Division 7A: UPE Checklist 2023

# Division 7A: UPE Checklist 2023

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 an 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[[1]](#footnote-2) 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)[[2]](#footnote-3):
	+ a loan
	+ a payment or
	+ a debt forgiveness.

This checklist does not deal with UPEs formerly owed by a trust to a private company that have been subsequently discharged in that the entitlements have been converted into a loan. Refer to CPA Australia’s standard 2023 Division 7A Checklist in the [tax time year end resources](https://www.cpaaustralia.com.au/tools-and-resources/taxation/tax-time-year-end-updates-and-resources/checklists) these circumstances.

This information is based on legislation current as at 2 June 2023.

**PROPOSED AMENDMENTS TO DIVISION 7A**

Significant targeted changes to Division 7A were announced by the previous Federal Government, with a consultation paper being released by Treasury in October 2018. However, there have been successive deferrals to these announced reforms and, in the absence of draft legislation or meaningful detail, the scope and impact of such changes remains unclear, save for the commitment of the previous government that changes would be prospective commencing on or after the date of Royal Assent of the enabling legislation. Notwithstanding this, it is important to monitor any new changes to the rules as any new announcements in this regard are made.

**About the author**

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

**Disclaimer**

CPA Australia and the authors have used reasonable care and skill in compiling the content of this material. However, CPA Australia and the authors make no warranty as to the accuracy or completeness of any information in these materials. This material is intended to be a general guide only. All practitioners, readers, viewers and users are advised to undertake their own research or to seek professional advice to keep abreast of any reforms and developments in the law. To the extent permitted by applicable law, CPA Australia, its employees, agents and consultants exclude all liability for any loss or damage claims and expenses including but not limited to legal costs, indirect special or consequential loss or damage (including but not limited to, negligence) arising out of the information in the materials.

|  |  |  |
| --- | --- | --- |
| 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. **Did the UPE arise on or after 1 July 2022?**
 |  |  |
| If the answer is no, continue to question 1c. If the answer is yes, continue to question 2.  |
| 1. **Has the UPE been converted into an actual loan?**
 |  |  |
| If the answer is no, continue to question 1d.If the answer is yes, please proceed to CPA Australia’s standard 2023 Division 7A Checklist [tax time year end resources](https://www.cpaaustralia.com.au/tools-and-resources/taxation/tax-time-year-end-updates-and-resources/checklists). You have completed this checklist.Taxation Ruling TR 2010/3 (now withdrawn) sets out scenarios in which certain UPEs owed to a private company beneficiary will be taken to be a loan, under the general provisions of Division 7A. The ruling continues to apply to trust entitlements that arose on or after 16 December 2009 and before 1 July 2022. In the ruling, the ATO contends Division 7A 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, UPEs that came into existence post 16 December 2009 (but before 1 July 2022) would be deemed to be loans under section 109D in certain circumstances.  |
| 1. **Was the UPE in existence before 16 December 2009?**
 |  |  |
| If the answer is no, continue to question 1e. If the answer is yes, continue to question 3. |
| 1. **Has the UPE been put on a sub-trust arrangement (by the required deadline) for the sole benefit of the private company beneficiary in compliance with PS LA 2010/4?**
 |  |  |
| If the answer is yes, continue to question 3.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 2023 Division 7A Checklist [tax time year end resources](https://www.cpaaustralia.com.au/tools-and-resources/taxation/tax-time-year-end-updates-and-resources/checklists). You have completed this checklist. The ATO has stated in Taxation Ruling TR 2010/3 (withdrawn) that if a UPE has been treated as a loan under section 109D, it is regarded as a loan for all purposes of Division 7A, including Subdivision EA. This ensures that the UPE is not subject to potential double taxation. However, where pre-1 July 2022 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.   |

|  |  |  |
| --- | --- | --- |
| 2. Did the private company provide financial accommodation where the trust entitlement remains unpaid, or the entitlement was held on sub-trust for the non-exclusive benefit of the private company?  | Yes | No |
| If the answer is yes, the private company will be deemed to have made a under section 109D of the general provisions of Division 7A which will potentially give rise to an unfranked dividend to the recipient of the deemed loan. Subdivision EA will not apply in these circumstances. Please proceed to CPA Australia’s standard 2023 Division 7A Checklist [tax time year end resources](https://www.cpaaustralia.com.au/tools-and-resources/taxation/tax-time-year-end-updates-and-resources/checklists). You have completed this checklist.If the answer is no, continue to question 3.  |  |  |
| The ATO has released Taxation Determination TD 2022/11 which sets out the circumstances in which UPEs owed by a trustee to a private company beneficiary will be regarded as a loan under section 109D of the general provisions of Division 7A. The determination expands the ATO’s view of what constitutes financial accommodation under subsection 109D(3)(b) and applies to trust entitlements arising on or after 1 July 2022. The term ‘financial accommodation’ has a broad meaning and is not limited to arrangements where an obligation to pay money is deferred or altered for the benefit of the entity using the funds. In the context of Tax Determination TD 2022/11, a provision for financial accommodation will be taken to have occurred where a private company beneficiary is presently entitled to income of a trust and, by arrangement, understanding or acquiescence, consents to the trust retaining that amount by not demanding immediate payment, or consents to an amount held on sub-trust which is not held for the exclusive benefit of the corporate beneficiary. Where a trust entitlement results in financial accommodation, section 109D of the general provisions of Division 7A will apply. In such cases, the Commissioner recognises that a trust entitlement dealt with under the general provisions of Division 7A will be deemed to have been treated in that manner for all purposes of Division 7A, including Subdivision EA. This stance avoids issues with double taxation. However, Subdivision EA does still have scope to apply UPEs that arose on or after 1 July 2022 that do not result in the provision of financial accommodation and otherwise not dealt with under the general provisions of Division 7A. For example, in instances where the private company does not have knowledge of the UPE amount that it can demand payment from or where the private company does not acquiesce to the non-payment of the UPE, there will be no financial accommodation and Subdivision EA could apply.  |

|  |  |  |
| --- | --- | --- |
| 3. 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 to transactions undertaken by a trust that directly owes the UPE to the private company, or to a transaction undertaken by another trust where there is an unbroken chain of UPEs owing through another trust to the private company . Continue to question 4.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. |

|  |  |  |
| --- | --- | --- |
| 4. 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 (except a shareholder or associate that is a 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 6. If the answer is yes, continue to question 5. |  |  |
| 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. |

|  |  |  |
| --- | --- | --- |
| 5. 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 6. |  |  |

|  |  |  |
| --- | --- | --- |
| 6. 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 8. If the answer is yes, continue to question 6b. 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, 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 and continue to question 7.Section 109XA(7) defines an unrealised gain as ‘any unrealised gain, whether of a capital or income nature’. This would include, 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. |

|  |  |  |
| --- | --- | --- |
| 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 in circumstances where the Commissioner is satisfied 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 11.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.** |

1. 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 [↑](#footnote-ref-2)
2. 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 [↑](#footnote-ref-3)