

Revenue Alert Questions and Answers

Q. We are planning to restructure our company-owned business and we're worried that the Commissioner will think it is tax avoidance and that there is a dividend. Is there a way we can find out what the Commissioner thinks of the restructuring before it goes ahead?

A. Yes, you can apply for a binding ruling from the Commissioner. A binding ruling is the Commissioner's formal view on how a tax law (like section BG 1 or section GB 1) applies to a particular arrangement. Please see the attached link to the Inland Revenue website: <http://www.ird.govt.nz/technical-tax/binding-rulings/>.

Q. How can there be a dividend when we haven't received any cash from the restructuring transactions?

A. The Commissioner considers that value can be transferred to a shareholder even if they have not received any cash. This will most commonly be the case if a debt has been created in the shareholder's favour. This is consistent with the High Court's view in *Beacham v CIR*.

Q. I did a restructure similar to the examples in the Revenue Alert more than five years ago. Will the Commissioner be concerned with that restructure?

A. Yes. While the restructure is outside the four year time bar limit on reassessments, the Commissioner can 're-open' assessments more than four years old if income of a particular source or nature has not been disclosed in a tax return or if the return was fraudulent or misleading.

Q. Will the Commissioner consider transactions are part of a tax avoidance arrangement if there are commercial reasons for the restructure?

A. Maybe. The issue is whether the commercial reasons really explain why the steps in the arrangement were used. General explanations which don't adequately explain aspects of the restructure will not usually mean that the tax avoidance was merely incidental. For more detail on the Commissioner's views on tax avoidance, and the merely incidental test in particular, please see her Interpretation Statement on Tax Avoidance at: <http://www.ird.govt.nz/resources/1/0/10876180402363a989fbef5d802abedf/is1301.pdf>

Q. My company has enough imputation credits to fully impute the dividend resulting from applying the avoidance provisions to this type of arrangement. Will the Commissioner reassess the 5% dividend withholding tax (33% less the 28% imputation rate) the company will have to pay if the dividend can be fully imputed? Or will I or the company be liable for the full tax on the dividend?

A. The High Court's view in *Beacham v CIR* was that the dividend was assessable income and the recipients were subject to tax at 33%. Also relevant is that imputation credits cannot be retrospectively attached to dividends except in very limited cases. While the Commissioner might counteract the tax avoided by seeking full tax on the amount of the dividend even where the company had imputation credits at the time, a voluntary disclosure may be treated more favourably by the Commissioner. Use of money interest and shortfall penalties will also need to be considered.

Q. I have participated in one of these arrangements but received repayments of the debt created over four years. Can I spread the dividend over the four years on a cash basis to match when I received the benefit of the cash funds?

A. No. The Commissioner considers that a dividend is assessable to a shareholder at the date of the transaction that transfers value from the company to the shareholder, even if they have not received any cash. This is consistent with the High Court's view in *Beacham v CIR*.

Q. How many investigations into these types of arrangements is the Commissioner carrying out?

A. It is not appropriate for the Commissioner to disclose operational details, however, we can say that there are current investigations underway nationwide and that additional risk reviews will be commenced to address this compliance issue. We are currently assisting a number of customers to rectify the tax effect of these types of arrangements. We can assist if you would like to make a voluntary disclosure or you would like to talk to us about these types of arrangements.