

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Social Security Act 1991

Social Security (Attribution of Income) Principles 2017

Summary

Section 1209E of the ***Social Security Act 1991*** (the Social Security Act) provides that the Secretary may formulate principles to be complied with by him or her when making decisions under a number of provisions of the Social Security Act, including subsections 1207Y(2), 1207Z(1), 1208C(2) and 1208D(1).

The purpose of this instrument is to set out decision-making principles that the Secretary must comply with in making determinations under sections 1207Y, 1207Z, 1208C and 1208D of the Social Security Act. The determinations under section 1207Y and 1207Z relate to preventing the double counting of attribution and distribution income from a company or trust in relation to an attributable stakeholder of that entity and also the appropriate treatment of capital distributions. The determinations made under sections 1208C and 1208D relate to finding appropriate derivation and attribution periods for the company or trust and the attributable stakeholders so that the typical earnings of the company or trust are fairly attributed to an effected individual.

The Principles commence on 1 April 2017 following the cessation of the *Social Security (Attribution of Income) Principles 2002* on that date.

The *Social Security (Attribution of Income) Principles 2002* cease operation on 1 April 2017 due to the sunset provisions in the *Legislation Act 2003*.

Background

Part 3.18 of the Social Security Act specifies the means test treatment of private companies and private trusts. The provisions in Part 3.18 aim to ensure that people who hold their assets in private companies or private trusts receive comparable treatment under the means test to those who hold their assets directly. The assets and income of the structure will be attributed to the person or persons who control the company or trust, or to the person or persons who were the source of the capital or corpus of the company or trust.

Sections 1207Y and 1207Z of the Social Security Act relate to the way in which income of a company or trust can be attributed, or not attributed, to an attributable stakeholder of that entity. Section 1208C deals with finding a typical earnings period for a company or trust, the derivation period, whilst section 1208D provides for determining the period (the attribution period) during which an amount equal to these 'typical earnings' will be held against the individual as personal income for social security purposes. These decision-making principles will assist the Secretary in making these various determinations.

Commencement

This instrument commences on 1 April 2017.

Consultation

Consultation regarding this instrument was undertaken with the Department of Human Services.

Regulation Impact Statement (RIS)

This instrument is not regulatory in nature and will have no regulatory impact on individuals, business, activity or competition.

Explanation of the provisions

Part 1

Section 1 of the Principles states the name of the instrument and **section 2** states that the Principles commence on 1 April 2017. **Section 3** contains interpretation provisions. **Section 4** sets out the purpose of the instrument.

Part 2

Division 2.1

This Division, and Division 2.2, are intended to stop the double counting of attributable income and distribution income from a company or trust to a couple, where the operation of section 1207Z of the Act would be unable to prevent the double counting by itself. This problem comes about because of the rules, under the social security law, that relate to working out a couple's income and assets for social security purposes.

Section 5 provides that this division will apply, in relation to an individual, where:

- the individual is a member of a couple;
- both members of the couple are attributable stakeholders of a particular company or trust;
- both members of the couple have been attributed income from the company or trust during the relevant period; and
- the individual's partner has also received a distribution from the company or trust during this same time.

Section 6 states that where the sum of a couple's distribution income from a company or trust is equal to their attribution income from that same source and the partner's distribution income is greater than his or her attribution income then, the Secretary must consider whether an amount equal to the difference between the partner's two income levels should be excluded income in relation to the individual.

Section 7 provides that where the sum of a couple's distribution income from a company or trust is less than their attribution income from that same source and the partner's distribution income is greater than his or her attribution income then, the Secretary must consider whether an amount equal to the difference between the partner's two income levels should be excluded income in relation to the individual.

Section 8 states that where the sum of a couple's distribution income from a company or trust is greater than their attribution income from that same source and the individual's distribution income is less than his or her attribution income then, the Secretary must consider whether an amount equal to the difference between the individual's two income levels should be excluded income in relation to the individual.

Division 2.2

Section 9 provides that this division will apply, in relation to an individual, where:

- the individual is a member of a couple;
- the individual is an attributable stakeholder of a particular company or trust, but his or her partner is not;
- the individual has been attributed income from the company or trust during the relevant period; and
- the individual's partner has received a distribution from the company or trust during this same period.

If this section applies, the Secretary must consider determining that an amount equal to the amount of the distribution received by the individual's partner is excluded income in relation to the individual.

Division 2.3

Section 10 provides that this Division will apply where an individual (the investor) makes a genuine transfer of capital to a company or trust in regard to which the investor is not an attributable stakeholder.

Section 11 states that for a genuine transfer of capital to exist the investor must:

- receive shares or units in the company or trust equivalent in value to the value of the capital transferred as consideration for the transfer;
- receive a legal or equitable right to a share of the capital of the company or trust;
- receive a legal or equitable right to receive dividends or distributions from the company or trust; and
- be over 18 years of age.

Section 12 provides that where an individual, who is an attributable stakeholder of a company or trust, is attributed with income that has actually been distributed to a genuine investor then, the Secretary must consider excluding income in relation to the individual equal to the amount of the distribution paid to the genuine investor, multiplied by the individual's income attribution percentage.

Part 3

Division 3.1

Section 13 states that for the purposes of determining whether income distributed to an individual, who is an attributable stakeholder, is to be excluded from the individual's income for income testing purposes under section 1207Z of the Act, the Secretary must take into account whether the individual is an attributable stakeholder of more than one controlled private company or trust. The Secretary also needs to consider whether any company or trust, in relation to which the individual is an attributable stakeholder, has received, whether directly or indirectly, a dividend or distribution from another controlled private company or trust.

Generally, where section 1073 of the Act applies to a dividend or distribution payment, this payment will be held against an individual, for income testing purposes, for the following 12 months.

Section 14 provides that where section 1073 does apply to a payment in relation to an individual and the company or trust that made the payment to the individual has suffered a significant decrease in its earning capacity due it either having been wound up, or otherwise ceasing to exist, or has been subject to circumstances that have adversely affected its profitability then, the Secretary needs to consider whether the application of section 1073 of the Act to the individual would be unfair or unreasonable. If the Secretary decides that this is the case then, the Secretary can determine, under section 1207Z of the Act, that the amount, or part of the amount, that is subject to the application of section 1073 should not be included in the income of the individual for social security income testing purposes.

Division 3.2

Section 15 provides that where an individual is an attributable stakeholder of a company and that company gives an equal, taking into account each attributable stakeholders asset attribution percentage, distribution of capital to all of its attributable stakeholders then the Secretary must consider whether all, or a part, of the distribution should not be included within the ordinary income of the individual for social security purposes.

Section 16 states that where a company makes a distribution to an individual who is an attributable stakeholder, which does not fall within the operation of sections 14 and 15, above, and the amount of the distribution is less than or equal to the income attributed to the individual under section 1207Y of the Act then, the Secretary must consider whether the amount of the distribution should be excluded from the individual's income assessment for social security purposes. Alternatively, if the amount of the distribution is greater than the amount of income attributed to the individual under section 1207Y of the Act then the Secretary must consider whether a part of the distribution equal to the amount of income attributed to the individual should be excluded from the individual's income assessment for social security purposes.

Division 3.3

Section 17 provides that where an individual is an attributable stakeholder of a trust and that trust gives an equal, taking into account each attributable stakeholder's asset attribution percentage, distribution of capital to all of its attributable stakeholders then the Secretary must consider whether all, or a part, of the distribution should not be included within the ordinary income of the individual for social security purposes.

Section 18 states that where a trust makes a distribution to an individual who is an attributable stakeholder, which does not fall within the operation of sections 14 and 17, above, and the amount of the distribution is less than or equal to the income attributed to the individual under section 1207Y of the Act then, the Secretary must consider whether the amount of the distribution should be excluded from the individual's income assessment for social security purposes. Alternatively, if the amount of the distribution is greater than the amount of income attributed to the individual under section 1207Y of the Act then the Secretary must consider whether a part of the distribution equal to the amount of income attributed to the individual should be excluded from the individual's income assessment for social security purposes.

Part 4

Generally a derivation period in relation to a company or trust will be a tax year. However, at times, a tax year will not give an accurate indication of the current rate of income of a company or trust. Where this is the case the Secretary can determine that another period more accurately reflects the company or trust's typical income. In determining what is a suitable derivation period, **section 19** says that the Secretary must take the following matters into account:

- the ordinary income of the company or trust during the relevant tax year;
- the ordinary income of the company or trust for any other period/s that is/are a typical earnings period/s for that entity;
- any circumstances affecting the company or trust during any of the above periods; and
- whether those circumstances would justify using a different derivation period than the relevant tax year.

Part 5

Section 20 provides for the determination of an appropriate attribution period, both in relation to an individual, and the company or trust in regard to which he or she is an attributable stakeholder, and also in relation to a derivation period. To determine an attribution period the Secretary must have regard to the following matters:

- the ordinary income of the individual for the derivation period;
- the ordinary income of individual for any other period/s that is/are a typical earnings period/s for the individual;
- any circumstances affecting the individual during any of the above periods; and

- any circumstances that could be regarded as likely to affect the individual's ordinary income.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Social Security (Attribution of Income) Principles 2017

The Principles are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

Sections 1207Y and 1207Z of the *Social Security Act 1991* ('the Act') allow the Secretary to disregard certain income when determining the total assessable income for a controlled private trust or a controlled private company. Sections 1208C and 1208D of the Act allow the Secretary to determine the derivation period and attribution period for assessing a person's attributed income.

This instrument specifies the principles that the Secretary must comply with when deciding to certain disregard income and when determining the derivation and attribution periods.

A determination under sections 1207Y or 1207Z of the Act ensures that a person's income is not double-counted, by preventing the same amount being treated as both ordinary income and attributed income. A determination under sections 1208C of the Act or 1208D of the Act allows the derivation and attribution periods to be set with regard to the trust or company's ordinary earnings, to ensure the person's attributed income reflects the amount the person is receiving in actual income.

Human rights implications

The Principles engage the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system.

The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The Principles are compatible with human rights as they ensure a person's current resources are appropriately assessed for the purposes of ascertaining the person's assessable income for means testing purposes under Part 3.18 of the Act.

Conclusion

The Principles are compatible with human rights as they do not raise any human rights issues.

Finn Pratt AO PSM

Secretary

Department of Social Services