

## **UNPAID PRESENT ENTITLEMENTS – INVESTMENT AGREEMENTS**

Taxation Ruling TR 2010/3 deals with trust distributions which are made in favour of corporate beneficiaries, but not actually paid by the trust, at the time of the determination to set aside income for that company.

The effect of the ruling is to deem certain unpaid entitlements to be loans to which Div 7A applies. However, under some circumstances, the ATO will recognise that, rather than being loans for Div 7A purposes, these amounts may be held by the trustee in a sub-trust, provided the conditions allow. Where amounts are set aside for a specific corporate beneficiary, the trust's accounts must record that amount as an unpaid entitlement, and the amount of the entitlement (and all returns on that amount) must be held only for the relevant corporate beneficiary.

The difficulty that this approach entails is that it is virtually impossible, in the majority of cases, to account for a commercial investment return on the amount of the unpaid entitlement, since that amount is, usually, not held separately from the trust fund. In accordance with PS LA 2010/4, the ATO will consider that the funds in the sub-trust are held for the sole benefit of the private company beneficiary, if the funds are invested in the main trust using one of the following investment options:

- (a) Option 1 - invest the funds representing the UPE on an interest-only 7 year loan. Under Option 1, the trustee must pay an annual return on the funds equal to the Div 7A benchmark interest rate.
- (b) Option 2 - invest the funds representing the UPE on an interest-only 10 year loan. Under Option 2, the trustee must pay an annual return on the funds equal to the prescribed interest rate. The prescribed rate for a particular income year is the Reserve Bank of Australia's indicator lending rate for a small business variable (other) overdraft for the month of May immediately before the start of that income year.
- (c) Option 3 - invest the funds representing the UPE in a specific income producing asset or investment. Under Option 3, the unpaid entitlement must be held in a separate account and all returns received by the trust from the investment must be credited to that account. However, the ATO would not consider that the funds are held for the sole benefit of the corporate beneficiary, where the investment benefits entities other than the corporate beneficiary.

Trusts adopting Option 1 or Option 2 must document the terms of the investment agreement. The agreement must be legally binding, but the document evidencing that agreement may be prepared as part of the tax return working papers.

The terms of the investment agreement must:

- (a) include an obligation, and not a discretion, on the part of the trustee to pay interest to the trustee of the sub-trust;
- (b) contain details of the 7 year interest-only loan or 10 year interest-only loan (as the case requires), including the amount of UPE on loan, and the start and end dates of the loan; and

- (c) include an obligation to repay the principal amount back to the sub-trust no later than at the end of the loan period.

**What to do?**

- Review your trusts' accounts now and determine if any of them can take advantage of either Option 1 or 2.
- Where a trust can do so, order a UPE Investment Agreement from ACIS for those trusts adopting Option 1 or Option 2.

If you have any queries, please call toll-free on 1800-773-477.