

ⓘ This is a reissue of BR Pub 10/06. For more information about the history of this Public Ruling see the Commentary to this Ruling.

## **INCOME TAX – MEANING OF “ANYTHING OCCURRING ON LIQUIDATION” WHEN A COMPANY REQUESTS REMOVAL FROM THE REGISTER OF COMPANIES**

### **PUBLIC RULING - BR Pub 14/09**

This is a public ruling made under s 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 para (b)(i) of the **definition of “liquidation”** in s YA 1.

#### **The Arrangement to which this Ruling applies**

The Arrangement is the liquidation of a company when a request is made under s 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:

- When a request is made to the Registrar of Companies to remove a company from the New Zealand register of companies under s 318(1)(d) of the Companies Act 1993, the first step legally necessary to achieve liquidation 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 para (b)(i) of the **definition of “liquidation”** in s YA 1. Anything done after that first step to enable liquidation occurs **“on liquidation”** for the purposes of the Income Tax Act 2007.

#### **The period or tax year for which this Ruling applies**

This Ruling will apply for an indefinite period beginning on 1 January 2015.

This Ruling is signed by me on 20 November 2014.

#### **Grant Haley**

Manager, Public Rulings

## COMMENTARY ON PUBLIC RULING BR PUB 14/09

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Ruling BR Pub 14/09 (the Ruling).

Legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this commentary.

### Contents

Summary.....	1
Background.....	1
Application of the Legislation.....	3
What is meant by “a step that is legally necessary to achieve liquidation”? .....	3
What is the first step legally necessary to achieve liquidation on a short-form liquidation?.....	4
What is the significance of the examples in para (b)(i) of the definition of “liquidation” in s YA 1?...	5
What is the tax treatment of capital distributions made on a short-form liquidation?.....	6
References.....	6
Appendix – Legislation.....	8

### Summary

1. 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 with surplus assets from the New Zealand register of companies under s 318(1)(d) of the Companies Act 1993.
2. **In the Commissioner’s view**, liquidation of a company is a process. Therefore, **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 s 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. Alternatively, the first step legally necessary may be 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.**
3. That step starts the period specified in para (b)(i) of the definition of **“liquidation” in s YA 1.** Anything done after that step to enable liquidation occurs **“on liquidation” for the purposes of the Income Tax Act 2007.**
4. 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 s CD 26.**

### Background

5. BR Pub 14/09 is a reissue of BR Pub 10/06, which expired on 31 December 2014. This Ruling is essentially the same as BR Pub 10/06.

6. **The Ruling concerns the meaning of the phrase “anything occurring on liquidation” in para (b) of the definition of “liquidation” in s YA 1 when a request for removal from the register of companies is made under s 318(1)(d) of the Companies Act 1993.**
7. Paragraph (a) of the definition of “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 in a number of circumstances, including after the full liquidation process or after the shorter, alternative process provided by s 318(1)(d) of the Companies Act 1993. The alternative process under s 318(1)(d) is sometimes referred to as a “short-form liquidation”.
8. 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.
9. Relevant to this Ruling, such a request can be made to the Registrar of Companies only after the company has ceased to carry on business, paid its debts and distributed its surplus assets to its members: s 318(2)(a) of the Companies Act 1993.
10. **Paragraph (b) of the definition of “liquidation” in s 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”.**
11. 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 s 318(1)(d) of the Companies Act 1993.
12. The second example has given rise to uncertainty, which is why the Commissioner has issued this Ruling.
13. The issue is whether a request for removal under s 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 s 318(1)(d). Under the Companies Act 1993, that request cannot be made until any surplus assets have been distributed.
14. 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 s 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”.

## Application of the Legislation

15. A request to remove a company from the register of companies under s 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.
16. It is clear from s 318(2) of the Companies Act 1993 that at the time a request for removal is made any surplus assets must have already been distributed.
17. The function of para (b) of **the definition of "liquidation"** is to set out the period when anything may occur on liquidation. Paragraph (b)(i) defines the period. The beginning of the period is most important and para (b)(i) provides that it **starts with "a step that is legally necessary to achieve liquidation"**. This puts the focus on the first steps. Paragraph (b)(ii) limits **"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"**.
18. 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 s CD 26.
19. **Under s CD 3, the term "dividends" includes a wide variety of payments, distributions and transactions that essentially transfer value to shareholders.** Sections 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"**.

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

20. 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.
21. **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.
22. 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**.

23. **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 s 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.
24. **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, for each procedure, some preliminary steps will usually occur before any decision to liquidate is made, with the final preliminary step being the making of the decision to liquidate. 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.
25. **The word "achieve" requires an end or goal to have been established** and committed to. In para (b) of the definition of "liquidation", the words **"to achieve liquidation" mean the steps** must be taken with liquidation as the established end. **Therefore, the Commissioner's view** is that steps cannot be said to have been taken "to achieve liquidation" until the decision to liquidate is established and committed to.
26. 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.
27. 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 it is not a **"step" as required by para (b)(i) of the definition of "liquidation"**. **The Commissioner's view is that the** passing of a resolution is an overt act – a **"step"** – and will, in most cases, be the first step legally necessary to achieve liquidation. The passing of such a resolution will also satisfy para (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?**

28. One of the two grounds in s 318(2) of the Companies Act 1993 must be satisfied before a request for removal from the register of companies under s 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 its surplus assets in accordance with its constitution and the Companies Act 1993.
29. 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.

30. 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 s 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.
31. 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 requirements in s 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 para (b)(i) of the definition of “liquidation” in s YA 1?**

32. After the phrase “a step that is legally necessary to achieve liquidation”, para (b)(i) of the definition of “liquidation” in s 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”.
33. The examples can be read as being the first steps of the relevant processes, which Parliament put in the section as specific illustrations of **first steps that start the period**. However, in the Commissioner’s view, the wording of para (b)(i) 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.
34. 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 para (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.
35. 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.
36. Regarding the second example, when removal from the register is requested under s 318(1)(d) of the Companies Act 1993, the request is also not the first step legally necessary to achieve liquidation. As noted above, before removal from the register can be requested, the company must have ceased business, paid its creditors and distributed its surplus assets. These steps must all have occurred before requesting removal

from the register. The **Commissioner's view**, therefore, is that 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. The Commissioner considers that any other interpretation would leave s CD 26(2) ineffective, which would not have been the intention of Parliament.

37. Therefore, the **Commissioner's view is that** the better interpretation of para (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 para (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?**

38. Capital distributions may not be dividends for tax purposes when they are made "on the liquidation" of a company under s CD 26.
39. Paragraph (b) of the definition of "liquidation" in s 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 to remove the company from the register. The first step will ordinarily be the passing of the resolution to cease business, pay all creditors, distribute surplus assets and then request removal.
40. 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 s CD 26.
41. 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 s CD 26 (and this Ruling) will not apply.
42. 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 resolution or other act was genuine, that the resolution or act preceded the distribution of the company's assets, and that the distributions were for the purpose of enabling liquidation.

### **References**

#### **Expired Rulings**

BR Pub 05/14 "Anything occurring on liquidation' when a company requests removal from the register of companies"  
*Tax Information Bulletin* Vol 17, No 10 (December 2005): 5

BR Pub 10/06 "Meaning of 'anything occurring on liquidation' when a company requests removal from the register of companies"  
*Tax Information Bulletin* Vol 22, No 5 (June 2010): 3

**Subject references**

Capital distributions  
Liquidation  
Short-form liquidation

**Legislative references**

Income Tax Act 2007, s CD 26, and the  
**definition of "liquidation" in s YA 1**  
Companies Act 1993, s 318



## Appendix – Legislation

1. Section CD 26 relevantly provides:

### **CD 26 Capital distributions on liquidation or emigration**

#### *When this section applies*

- (1) This section applies when a shareholder—
  - (a) is paid an amount in relation to a share on the liquidation of the company;
  - (b) is treated under section FL 2 (Treatment of emigrating companies and their shareholders) as being paid an amount in relation to a share in the company.

#### *Return of subscribed capital or capital gains*

- (2) The amount paid is a dividend only to the extent to which it is more than—
  - (a) the available subscribed capital per share calculated under the ordering rule; and
  - (b) the available capital distribution amount calculated under section CD 44.

...

2. The definition of “liquidation” in s YA 1 reads:

#### **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

3. Section 318 of the Companies Act 1993 relevantly provides:

### **318 Grounds for removal from register**

- (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); or

...
- (2) A request that a company be removed from the New Zealand register under subsection (1)(d) 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 for an order putting the company into liquidation.

- (3) A request that a company be removed from the New Zealand register under subsection (1)(d) must be accompanied by a written notice from the Commissioner of Inland Revenue stating that the Commissioner has no objection to the company being removed from the New Zealand register.

...