

Note (not part of ruling): This ruling is a re-issue of public ruling BR Pub 05/14, which was first published in *Tax Information Bulletin* Vol 17, No 10 (December 2005). BR Pub 05/14 applied until 31 December 2008. This ruling is essentially the same as BR Pub 05/14, but has been updated for the Income Tax Act 2007, which came into force on 1 April 2008.

MEANING OF "ANYTHING OCCURRING ON LIQUIDATION" WHEN A COMPANY REQUESTS REMOVAL FROM THE REGISTER OF COMPANIES

PUBLIC RULING - BR Pub 10/06

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of paragraph (b)(i) of the definition of "liquidation" in section YA 1.

The Arrangement to which this Ruling applies

The Arrangement is the liquidation of a company when a request is made under section 318(1)(d) of the Companies Act 1993 that the company be removed from the New Zealand register of companies.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows.

The first step legally necessary to achieve liquidation when a request is made to the Registrar of Companies to remove a company from the New Zealand register of companies under section 318(1)(d) of the Companies Act 1993 is a resolution by the shareholders or board of directors or, where applicable, another overt decision-making act provided for in a company's constitution to adopt a course of action that will end in removal from the register. That first step starts the period specified in paragraph (b)(i) of the definition of "liquidation" in section YA 1. Anything done after that first step to enable liquidation occurs "on liquidation" for the purposes of the Income Tax Act.

The period for which this Ruling applies

This Ruling will apply for a five year period beginning on 1 January 2009 and ending on 31 December 2014.

This Ruling is signed by me on the 29th day of April 2010.

Susan Price

Director, Public Rulings

COMMENTARY ON PUBLIC RULING BR Pub 10/06

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 10/06 (“the Ruling”).

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

The purpose of this ruling is to clarify the first step legally necessary to achieve liquidation when a request is made to the Registrar of Companies to remove a company from the New Zealand register of companies under section 318(1)(d) of the Companies Act 1993. The conclusion is that the first step is a resolution or another overt decision-making act that is provided for in a company's constitution to adopt a course of action that will end in the removal of the company from the register.

Interpretative issue

1. The Ruling concerns the meaning of the phrase “anything occurring on liquidation” in paragraph (b) of the definition of “liquidation” in section YA 1 when a request for removal from the register of companies is made under section 318(1)(d) of the Companies Act 1993.
2. The term “liquidation” includes the removal of a company from the register of companies. The removal of a liquidated company from the register occurs under the Companies Act 1993 after the full liquidation process or after the shorter, alternative process provided by section 318(1)(d) of the Companies Act 1993. The alternative process is sometimes referred to as a “short-form liquidation”.
3. A short-form liquidation is cheaper and simpler than a full liquidation. A short-form liquidation involves a request for the company's removal from the register by:
 - an authorised shareholder; or
 - the board of directors; or
 - any other person required or permitted to do so by the constitution of the company.

Such a request can be made to the Registrar of Companies only after the company has paid its debts and distributed any surplus to its members: section 318(2) of the Companies Act 1993.

4. Paragraph (b) of the definition of “liquidation” in section YA 1 prescribes the period during which an action or event will be considered to be occurring “on liquidation”. This definition is important because specific tax consequences flow from acts that occur “on liquidation”. Paragraph (b) of the definition of “liquidation” provides that the period known as “on liquidation” starts with “a step that is legally necessary to achieve liquidation”.
5. Paragraph (b)(i) includes two examples of steps that are legally necessary to achieve liquidation:
 - the appointment of a liquidator; or
 - a request for removal under section 318(1)(d) of the Companies Act 1993.
6. The second example of a step that is legally necessary to achieve liquidation has given rise to uncertainty and is why the Commissioner has issued this Ruling.

7. The issue is whether a request for removal under section 318(1)(d) of the Companies Act 1993 is the first step legally necessary to achieve liquidation. If so, on a short-form liquidation the period known as “on liquidation” will not begin until the request for removal from the register has been made under section 318(1)(d). Under the Companies Act 1993, that request cannot be made until any surplus has been distributed.
8. Such an interpretation would mean that companies that follow the short-form liquidation process may be unable to make tax-free distributions “on liquidation” under section CD 26(2). If a request for removal is the start of the “on liquidation” period then all surplus assets must have been distributed before the request is made. Therefore, the purpose of this Ruling is to determine the correct interpretation of the phrase “anything occurring on liquidation” in the context of a short-form liquidation. In particular, the Ruling considers the meaning of the words “on liquidation”.

Conclusion

9. In the Commissioner’s view, the phrase “anything occurring on liquidation”, in particular the words “on liquidation”, refer to a period. That period starts with the occurrence of the first step legally necessary to achieve liquidation. The Commissioner considers that when a removal request is made under section 318(1)(d) of the Companies Act 1993, the first step legally necessary to achieve liquidation will ordinarily be the passing of the resolution to cease business, pay all creditors, distribute surplus assets, and to then request removal from the register. That step starts the period specified in paragraph (b)(i) of the definition of “liquidation” in section YA 1. Anything done after that step to enable liquidation occurs “on liquidation” for the purposes of the Income Tax Act.
10. Therefore, on a short-form liquidation any capital distributions a company makes after the passing of a resolution to enable liquidation will be made “on the liquidation of the company” and may be excluded from being dividends under section CD 26.

Legislation

11. Section YA 1 provides:

YA 1 Definitions

In this Act, unless the context requires otherwise,—

...

liquidation, for a company,—

- (a) includes—
 - (i) removal of the company from the register of companies under the Companies Act 1993; and
 - (ii) termination of the company’s existence under any other procedure of New Zealand or foreign law; and
- (b) includes, in references in this Act to anything occurring on liquidation, anything occurring—
 - (i) during the period that starts with a step that is legally necessary to achieve liquidation, including the appointment of a liquidator or a request of the kind referred to in section 318(1)(d) of the Companies Act 1993; and
 - (ii) for the purpose of enabling liquidation

12. A request to remove a company from the New Zealand register of companies can be made under section 318 of the Companies Act 1993. Section 318(1)(d) provides:
- (1) Subject to this section, the Registrar must remove a company from the New Zealand register if—
- ...
- (d) there is sent or delivered to the Registrar a request in the prescribed form made by—
- (i) A shareholder authorised to make the request by a special resolution of shareholders entitled to vote and voting on the question; or
- (ii) The board of directors or any other person, if the constitution of the company so requires or permits—
- that the company be removed from the New Zealand register on either of the grounds specified in subsection (2) of this section; ...
13. Section 318(2) of the Companies Act 1993 sets out the grounds for making such a request:
- (2) A request that a company be removed from the New Zealand register under subsection (1)(d) of this section may be made on the grounds—
- (a) that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and this Act; or
- (b) that the company has no surplus assets after paying its debts in full or in part, and no creditor has applied to the Court under section 241 of this Act for an order putting the company into liquidation.

Application of the legislation

14. A request to remove a company from the register of companies under section 318(1)(d) of the Companies Act 1993 can be made by:
- a shareholder authorised by shareholders' special resolution; or
 - the board of directors; or
 - any other person required or permitted by the constitution to do so.
15. It is clear from section 318(2)(a) and (b) of the Companies Act 1993 that at the time a request for removal is made under section 318(1)(d) of the Companies Act 1993 any surplus assets must have already been distributed.
16. The function of paragraph (b) of the definition of "liquidation" in the Income Tax Act is to set out the period when anything may occur on liquidation. Subparagraph (i) of paragraph (b) defines the period. The beginning of the period is most important and starts with "a step that is legally necessary to achieve liquidation". This puts the focus on the first steps. Subparagraph (ii) limits the "anything occurring on liquidation" to things occurring within that period that are for the purpose of enabling liquidation. Things that occur for another purpose will not occur "on liquidation".

What is meant by "a step that is legally necessary to achieve liquidation"?

17. The phrase "a step that is legally necessary to achieve liquidation" distinguishes between:
- steps that are legally necessary and any other steps; and
 - steps that are to achieve liquidation and steps that are taken for another purpose.

18. The ordinary meaning of the word “step” implies an “action”. Therefore, the focus is on overt acts rather than, for example, the existence of circumstances or beliefs.
19. Some steps necessary to achieve liquidation in practice may not be legally necessary. For example, a step that is necessary in practice for a liquidation by special resolution of shareholders is to decide who the liquidator will be. That decision is not a legally required step even though it must have occurred. The closest legally necessary step would be appointing the liquidator or obtaining the liquidator’s written consent to appointment.
20. The words “to achieve liquidation” further narrow the range of steps that can start the period. Some steps legally necessary to achieve liquidation may be taken for a purpose other than to achieve liquidation. For example, paying all creditors is necessary before making a request under section 318(1)(d) of the Companies Act 1993. However, those payments may be made in the ordinary course of business rather than for the purpose of enabling liquidation.
21. Other steps undertaken may not reach the required threshold “to achieve liquidation”. For each liquidation procedure, the series of steps involved will largely be settled by the governing legislation, usually the Companies Act 1993. However, in relation to each procedure some preliminary steps will usually occur before any decision to liquidate is made and will end in that decision being made. The decision to liquidate is then followed by a further series of steps that achieve the liquidation and removal of the company from the register of companies.
22. The word “achieve” requires an end or goal to have been established and committed to. In paragraph (b) of the definition of “liquidation”, the words “to achieve liquidation” mean the steps must be taken with liquidation as the established end. Therefore, in the Commissioner’s view, until the decision to liquidate is established and committed to, steps cannot be said to have been taken “to achieve liquidation”.
23. This emphasis on the established goal of liquidation means some steps that are preparatory to the removal of the company from the register (for example, the exercise by the liquidator of his or her functions) are capable of being the first step to achieve liquidation. However, a decision to liquidate must have been made.
24. While a decision to liquidate has to be made in practice, the step required by law in relation to a company’s decision is usually the passing of a resolution. The silent making of a decision is not an overt act, so is not a “step” as required by paragraph (b) of the definition of “liquidation”. The passing of a resolution is an overt act – a “step” – and will, in most cases in the Commissioner’s view, be the first step legally necessary to achieve liquidation. The passing of such a resolution will also satisfy paragraph (b)(ii) as being for the purpose of enabling liquidation.

What is the first step legally necessary to achieve liquidation on a short-form liquidation?

25. One of the two grounds in section 318(2) of the Companies Act 1993 must be satisfied before a request for removal from the register of companies under section 318(1)(d) can be made. However, only the first ground applies where the company has surplus assets to distribute. Therefore, the first ground is the only ground considered in this Ruling. The first ground requires the company to have ceased business, paid its creditors, and distributed any surplus assets in accordance with its constitution and the Companies Act 1993.

26. Therefore, it follows that in those circumstances the first step that is legally necessary when a request is made to remove the company from the register should relate to ceasing business, paying all creditors, and distributing surplus assets. Section 318(2)(a) of the Companies Act 1993 does not specify the order in which these events must occur.
27. Accordingly, the Commissioner accepts that the first step legally necessary to achieve liquidation when a request is made to remove a company from the register of companies under section 318(1)(d) of the Companies Act 1993 is a resolution to:
- cease business;
 - pay all creditors;
 - distribute surplus assets; and then
 - request removal from the register of companies.
28. Other steps may be taken that could also be the first step that is legally necessary to achieve liquidation. For example, a company may act less formally than by passing a resolution to carry out the grounds in section 318(2) of the Companies Act 1993. If the step is overt and carried out with the aim of achieving removal from the register, it may still be the first step that is legally necessary to achieve liquidation. However, a company taking a less formal course of action may be required to produce evidence establishing that the taking of the step was carried out with the aim of achieving liquidation.

What is the significance of the examples in paragraph (b)(i) of the definition of “liquidation” in section YA 1?

29. After the phrase “a step that is legally necessary to achieve liquidation”, paragraph (b)(i) of the definition of “liquidation” in section YA 1 sets out two examples: “including the appointment of a liquidator or a request of the kind referred to in section 318(1)(d) of the Companies Act 1993”.
30. The examples can be read as being the first steps of the relevant processes that Parliament put in the section as specific illustrations of first steps that start the period. However, in the Commissioner’s view, the wording of paragraph (b) is ambiguous. The steps could be examples of:
- a step that is legally necessary to achieve liquidation; or
 - *the first step* that is legally necessary to achieve liquidation.
31. Possibly, the more obvious meaning is that the examples are of first steps – suggested by the immediate context and the emphasis in the section. The focus of paragraph (b)(i) is on determining “the period” and its commencement, which suggests the examples are of first steps rather than any steps of the processes to which they are relevant. However, this is not conclusive. Whether the examples should be taken to be the first steps or just any steps in the processes they are relevant to becomes clearer when the examples are examined.
32. The first example refers to the appointment of a liquidator. In the processes of liquidation, the appointment of a liquidator is not the first step legally necessary to achieve liquidation. For example, where the shareholders of a company resolve to appoint a liquidator, obviously the resolution is a legally necessary step that precedes the appointment.
33. Regarding the second example, when removal from the register is requested under section 318(1)(d) of the Companies Act 1993, the request is also not the first step legally necessary to achieve liquidation. In the Commissioner’s view passing a resolution to cease business, pay all

creditors, distribute surplus assets, and to then request removal will usually be the first step that is legally necessary to achieve liquidation.

34. Therefore, in the Commissioner's view, the better interpretation of paragraph (b)(i) is that the steps given as examples are not *the first* steps legally necessary to achieve liquidation in the liquidation processes they relate to. Instead, they are examples of steps (in fact, fundamental steps) in those processes. The Commissioner considers that a step other than one of the two examples included in paragraph (b)(i) could be the first step that is legally necessary to achieve liquidation. And, as noted above, the Commissioner considers that step will usually be the passing of a resolution to cease business, pay all creditors, distribute surplus assets, and then request removal.

What is the tax treatment of capital distributions made on a short-form liquidation?

35. The importance of determining the first step legally necessary to achieve liquidation is highlighted when determining the tax treatment of capital distributions made on a short-form liquidation. Capital distributions may not be dividends for tax purposes when they are made "on the liquidation" of a company under section CD 26.
36. Under section CD 3, the term "dividends" includes a wide variety of payments, distributions, and transactions that essentially transfer value to shareholders. Section CD 26(1) and (2) exclude from being a dividend any amounts distributed to shareholders that are essentially subscribed capital ("available subscribed capital per share") and capital gains ("available capital distribution amount") where the amounts are distributed "on the liquidation of the company".
37. Paragraph (b) of the definition of "liquidation" in section YA 1 provides that the period known as "on liquidation" starts with the first step that is legally necessary to achieve liquidation. As discussed above, the Commissioner's view is that the first step is not the making of the request. The first step will ordinarily be the passing of the resolution to cease business, pay all creditors, distribute surplus assets, and then request removal.
38. Therefore, any capital distributions made after the passing of such a resolution will be made "on the liquidation of the company" and may be excluded from being dividends under section CD 26.
39. In some cases there may be an extended period between the first step legally necessary to achieve liquidation and the removal of the company from the register. The period may even span different tax years, so that a distribution is made in a period preceding the removal of the company from the register. The Commissioner will assume that such distributions are made pursuant to a genuine intention to liquidate. However, if the liquidation is not completed then such a distribution will not have occurred "on liquidation", and the exclusion under section CD 26 (and this Ruling) will not apply.
40. Taxpayers making distributions should ensure they keep adequate records of relevant resolutions or other decision-making acts. This is so they can demonstrate that the essential genuineness of the resolution or other act preceded the distribution of the company's assets, and that the distributions were for the purpose of enabling liquidation.