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# EXCLUSION FROM THE TERM "DIVIDENDS"—WHETHER DISTRIBUTION MADE IN LIEU OF DIVIDENDS' PAYMENT

## Summary

This interpretation statement considers the application of section CF 3(1)(b) of the Income Tax Act 1994 in relation to the factors to be taken into account in determining whether an acquisition, redemption, or cancellation of shares is made in lieu of the payment of dividends.

Section CF 2 provides a wide definition of the term "dividends". Prima facie, all distributions from a company to its shareholders are dividends. Under section CF 2(1)(g), a dividend includes any amount distributed in respect of the acquisition, redemption, or cancellation of shares in a company or other reduction or return of share capital of a company. However, section CF 3 provides certain exclusions from the definition, including distributions made on the repurchase, redemption, or cancellation of shares in certain situations.

Broadly speaking, the legislation provides a rebuttable presumption that a capital reduction of 15% or more is a return of capital, rather than a dividend, but the Commissioner can rebut this presumption if it appears that the company is returning capital in substitution for a dividend. Alternatively, upon application, the Commissioner can notify a company that a 10% or more reduction is not in substitution of a dividend on similar grounds.

Included in the tests of whether an amount distributed to shareholders in the above circumstances is excluded from the term "dividends" under section CF 3(1)(b) is whether the payment is "made in lieu of the payment of dividends". If it is established that the payment is made in lieu of dividends, the exclusion does not apply and the amount will remain a dividend under section CF 2. The Commissioner takes into account a number of factors, set out in section CF 3(1)(b)(iii), in determining whether the "in lieu of dividend" test is met. This item provides some guidance as to how the Commissioner applies his discretion in determining whether these factors apply to a given situation.

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

## Issues

Section CF 3(1)(b)(iii) lists the factors to which the Commissioner must have regard in satisfying himself that a repurchase, redemption, or cancellation of shares is not made in lieu of the payment of dividends. These are:

- The nature and amount of dividends paid by the company prior or subsequent to the relevant cancellation; and

- The issue of shares in the company subsequent to the relevant cancellation; and

- The expressed purpose or purposes of the relevant cancellation; and
- Any other relevant factor.

The issue is the nature of the factors and circumstances the Commissioner takes into account in exercising his discretion in situations involving the cancellation of shares.

**Background**

Law reform introduced by the Companies Act 1993 now makes it easier for a company to repurchase or redeem its own shares. The Act provides that the company must have the express power to do so under its constitution. In essence, the share repurchase provisions are a means of returning capital back to shareholders, which previously required an application to the High Court.

Section 52 of that Act provides that the company must satisfy a solvency test before making any distribution to shareholders. The term “solvency test” is defined in section 4 of the Act, and its effect is to ensure that the company does not distribute amounts greater than its net assets and has sufficient funds available to meet its normal business outgoings.

The company law reform has meant that income tax rules also had to be formulated to cover both share repurchases and share redemptions. A series of tests known as the “brightline” tests were introduced into the Income Tax Act 1994 which, prima facie, allow such repurchases or redemptions on a tax-free basis if specific criteria have been met. In summary, these tests treat the repurchases of small parcels of shares (generally where the repurchase is less than 10% of the market value of all shares) as dividends, and larger parcels as tax-free. This is necessary to prevent companies distributing their earnings to their shareholders by way of tax-free repurchases and not dividends.

It is recognised that substantial repurchases should be treated for tax purposes as a partial liquidation of the company. Where the cancellation is part of a pro rata offer to all shareholders, the capital reduction must be either at least 10% or at least 15% of all shares in the company. For a reduction that falls between the 10% and 15% thresholds, the company must make application to the Commissioner. The ‘brightline’ test, which applies to shares that are not non-participating redeemable shares, was set at 15% - considered to be approximately three times the typical dividend yield - to provide reasonable scope for a company genuinely reducing the size of its operation to fund a one-off distribution to its shareholders from tax-free reserves.

When taxpayer behaviour defeats the purpose of the new rules, the Commissioner has a residual discretion to treat a distribution on the repurchase of shares as being in lieu of the payment of dividends. Evidence of this would be if the repurchase were made under an arrangement to acquire, redeem, or otherwise cancel shares in lieu of the payment of a dividend. Factors that the Commissioner takes into account in deciding the matter are contained in section CF 3(1)(b)(iii) and include the nature and amount of dividends paid by the company prior to, and subsequent to, the particular cancellation, and whether there is any subsequent issue of shares after the cancellation. In addition, the Commissioner has the discretion to take into account any other relevant factors (section CF 3(1)(b)(iii)(D)). The "in lieu of dividend" test applies regardless of whether the shares are non-participating shares and regardless of whether the brightline tests are satisfied.

**Legislation**

Section CF 3(1)(b) provides an exclusion from the term "dividends" of any amount distributed on the acquisition, redemption, or cancellation of shares in a company under certain circumstances. It states:

In this Act, and subject to the provisions of this section, the term "dividends", in relation to any company, does not include -

(b) Any amount distributed upon the acquisition, redemption, or other cancellation (in whole but not in part) by the company of any share in the company (referred to in this paragraph as the "relevant cancellation") where -

  (i) If the share is not a non-participating redeemable share, -

    (A) The relevant cancellation is part of a pro rata cancellation where the company has a fifteen percent capital reduction; or

    (B) The relevant cancellation is part of a pro rata cancellation where the company has a ten percent capital reduction and, upon application to the Commissioner by the company in such form as the Commissioner may specify, the Commissioner notifies the company in writing that the Commissioner has no reasonable grounds to conclude (having regard to the factors specified in subparagraph (iii)(A) to (D) that either the whole or any part of the relevant cancellation is made in lieu of the payment of dividends; or

    (C) The relevant cancellation is not part of a pro rata cancellation but the shareholder suffers a fifteen percent interest reduction; or

    (D) The company is an unlisted trust and the share was issued on such terms that its redemption is subject to subparagraph (iv)(A); or

    (E) The relevant cancellation is not part of a pro-rata cancellation and the company is an unlisted trust and the share was issued on such terms that its redemption is subject to subparagraph (iv)(B); and

  (ii) The relevant cancellation is not an on-market acquisition; and

  (iii) The Commissioner has given, in respect of the relevant cancellation, the notice referred to in subparagraph (i)(B) or otherwise is satisfied that neither the whole nor any part of the relevant cancellation was made in lieu of the payment of dividends, having regard to -

    (A) The nature and amount of dividends paid by the company prior or subsequent to the relevant cancellation; and

    (B) The issue of shares in the company subsequent to the relevant cancellation; and

    (C) The expressed purpose or purposes of the relevant cancellation; and

    (D) Any other relevant factor; and

  (iv) To the extent that the amount distributed does not exceed -

    (A) In any case where the company is an unlisted trust and the share is issued on such terms that its redemption is subject to this subsubparagraph, the available subscribed capital per share; and

    (B) In any other case, the available subscribed capital per share cancelled:

The definitions of "fifteen percent capital reduction" and "ten percent capital reduction" are contained in section CF 3(14):

"Fifteen percent capital reduction" means, in respect of any company and any pro rata cancellation (referred to in this definition as the "relevant cancellation"), the circumstance where the aggregate amount paid by the company on account of the relevant cancellation (or paid by the company at the same time on account of any other pro rata cancellation of shares other than non-participating redeemable shares) is equal to or greater than 15% of the market value of all shares (not being non-participating redeemable shares) in the company at the time the company first notified shareholders of the proposed relevant cancellation (or, in any case where no advance notice was given, the time of the relevant cancellation):

"Ten percent capital reduction" means, in respect of any company and any pro rata cancellation (referred to in this definition as the "relevant cancellation"), the circumstance where the aggregate amount paid by the company on account of the relevant cancellation (or paid by the company at the same time on account of any other pro rata cancellation of shares other than non-participating redeemable shares) is equal to or greater than 10% of the market value of all shares (not being non-participating redeemable shares) in the company at the time the company first notified shareholders of the proposed relevant cancellation (or, in any case where no advance notice was given, the time of the relevant cancellation):

Section FC 1(1) states:

Where in any debenture issued by a company the rate of interest payable in respect of the debenture is not specifically determined, but is determinable from time to time -

(a) By reference to the dividend payable by the company; or
(b) By reference to the company's profits, however measured, for debentures issued after 8 pm New Zealand Standard Time on 23 October 1986 other than those issued under a binding contract entered into before that time; or
(c) In any other manner, for debentures issued before the time specified in paragraph (b),-

no deduction shall be made, in calculating the assessable income of the company, in respect of any interest payable under the debenture or of any expenditure or loss incurred in connection with the debenture or in borrowing the money secured by or owing under it.

Section FC 2(1) deals with interest on debentures issued in substitution for shares:

Where a company has issued debentures to its shareholders or to any class of its shareholders, and the amount of the debenture or debentures issued to each shareholder of the company or of that class has been determined by reference to the number or to the available subscribed capital per share of, or by reference or otherwise to, the shares in that company or in any other company (whether or not that other company is being or has been liquidated) that were held by or on behalf of the shareholder at the time the debentures were issued or at any earlier time, no deduction shall be allowed to the company, in respect of any interest payable under any debenture so issued or of any expenditure or loss incurred in connection with any such debenture or in borrowing the money secured by or owing under any such debenture.

Section FC 2(2) provides a link to FC 1:

Section FC 1 shall apply with respect to all debentures to which subsection (1) applies and to the interest payable under those debentures, in the same manner as if those debentures and that interest were debentures and interest of the kinds referred to in section FC 1.

The definition of “share” or “shares” is contained in section OB 1 and includes:

(a) Except in section DF 7, includes-
    (i) …
    (ii) Any debenture to which section FC 1 or FC 2 applies:

## Application of the Legislation

The Valabh Committee in its final report *The Taxation of Distributions from Companies* (July 1991) at page 31 discussed the need to distinguish between transactions that used the share cancellation process as a substitute for paying shareholders a dividend, and genuine commercially motivated transactions:

> A difficulty in defining and applying an anti-avoidance provision aimed at reductions in capital (or share repurchases) made in substitution for assessable dividends is in drawing a line between genuine commercially motivated transactions and those intended to avoid tax. The extremes between these alternatives are known. For example, where a company normally pays two dividends a year and one of those dividends in terms of approximate date and quantum is not paid but a partial reduction is made, it is clear that the capital reduction is in substitution of a dividend. At the other extreme, if the company sold a substantial part of its business and paid a substantial amount in addition to the normal dividend, it would not be a dividend substitution.

Under section CF 3(1)(b)(iii),the Commissioner has a residual discretion to deem the share cancellation to be a dividend if it appears that the company is returning capital in substitution for dividends. In exercising this discretion, the Commissioner must consider the factors outlined in that provision. A discussion of these factors follows.

***Nature and amount of dividends paid by the company prior or subsequent to the relevant cancellation***

Prima facie, the nature and amount of dividends paid prior to and after a share repurchase (or redemption) may indicate that amounts paid on repurchase are in lieu of a dividend. This may be the case if it appears that the company has not paid dividends, which would ordinarily be payable, prior to or after the acquisition, but has instead built-up its retained earnings and paid these out on a share acquisition. A low or no dividend policy, or an unexplained change in policy to reduce dividends, together with an increase in retained earnings, may indicate that the company is, or has been, taking such an approach.

In instances where the Commissioner is asked to give a ruling on a proposed transaction, reliance would be given to knowledge gained before the cancellation in respect of dividends to be paid after the cancellation. That knowledge might include dividends declared but not paid, and knowledge of the directors' intentions and expectations (including knowledge of the company's dividend policy).

The legislation refers to "dividends paid". It does not refer to expectations, purpose, intentions, or policy. The test is not based on the company's dividend policy but is stated explicitly in terms of its practice or history in paying dividends. However, the company's dividend policy may help the Commissioner to determine the practice in issuing dividends. If there is no apparent pattern in the issue of dividends, but the company can show that it has adhered to an explicit policy that refers to objective criteria, the Commissioner may be able to draw conclusions that would not otherwise be available.

Overall, this factor focuses on the company's dividend policy or practice both before and after the share cancellation. Its purpose is to detect any changes or variations in the company's dividend policy that indicate that the share cancellation is replacing a dividend the company would normally pay. Such inferences could be drawn from a combination of an increase in retained earnings and either a low dividend policy, or an unexplained change in policy or practice to reduce dividends.

***Issue of shares in the company subsequent to the relevant cancellation***

A company may acquire sufficient shares to meet the brightline levels for capital reduction, i.e. the 10% or 15% of market value of shares, (and, by doing so, effect a tax free distribution) and subsequently may reissue shares so that the effective capital reduction is less than the brightlines. If the subsequent reissue is to replace cash which is necessary to meet the company's current operational or capital expenditure, this suggests that the company did not really intend, and was not really in a position, to reduce its capital, and that the funds paid out on repurchase were in lieu of dividends.

If, after a share redemption takes place, a reissue of shares is made to only some of the shareholders, there will be an uneven effect on the shareholders, being those that previously held shares but no longer do so, and those that now have more shares. This will not affect the potential application of section CF 3(1)(b) however, as that paragraph does not distinguish between situations according to which shareholders receive reissued shares.

An example of a cancellation of shares and a subsequent reissue is where shortly after a share repurchase of 15% a company reissues 10% of its shares. The result of this reissue is that the initial capital reduction of 15%, minus the amount of newly issued shares (10%), results in total capital reduction of 5% which falls below the minimum brightline test of 10%. Such a transaction would indicate that the company has in reality effected a distribution that is more indicative of a dividend as opposed to a bona fide reduction in capital. The length of time between the cancellation and the issue of shares is relevant: the shorter this period is, the more likely the cancellation is made in lieu of the payment of dividends.

If the Commissioner is asked to give a binding ruling on a proposed share repurchase transaction, he is placed in the difficult situation of having to consider the issue of shares by the company **after** the cancellation. The Commissioner then has to rely on knowledge available before the cancellation in respect of share issues planned for after the cancellation. That knowledge might include share issue offers made or received, and any information supplied by the directors and the shareholders regarding their intentions or expectations related to share issues. The Commissioner might also wish to make an assumption in the ruling about future share issues.

***Expressed purpose or purposes of the relevant cancellation***

This factor focuses on why the company is seeking to cancel shares. When the company can show a genuine commercial reason for cancelling the shares, this will indicate the cancellation is unlikely to be a dividend. The provision does not require the Commissioner to accept statements by or on behalf of the company that do not reflect the genuine intention of the company. The more intuitive and compelling the reason for the cancellation of the shares, the stronger this factor will be in reaching the overall decision. The existence of a genuine commercial motive for the transaction should assist in indicating that the distribution is not in lieu of dividends.

For example the expressed purpose of a repurchase and cancellation may be a necessary step in the reorganisation of the ownership and corporate structure of a group. It could be directed towards placing the overall strategic control of the group in the hands of its principals and certain senior employees, rather than outside shareholders. These are bona fide commercial reasons for a share cancellation.

Another purpose of a cancellation may be that the company has surplus capital, notwithstanding a high dividend policy, and wishes to alter its debt:equity ratio to more closely align it with other companies in the same industry (in market value terms) and to increase its earnings per share. In such a case the company will borrow the cash to fund the share buyback, thereby helping it achieve its desired debt:equity ratio. This purpose provides sound commercial reasons for the cancellation and would support a view that the repurchase is not in lieu of a dividend.

Other valid commercial reasons for reducing capital would include:

- Reducing funding costs by replacing its equity funding with cheaper debt funding, and by reducing the administration costs associated with a large and diverse shareholding.

- Reducing its cash balance to improve balance sheet performance and reduce its vulnerability to take-over.

These reasons would of course need to be supported by evidence as to the company's requirements, costs of funding, industry norms, market rates, and so on.

***Any other relevant factor***

The Valabh Committee Final Report "*The Taxation of Distributions from Companies*" (July 1991) and the discussion document "*Tax Implications of Company Law Reform*" (December 1993) indicated that the following factors may be relevant as to whether a return of capital is in lieu of dividends:

- Is the capital reduction part of the down-sizing of the company? If so, this would be an indication the cancellation is not in lieu of dividends.

- Has the company been retaining earnings and then distributing them without any accompanying reduction of the business? A distribution arising from a cancellation of shares in this case would more than likely be in lieu of dividends.

- Has there been a sale of part of the business, accompanied by the return of a sizeable amount to the shareholders in addition to a dividend? If so, this would point to the cancellation not being in lieu of a dividend.

- Is the capital return an unusual one-off event? If it is, this too would suggest that the cancellation is not a disguised dividend. Conversely, if there have been previous capital reductions, this may lead to the conclusion that the reductions are in lieu of dividends.

- Will the cancellation leave the shareholders' interests largely unchanged, or will the shareholders' interests decline significantly with the capital reduction, i.e. the size of shareholder capital across the board will be significantly less? A substantial change would be grounds for presuming that the cancellation has a purpose other than, or in addition to, a distribution of funds. A minimal change could indicate that the payment resulting from the cancellation was in lieu of a dividend.

An example of one of these factors applying is where a company (likely to be a closely-held company) accumulates earnings until they represent 15 percent or more of the market value of the company. The company then makes a distribution, ostensibly as a result of a down-sizing operation, but without reducing any of its core business. Such a distribution would be in lieu of dividends. Similarly, successive disproportionate reductions that leave the respective interests of shareholders largely unchanged, would also potentially be in lieu of dividends.

Another example is that of a company purchasing all of a shareholder's shares thus resulting in the exit of that shareholder from the company. This could be the company's first share repurchase, and, to that extent, would be an "unusual event". This suggests that the payment is not made in lieu of any dividend, but rather to facilitate a shareholder's exit.

***FC 1 and FC 2 debentures***

An issue arises as to whether the redemption of debentures that fall within the provisions of sections FC 1 and FC 2 should be subjected to the in lieu of dividend criteria in section CF 3(1)(b)(iii).

Under section FC 1, if a debenture is issued where the rate of interest is not specified but is ordinarily based either on the dividend payable by the company or the profits of the company, no deduction is allowed for the interest. Under section FC 2(1), if a company issues debentures to its shareholders based on the number of shares the shareholders have in the company, again no deduction is allowed for the interest payable in respect of those debentures. These debentures (as do section FC 1 debentures) fall within the definition of "shares" under section OB 1. The debentures are, in effect, issued in substitution for shares. Where a company cancels or redeems these debentures either in whole or in part, the Act treats this as if it was cancelling or redeeming ordinary shares. The redemption or cancellation of these debentures is therefore subject to the provisions of section CF 3(1)(b). Whether or not the repayments in respect of these debentures are in lieu of dividends will be determined on the basis of all four factors noted in this paragraph. The terms and conditions of repayment are matters the Commissioner will take into account to the extent that they are relevant to the factors in CF 3(1)(b) in determining whether the redemption or cancellation is in lieu of dividends.

**Examples**

***Example 1***

As at 31 March 1997 Company A had share capital of $100,000, being 100,000 shares of $1, and accumulated profits of $20,000. Its shareholders planned to extract the $20,000 accumulated profits as dividends. However, because of a previous change of shareholding, Company A did not have sufficient imputation credits available to pay fully imputed dividends. Accordingly, the shareholders returned $20,000 share capital tax free, by redeeming 20,000 shares. Is the subsequent amount paid to shareholders excluded from the term "dividends" under section CF 3(1)(b)?

The amount is **not** excluded. Under section CF 3(1)(b)(iii), the exemption will apply if the Commissioner "is satisfied that neither the whole nor any part of the relevant cancellation was made in lieu of the payment of dividends …". This provision is aimed at returns of capital which, in normal commercial terms, would have been paid as dividends. In the example the redemption of shares is made in lieu of dividends and the exemption does not therefore apply.

***Example 2***

On 31 March 1997 Company B makes a capital distribution of $5M by cancelling 5,000,000 shares paid up to $1 each. Its total share capital is $30M. The company advises that its policy in respect of dividends is to pay 80% of profit after providing for interest, taxation, and the funding of asset replacement to maintain operating assets at an **appropriate** level. No definition of "appropriate" is given. This policy is not expected to alter. For the last two years, 1995 and 1996, it has paid dividends amounting to $1.5M and $3.5M respectively, representing 15% and 35% percent of profits in those two years. The company has not issued further shares since the cancellation. It advises that the purpose of the cancellation was to increase its debt:equity ratio to 30% debt and 70% equity. It has not down-sized its business. The retained earnings of the company amount to $10M. The question is whether the amount paid to shareholders will be excluded from the term "dividends" under section CF 3(1)(b).

The first test as to the nature and amount of dividends the company issues is an objective one which looks to its practice in paying dividends. In the absence of a pattern in issuing dividends, the company would need to show that it has adhered to an explicit policy that refers to objective criteria. In the example there is no apparent pattern of dividend distribution. Under examination, the company's dividend policy is apparently based on subjective criteria. It is not possible to draw any inference from the amount of past or future dividends paid where the amount of payment is determined after providing for *inter alia* "funding of asset replacement required to maintain the assets at an **appropriate** level". Therefore, consideration of the nature and amount of dividends prior to and subsequent to the cancellation does not give any indication as to whether the cancellation will be made in lieu of dividends.

The company has not issued further shares subsequent to the cancellation – a factor that assists the company's case that the distribution to shareholders resulting from the cancellation is not in lieu of dividends.

The company advises that the purpose of the cancellation was to increase its debt:equity ratio. However, other factors such as maintenance of its current level of business operations, and its retained earnings being in excess of the proposed amount to be distributed to shareholders, lead towards the conclusion that the cancellation is in lieu of dividends.

In this example, on the evidence produced it would be difficult to satisfy the Commissioner that the distribution resulting from the cancellation of shares is not in lieu of dividends.

***Example 3***

Company C, a wool exporting company, has restructured its ownership to reflect a move away from having a mix of supplier and non-supplier shareholders. One of the company shareholders, Company D, a company that does not supply a product to Company C, purchased all the shares that the other non-supplier shareholders held in Company C. Company C then repurchased all of Company D's shares. Company C's shareholding then consisted solely of companies from which it purchased products. Company C has accumulated losses. In past years the company has paid out dividends when it has been able, and has a policy of paying dividends in the future. It advises that the share repurchase has not affected its ability to pay out dividends subsequently. The company also advises it has not been necessary to issue further shares to replace the capital returned to the shareholder in the repurchase, and evidence shows this to be true. The Commissioner now has to decide whether or not the repurchase of Company D's shares is in lieu of a dividend under section CF 3(1)(b).

From the information supplied it does not appear that the proposed redemption was made "in lieu of a dividend", having regard to the company's dividend policy. The company has paid dividends in the recent past (when it was able to do so). The company also has accumulated losses. Accordingly, there can be no suggestion that the company has been accumulating earnings that would normally be paid out as dividends. The company has not needed to issue further shares after the repurchase. This suggests that the company is in a position to pay out the shareholder on the repurchase of shares, thus helping to refute any suggestion that the repurchase is in lieu of dividends.

The repurchase was part of a wider arrangement involving a change in ownership of the company, reflecting a desire to change the ownership from a mix of supplier and non-supplier shareholders to ownership by supplier shareholders. For this reason, the fact that the repurchase was to facilitate the exit of a major shareholder (which in itself is an unusual one-off event), leads to the conclusion that the repurchase was not in lieu of a dividend.

***Example 4***

Company A decides to consolidate its business by selling assets surplus to requirements. The company distributes the capital profits to its shareholders by way of a pro-rata cancellation of more than 15% of its shares. Company B, which owns assets of the type used in the core business of company A, sells these assets to company A in exchange for an issue of shares.

These actions would appear to amount to a straight cancellation of shares and a subsequent reissue to recoup capital – thus appearing to constitute a distribution to shareholders in lieu of dividends. The fact that the reissue of shares was not to all the shareholders is not a relevant consideration. The section does not require the

Commissioner to address the shareholders' position directly. The Commissioner is concerned with the initial transaction, i.e., the cancellation of shares and the resulting distribution to shareholders. A later reissue of shares provides an indication that the company was not in a position to reduce its capital and that the funds paid out were in lieu of dividends.

A cancellation of shares and subsequent reissue must be considered in light of all the facts. For example, the period of time between the cancellation and the reissue may be relevant – the shorter the time, the greater the chance of the reissue being known prior to the cancellation. If it is known that a later reissue was required soon after the date of cancellation, then this would be a strong indicator on its own that the distribution was in lieu of dividends.

Essentially, whether a distribution is in lieu of dividends is the same in all cases – the Commissioner cannot look at just one factor in isolation – all four factors would have to be considered before a determination could be made that the distribution was or was not in lieu of dividends.

One of the factors that could be relevant here is the expressed purpose or purposes of the cancellation. In this case, if the company has genuine commercial reasons for the share cancellation and the subsequent reissue of shares and none of the other section CF 3(1)(b) factors applied, then this would provide support for the conclusion that the distribution was not in lieu of dividends.