

# TAX TALKS

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## 51 | Div 7A Payments

Div 7A payments can turn into an expensive exercise. So it is important to be across the issue of Div 7a payments from a private company to a shareholder or their associate. But the below is just a short overview. Peter Adams covers the topic in a lot more detail in the audio file above. You can also listen to the interview on your iphone or android phone via a podcast app while you drive or walk.

### Div 7A Payments

Division 7A applies when a private company makes a payment to a shareholder or their associate. In this case s 109C comes in and causes trouble.

#### FBT

However, there is one important exception coming in through s 109ZB(3). Div 7A does not apply to payments made to a shareholder or their associate in their capacity as an employee. In this instance, FBT would apply.

#### Payment

“Payment” per s 109C (3) is a payment or credit to the shareholder or their associate. It also includes a payment on behalf of or for the benefit of a shareholder or their associate. And it also includes the transfer of property. *FCT v Rozman (No 2)* [2010] FCA 387 reaffirmed that a direction to a debtor by a private company to pay a shareholder was a dividend as defined in s 109C.

#### Provision of an Asset

The Tax Laws Amendment (2010 Measures No. 2) Act 2010 extended the term ‘payment’ to the provision of an asset for use by the shareholder or their associate. It did this through the insertion of s 109CA. This includes provision under a lease or a licence. These amendments sought to close a loop hole in the current law with respect to ‘lifestyle assets’.

#### Exceptions

109CA lists a number of exceptions to the amended definition of payment.

- a) To reduce compliance costs, there is a “minor and infrequent” carve-out. Minor and infrequent will have the same definition as that in the *Fringe Benefits Tax Assessment Act 1986* (Cth).
- b) There is also an ‘otherwise deductible rule’ similar to the FBT one. If a shareholder or associate could otherwise claim a once-only deduction for the payment, Div 7a does not apply .
- c) Where a company acquired the dwelling before 1 July 2009 and that dwelling is the shareholder’s or associate’s main residence, s 109CA will not apply. The company must satisfy the continuity of ownership test

for this exception to apply.

d) You can also disregard the use of a dwelling by a shareholder that is part of a land where the shareholder or their associate carries on a business. For example, the right to use private accommodation on farmland belonging to a private company and licensed to the shareholders for use in running their farming business will be excluded.

e) Finally, there is also an exception for a “company title” flat or home unit in a complex, where a share or shares in a private company gives the relevant shareholder the right to occupy the flat or home unit.

### Amount

The amount of the dividend is equal to the amount paid or, in the case of a transfer of property, the amount that would have been paid at arm’s length for the transfer less any consideration given by the transferee – s 109C(2).

### Distributable Surplus

Just like with Div 7a loans and debt forgiveness, the deemed dividend is subject to distributable surplus considerations in s 109Y.

The amount of the dividend for the use of a company asset is, subject to the distributable surplus per s 109Y, the arm’s length amount that an arm’s length buyer would have been paid for the provision of the asset less any consideration given by the shareholder or their associate for the provision of the asset.

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