 July 2022 in respect of a trust entitlement arising before that date.  The Commissioner in Draft Taxation Determination TD 2022/D1 considers that the express terms of subsection 109D(3) are not required to be interpreted in the constrained way to accommodate for Subdivision EA. Consistent with the legislative context of Division 7A, an amount that has been treated as a loan and dealt with under section 109D should be regarded as a loan for all purposes of Division 7A, including Subdivision EA. Accordingly, the Commissioner will not treat a UPE in those circumstances as a present entitlement that remains unpaid for Subdivision EA purposes. This is consistent with the position taken in Taxation Ruling TR 2010/3.  Subdivision EA also still has scope to operate in circumstances where the UPE of a private company does not result in financial accommodation. | | |

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| 2. Does the private company (which is owed the present entitlement) have a distributable surplus for the year of income? | Yes | No |
| If the answer is yes, Subdivision EA of Division 7A can potentially apply. Continue to question 3.  If the answer is no, Subdivision EA of Division 7A cannot result in the private company being deemed to have paid an unfranked dividend, in which case there is no need to proceed. You have completed this checklist. |  |  |
| Whether or not the private company has a distributable surplus is determined under section 109Y.  Under sections 109XA(4) and 109XC(7) the amount of any deemed dividend that arises under Subdivision EA will be the lower of the amount of the actual payment, loan or debt forgiveness transaction; the amount of the UPE owed to the private company beneficiary; and the distributable surplus of the private company beneficiary as at the end of the tax year in which the actual transaction occurred.  Where the private company is part of a tax consolidated group, and the shareholder or associate is outside that group, only the accounts of that private company are taken into account when determining the distributable surplus, as discussed in Taxation Determination TD 2004/68.  In working out the company’s distributable surplus it is important to take into account the income tax liability that may arise at the end of the income year, as well as any unpaid PAYG instalments, as discussed in Taxation Determination TD 2012/10. | | |
| 3. Did the trustee of the trust make a loan (either directly or indirectly) to a shareholder, or an associate of a shareholder, of the private company? | Yes | No |
| Loans to shareholders or associates made by a trust with a UPE owing to a private company, during the current year, that were not fully repaid before the earlier of the due date for lodgement and the actual date of lodgement of the trust’s tax return for the current year are dealt with under section 109XA(2).  If the answer is no, continue to question 5. If the answer is yes, continue to question 4. |  |  |
| From 1 July 2009, due to the application of Subdivision EB, Subdivision EA may apply where a trust makes a loan to a shareholder or an associate of a shareholder of a private company through one or more entities interposed between the trust and the shareholder or associate. This will only apply where it can be reasonably concluded that the entity was interposed solely or mainly as part of an arrangement involving a payment or loan made by the trust via an interposed entity to a shareholder or an associate of a shareholder. | | |
| 4. Did the trustee and the shareholder, or shareholder’s associate, place the loan on excluded terms before the earlier of the due date for lodgement and the actual date of lodgement of the trustee’s return of income for the trust for the current year? | Yes | No |
| If the answer is yes, Subdivision EA should not be applicable to the loan. However, the shareholder or associate should ensure that minimum yearly repayments are made in subsequent years. You have completed this checklist.  If the answer is no, the private company may be deemed to have paid a deemed unfranked dividend to the shareholder (or associate of a shareholder) of the private company, subject to a cap equal to the distributable surplus of the private company. Continue to question 5. |  |  |
| 5. Payments by a trust with a UPE owing to a private company (either directly or indirectly) to a shareholder, or an associate of a shareholder, of the private company. | Yes | No |
| 1. Did the trustee make a payment to a shareholder, or an associate of a shareholder (either directly or indirectly), of a private company (except a shareholder or associate that is a company) during the current year, other than a loan? (Refer to section 109XA(1)) |  |  |
| If the answer is no, continue to question 7. If the answer is yes, continue to question 5b.  From 1 July 2009, due to the application of Subdivision EB, Subdivision EA may apply where a trust makes a payment to a shareholder or an associate of a shareholder of a private company through one or more entities interposed between the trust and the shareholder or associate. This will only apply where it can be reasonably concluded that the entity was interposed solely or mainly as part of an arrangement involving a payment or loan made by the trust via an interposed entity to a shareholder or an associate of a shareholder. | | |
| 1. Was the payment a discharge or a reduction in a present entitlement of the shareholder or an associate of the shareholder that is wholly or partly attributable to an amount that represents an unrealised gain (see note below) in the trust? |  |  |
| If the answer is no, continue to question 7. If the answer is yes, continue to question 6.  Section 109XA(7) defines an unrealised gain as ‘any unrealised gain, whether of a capital or income nature’. For example, a capital profit generated from the revaluation of an asset. However, an unrealised gain will not arise to the extent that the gain will be included in the assessable income of the trust in the year before the year in which the payment was made, or the year in which the payment is made or in the year of income after the year in which the payment was made. | | |
| 6. Was the payment a discharge of an obligation by the trustee, other than a payment discharging a UPE? | Yes | No |
| If the answer is no, the private company may be deemed to have paid an unfranked dividend to the shareholder (or associate or a shareholder) of the private company capped to the distributable surplus of the private company. You have completed this checklist.  If the answer is yes, continue to question 7.  Division 7A exemptions under section 109J, section 109K, section 109NA and section 109NB are not applicable to transactions subject to Subdivision EA. |  |  |
| 7. Trusts with a UPE owing to a private company (either directly or indirectly) that forgive a debt in favour of a shareholder, or an associate of a shareholder, of the private company. | Yes | No |
| 1. Was all or part of a debt owed to a trustee by a shareholder or an associate of a shareholder of a private company (except a shareholder or associate that is a company) forgiven during the current year? (Refer to section 109XA(3)) |  |  |
| If the answer is no, you have completed the checklist. If the answer is yes, continue to question 7b.  Section 109F(3) provides that a debt is forgiven where the amount of the debt would be forgiven under sections 245-35 or 245-37 of the *Income Tax Assessment Act 1997* which deal with commercial debt forgiveness. This would include where the debt is realised, waived or otherwise extinguished, the debt is deemed to be forgiven because the right to recover the debt expires under a statute of limitations or if an entity subscribes for shares in a company to enable it to pay or discharge a debt it owes to the entity. A debt forgiveness will also arise in relation to certain debt parking arrangements under section 109F(5), or where it can be reasonably expected that a private company will not insist on payment or rely on the debtor’s obligation to repay under section 109F(6). However, section 109F(8) provides that if the same debt is forgiven at different times under different provisions of section 109F then section 109F will only apply to the first debt forgiveness. | | |
| 1. Has the loan that was forgiven been included in the assessable income of the shareholder or associate of shareholder under Subdivision EA in the current or an earlier year of income? |  |  |
| If the answer is no, continue to question 8.  If the answer is yes, Subdivision EA should not be applicable to the debt forgiveness. You have completed the checklist. | | |
| 8. Has the debt been forgiven under the Bankruptcy Act? | Yes | No |
| If the answer is no, continue to question 9.  If the answer is yes, Subdivision EA should not be applicable to the debt forgiveness. You have completed the checklist. |  |  |
| 9. Has the Commissioner made (or will make) a determination that the debt forgiven will not give rise to a deemed dividend? | Yes | No |
| Such determinations are made on the basis that ALL of the following conditions are satisfied:  - the debt has been forgiven because payment would result in undue hardship  - the debtor had the capacity to pay the debt when initially borrowed  - the debtor lost the capacity to pay the debt because of circumstances beyond its control.  If the answer is no, continue to question 10.  If the answer is yes, Subdivision EA should not be applicable to the debt forgiveness. You have completed the checklist. |  |  |
| 10. Has the debt forgiveness arisen because of the rule that deems a debt to be forgiven under a statute of limitations and relates to a pre-Division 7A loan? | Yes | No |
| If the answer is no, the private company may be deemed to have paid an unfranked dividend to the shareholder (or associate of a shareholder) of the private company, capped to the distributable surplus of the private company.  If the answer is yes, Subdivision EA should not be applicable to the debt forgiveness. You have completed the checklist. |  |  |
| Practice Statement PS LA 2006/2 (GA) sets out the circumstances where a statute barred trustee loan made prior to the enactment of Division 7A will not be treated as giving rise to a deemed dividend under Division 7A (note that this Practice Statement should not be regarded as confirmation of the ability to write off and clean out old loans without adverse tax consequences, especially given the legislation dealing with the statute of limitation varies between States). | | |
| **You have completed the checklist.** | | |