

INCOME TAX – TREATMENT OF ALTERATION TO RIGHTS ATTACHED TO SHARES UNDER SECTION CB 4

PUBLIC RULING - BR Pub 17/04

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

Taxation Law

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

This Ruling is about how s CB 4 applies to the Arrangement.

The Arrangement to which this Ruling applies

The Arrangement is where a shareholder holds shares in a company and the shares were acquired for the purpose of disposal. Subsequently, the rights attached to the shares are altered and the following apply:

- The shares are in a company registered under the Companies Act 1993.
- The alteration is not structured as a cancellation and issue of shares.

For the avoidance of doubt, the Arrangement does not include an arrangement where s BG 1 applies to void the arrangement.

How the taxation law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- The alteration of rights attached to the shares does not result in a disposal of personal property for the purposes of s CB 4.

The period or tax year for which this Ruling applies

This Ruling will apply for the period 1 April 2017 to 31 March 2020.

This Ruling is signed by me on 18 April 2017.

Susan Price

Director, Public Rulings

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The Arrangement is where a shareholder holds shares in a company and the shares were acquired for the purpose of disposal. Subsequently, the rights attached to the shares are altered and the following apply:

- The shares are in a company registered under the Companies Act 1993.
- The alteration is not structured as a cancellation and issue of shares.
- After the alteration, the shareholder disposes of some or all of their shares with altered rights.

For the avoidance of doubt, the Arrangement does not include an arrangement where s BG 1 applies to void the arrangement.

How the taxation law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- Section CB 4 applies to the disposal of shares with altered rights.
- The time of acquisition of a share with altered rights held on revenue account is the time the share was acquired before the alteration.

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This Ruling will apply for the period 1 April 2017 to 31 March 2020.

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Susan Price

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COMMENTARY ON PUBLIC RULING BR PUB 17/04 AND BR PUB 17/05

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Rulings BR Pub 17/04 and BR Pub 17/05 (“the Rulings”).

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

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Summary

1. The Rulings consider two situations. The situations represent two points in time at which s CB 4 could apply when share rights are altered, namely when the:
 - rights are altered; and
 - shares with altered rights are disposed of.
2. Whether s CB 4 applies in these situations depends on whether the shares with altered rights are the same property as the shares before the alteration.
3. A basis sometimes put forward for shares with fundamentally altered rights being different property is the contractual doctrine of rescission. In the case of alterations provided for in the terms on which the shares were issued, the alteration would be pursuant to the original contract, so the contractual doctrine of rescission would not apply. For the contractual doctrine of rescission to be relevant in other cases, there must be a contract. This makes the nature of a share, and whether share rights are conferred by contract, relevant in determining whether shares with altered rights are the same property as the shares before the alteration. It is also relevant to consider the rules in the Companies Act 1993 (CA 1993) for the issue and cancellation of shares and the altering of share rights.

4. The Commissioner considers that shares with altered rights are the same property as the shares before the alteration for the purposes of s CB 4 for four reasons:
 - The rights and obligations comprising a share are not conferred by contract, so the contractual doctrine of rescission is not relevant.
 - Based on the rules in the CA 1993 for the issue and cancellation of shares and the altering of share rights, there is no cancellation and issue of shares by implication when share rights alter.
 - When share rights alter, at no point does a shareholder lose control of their shares and have only a right to receive shares, such as may be the case when shares are cancelled and new shares are issued.
 - Altering share rights does not involve property moving from the company to the shareholders. The alteration merely alters the shareholders' existing rights against the company.
5. Accordingly, the alteration of rights attached to shares (share rights) does not result in a disposal of any shares for the purposes of s CB 4. The shares continue in existence with altered rights. The Commissioner considers that this will be the case whether there is a minor change, or a complete change of class.
6. When a shareholder who acquired the shares on revenue account before the alteration disposes of the shares after the alteration, s CB 4 will apply to the disposal. This is because the shares with altered rights are the same property as the shares before the alteration. Therefore, the time of acquisition of the shares with altered rights is the time the shares were acquired before the alteration.
7. While an alteration of share rights will not result in a disposal of a share, it may have an effect on shareholder continuity.
8. If a change in the rights attached to a share is effected by cancelling the old share and issuing a new share, there will be a disposal for the purposes of s CB 4 when the share is cancelled.

Background

9. Shares confer rights on shareholders: s 36(1) of the CA 1993. The rights can be altered by the constitution of the company, if any, or the terms on which the shares were issued: s 36(2) of the CA 1993. Altering share rights may be referred to as alterations, share reclassifications or share reorganisations.
10. Section CB 4 provides that an amount derived from the disposal of personal property acquired for the purpose of disposal is income of the person. Shares are a type of personal property: s 35 of the CA 1993. Questions arise as to the application of s CB 4 where share rights alter and when a shareholder disposes of shares with altered rights.

Application of the legislation

11. Under s CB 4, an amount that a person derives from disposing of personal property is income of the person if they acquired the property for the purpose of disposing of it:

CB 4 Personal property acquired for purpose of disposal

An amount that a person derives from disposing of personal property is income of the person if they acquired the property for the purpose of disposing of it.

12. The Rulings consider two points in time at which s CB 4 could apply when share rights are altered, namely when the:
 - rights are altered;
 - shares with altered rights are disposed of.
13. Whether s CB 4 applies in these situations depends on whether the shares with altered rights are the same property as the shares before the alteration.

Can the shares with altered rights be regarded as the same property as the shares before the alteration?

14. Two broad requirements of s CB 4 must be satisfied. If these requirements are met, an amount that the person derives from disposing of the personal property is income of the person. The first requirement is that a person acquires personal property for the purpose of disposing of it. The second requirement is that the person disposes of the personal property.
15. The grammatical construction of s CB 4 shows that the property disposed of must be the same property as that acquired. When share rights alter, the question arises whether the shares are the same property as the shares before the alteration. The answer to this question will also assist in determining the time of acquisition of the shares with altered rights for the purposes of s CB 4. In determining whether the shares with altered rights are the same property as the shares before the alteration, it is helpful to ask two questions:
 - What is the nature of a share?
 - Are shares disposed of when rights attached to them alter?

What is the nature of a share?

16. Section 36 of the CA 1993 sets out the basic rights and powers that attach to shares. The basic rights and powers include the right for the shareholder to vote at a meeting of the company on any resolution, the right to an equal share in dividends authorised by the board, and the right to an equal share in the distribution of surplus assets of the company.
17. A company may issue different classes of shares: s 37(2) of the CA 1993. "Class" means a class of shares having identical rights, privileges, limitations and conditions attached to them: s 116(1) of the CA 1993.
18. It is generally accepted that a share is a bundle of rights and obligations between the shareholders and the company: *Borland's Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279; *Bradbury v English Sewing Cotton Ltd* [1923] AC 744 (HL); *IR Commrs v Laird Group plc* [2003] UKHL 54. This was confirmed by the New Zealand Court of Appeal in *Robertson v Bicknell* [2002] BCL 408 (CA). In *Robertson* at [23], the Court also confirmed that the nature of the property in a

share is the interest of a person in the company, that interest comprising various rights and obligations.

19. A shareholder does not have a proprietary right or interest in the assets of a company. A shareholder has been said to be entitled to a proportion of the **company's** share capital, with reference to which the shareholder has certain rights: *Archibald Howie v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 156.
20. The property comprising a share encompasses all of the rights and obligations attached to the share. A shareholder does not own each share right as a separate piece of property: *In re Alex Russell (deceased)* [1968] VR 285 at 299.
21. Previously, under the Companies Act 1955 (CA 1955), the memorandum and articles of a company were deemed to be a contract between the company and its shareholders: s 34 of the CA 1955. However, the CA 1993 replaced the contractual model in the CA 1955: *Maori Development Corp Ltd v Power Beat International Ltd* [1995] 2 NZLR 568 (HC). The relationship between a company and its shareholders is now statutory: ss 31 and 38 of the CA 1993.
22. Obiter dicta in some cases decided under the CA 1993 suggest the relationship between a company and its shareholders is a contractual one: *Ord v Calan Healthcare Properties Ltd* [2004] 2 NZLR 122 (HC); *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* (2005) 2 NZCCLR 266 (HC); *Herzog v Hertli* (HC Blenheim CIV-2007-406-251, 23 March 2009); *Manak v Hutt & City Taxis Ltd* [2009] NZCCLR 36 (HC). However, in *Maori Development Corp*, s 31 of the CA 1993 was specifically referred to and considered. Blanchard J said, at 574, that the contractual model in the CA 1955 had been replaced by the statutory statement in s 31 of the CA 1993.
23. Blanchard J's view is supported by statements made by the New Zealand Law Commission on the form and content of a new Companies Act in *Company Law Reform and Restatement* (NZLC R9, New Zealand Law Commission, Wellington, June 1989). In that report, at 1, the Commission said that one of the most **significant proposed reforms was to redefine "the distribution of power within the company by direct operation of statute rather than by a deemed contract"**. The Commission said, at 19, that "[t]he standard constitution, and any modification of it, should confer rights directly and not, as the [CA 1955] provides, by deeming the **constitutional documents to be a contract"**. Also, the Explanatory Note to the Companies Bill introduced on 21 September 1990 stated, at ii, that a purpose of the Bill was to redefine "the distribution of power within the company by direct operation of statute rather than by a deemed contract".
24. The change from the contractual model of the CA 1955 is important. This is because under the contractual model, fundamentally altering the share rights may have amounted to rescission of a contract and the entering into of a new one and, by implication, a cancellation of the shares and the issue of new ones. This would not have been the case, though, if the alteration arose from the terms of the shares themselves or the articles of association of the company (or constitution in the case of the CA 1993). However, given the statutory basis of shares under the CA 1993, the contractual doctrine of rescission is not relevant. Whether the shares are cancelled and new ones are issued depends on the operation of the CA 1993 and **the company's constitution, if any.**

25. The Commissioner considers that the relationship between a company and its shareholders is statutory. The Commissioner has previously considered the nature of shares: **"Commentary on Public Ruling BR Pub 16/05 and BR Pub 16/06", *Tax Information Bulletin* Vol 28, No 5 (June 2016): 5**, **"Income tax – Treatment of a subdivision of shares under section CB 4: Public Ruling – BR PUB 16/05", *Tax Information Bulletin* Vol 28, No 5 (June 2016): 3**, and **"Income tax – Treatment of a disposal of subdivided shares: Public Ruling – BR PUB 16/06", *Tax Information Bulletin* Vol 28, No 5 (June 2016): 4**. The commentary on BR Pub 16/05 and BR Pub 16/06 states that it is generally accepted that a share is a bundle of rights and obligations conferred under a contract between the shareholders and the company. To the extent that the commentary on BR Pub 16/05 and BR Pub 16/06 suggests the relationship between a company and its shareholders is contractual, it is incorrect. The commentary to these Public Rulings (BR Pub 17/04 and BR Pub 17/05) **should be relied on as setting out the Commissioner's view on the nature of a share and the relationship between a company and its shareholders.**

Are shares disposed of when the rights attached to them alter?

26. **"Dispose" is not defined in s YA 1 for the purposes of s CB 4.** (It is defined for the purposes of other sections in the Act, but these definitions do not assist in this inquiry.) **The courts have held that, speaking generally, "disposed of" covers all forms of alienation and carries connotations of sale, assignment, or transfer of the property:** *FCT v Wade* (1951) 84 CLR 105 (HCA); *Lyttelton Port Co Ltd v CIR* (1996) 17 NZTC 12,556 (HC). **"Disposition" has been said to mean "a ridding oneself of the right or interest":** *Coles Myer Ltd v Commissioner of State Revenue (VIC)* (1998) ATC 4,537 (VICCA) at 4,456. As a result, the Commissioner considers that **"disposing" of property must involve the alienation or ridding of that property by the disposer.**
27. If there is a cancellation and issue of shares by implication when share rights alter, then that would indicate that shares have been disposed of and that the shares with altered rights are different property from the shares before the alteration.
28. The CA 1993 provides comprehensive rules for the issue and cancellation of shares, and the altering of share rights.
29. Section 36 of the CA 1993 provides that the rights and powers attached to shares may be negated, altered or added to by the constitution of the company or in accordance with the terms on which the share are issued. A company is not required to have a constitution, although it may adopt one by special resolution: ss 26 and 32 of the CA 1993. If a company does not have a constitution, the company, its board and each of its directors and shareholders have the rights, powers, duties and obligations set out in the CA 1993: s 28 of the CA 1993. If a company does not have a constitution, the rights attached to its shares can alter only in accordance with the terms on which the shares were issued.
30. Sections 117 and 118 of the CA 1993 provide certain rules regarding the alteration of shareholder rights. Section 117(1) of the CA 1993 provides that a company must not take action that affects share rights unless that action has been approved by shareholders whose rights are affected. Section 118 of the CA 1993 gives dissenting shareholders the right to require the company to purchase their shares.

31. The issue of shares is dealt with in ss 41–51 of the CA 1993. The issue of shares has been described as the whole process whereby unissued shares are applied for, allotted and, finally, registered: *National Westminster Bank plc v IRC* [1994] 2 BCLC 239 (HL).
32. Section 42 of the CA 1993 provides that, subject to the CA 1993 and the constitution of the company, if any, a company may issue shares at any time, to any person and in any number it thinks fit. On the face of it, this is a very broad power. However, the right to issue shares is subject to requirements in other provisions of the CA 1993, such as the registration of notice of a share issue and the obtaining of shareholder approval in certain circumstances: ss 43 and 44 of the CA 1993. Section 107(2) of the CA 1993 provides that shares may be issued otherwise than in accordance with some of these requirements, if all entitled persons agree or concur. Section 51 provides that a share is issued when the name of the holder is entered on the share register.
33. Sections 58–67 of the CA 1993 deal with the acquisition by a company of its own shares and their deemed cancellation. Section 59 provides that a company may acquire its own shares if permitted by its constitution, if any. Generally, any shares so acquired are deemed to be cancelled immediately on acquisition. A company must comply with procedural requirements when acquiring its own shares, such as meeting a solvency test and registration of notice of the acquisition: ss 58 and 59 of the CA 1993.
34. Sections 68–75 of the CA 1993 deal with the redemption of shares and their deemed cancellation. Section 68 provides that shares are redeemable if:
 - the constitution of the company makes provision for the issue of redeemable shares, and
 - the constitution or the terms of issue of the shares makes provision for the redemption of the shares for a consideration that is specified or calculated by a formula or suitably qualified person.
35. Shares a company redeems are deemed cancelled immediately on redemption. A company must comply with procedural requirements when redeeming shares, such as board resolutions and meeting a solvency test in certain circumstances: ss 69 and 70 of the CA 1993.
36. The rules in the CA 1993 for the issue and cancellation of shares, and the altering of share rights, make it seem unlikely that an alteration of share rights by the **company's constitution, if any, or the terms on which the shares are issued could** involve the cancellation and issue of shares by implication.
37. Further, s 83 of the CA 1993 provides for a statement of rights to be given to shareholders, on request. Section 83(2) provides that the company does not have to provide a shareholder with such a statement in certain circumstances, including if a statement has been provided within the previous six months and the:
 - shareholder has not acquired or disposed of shares since the previous statement was provided (s 83(2)(b) of the CA 1993); and
 - the rights attached to shares of the company have not been altered since the previous statement was provided (s 83(2)(c) of the CA 1993).

38. The relevance of s 83(2) of the CA 1993 is the distinction that Parliament has drawn between the acquisition of shares and the alteration of share rights. It is apparent from s 83(2) of the CA 1993 that Parliament regarded the acquisition of shares and the alteration to share rights as different things.
39. Based on the rules in the CA 1993 for the issue and cancellation of shares and the altering of share rights, the Commissioner considers that there is no cancellation and issue of shares by implication when share rights alter. This will be the case whether there is a minor change, or a complete change of class.
40. There are also other indications that shares are not disposed of when share rights alter. One such indication is that when share rights alter there is no point at which a shareholder loses control of their shares and has only a right to receive shares, such as may be the case when shares are cancelled and new shares are issued.
41. Another is that altering share rights does not involve property moving from the company to the shareholders. The alteration merely alters the shareholders' existing rights against the company: *Robertson v FCT* (1952) 86 CLR 463.

Conclusion

42. The Commissioner considers that shares with altered rights are the same property as the shares before the alteration for the purposes of s CB 4 for four reasons:
 - The rights and obligations comprising a share are not conferred by contract, so that the contractual doctrine of rescission is not relevant.
 - Based on the rules in the CA 1993 for the issue and cancellation of shares and the altering of share rights, there is no cancellation and issue of shares by implication when share rights alter.
 - When share rights alter there is no point at which a shareholder loses control of their shares and has only a right to receive shares, such as may be the case when shares are cancelled and new shares are issued.
 - Altering share rights does not involve property moving from the company to the shareholders. **The alteration merely alters the shareholders' existing rights** against the company.
43. **This conclusion is consistent with IS9708 "Available subscribed capital – Consequences of deemed reregistration"** (*Tax Information Bulletin* Vol 10, No 7 (July 1998): 8, which considers the consequences of share reclassifications on available subscribed capital.
44. While the altered shares will be the same property, it is noted that any change to the voting rights (defined in s YC 2) attached to shares may affect shareholder continuity for the purposes of determining whether losses and imputation credits can be carried forward. It is also noted that s GB 34 (ICA arrangements for carrying amounts forward) may apply in some circumstances if voting rights are altered.

Does s CB 4 apply at the time share rights are altered?

45. When share rights alter, the Commissioner considers that the shareholder does not alienate, rid themselves of, or otherwise lose control of their shares. Shares with

altered rights are the same property as the shares before the alteration. Given this, the Commissioner considers s CB 4 does not apply at the time share rights are altered.

Does s CB 4 apply at the time shares with altered rights are disposed of?

46. An amount derived by a person on the disposal of shares with altered rights, where the shares were acquired for the purpose of disposal before the alteration, will be income of the person under s CB 4. Conversely, s CB 4 will not apply to an amount derived by a person on the disposal of the shares where the shares were not acquired before the alteration for the purpose of disposal. This is because the shares held by the person after rights attached to the shares have been altered are the same property as the shares held by the person before the alteration.

What is the time of acquisition for shares with altered rights held on revenue account?

47. Given that the shares with altered rights are the same property as the shares before the alteration, the Commissioner considers that the time of acquisition of the shares with altered rights is the time the shares were acquired before the alteration.

Examples

48. The following examples are included to help explain the application of the law.

Example 1 – shares acquired for the purpose of disposal

49. On 15 May 2015, Shani purchased 1,000 shares in Red Packaging Ltd (RPL) for \$10 per share. Shani acquired the shares for the purpose of disposing of them. Therefore, Shani holds these shares on revenue account.
50. The directors of RPL decide to create a new class of share with preferential rights to dividends and limited voting rights. The rights attached to half of RPL's issued shares will be altered to create the new class of share. Five hundred of Shani's shares will have their rights altered and become part of the new class of shares. The alteration has been approved by interested shareholders.
51. The alteration occurs on 30 July 2016. **Shani's shares are not formally cancelled or redeemed;** nor are any new shares issued. Section CB 4 will not apply at this time because Shani has not disposed of anything.
52. On 15 August 2016, Shani sells all of her shares in RPL for \$15,000. At this point, the requirements of s CB 4 have been met. Shani has derived an amount from the disposal of property that she acquired for the purpose of disposal. As a result, Shani will have derived income on the sale of the shares. **Shani's** net income from the sale of the shares in RPL will be \$5,000.

Example 2 – shares not acquired for purpose of disposal

53. On 10 April 2012, Blue Ltd purchased 100 shares in Orange Transport Ltd (OTL) as a long-term investment. The shares carry preferential rights to dividends and have limited voting rights. The directors of OTL propose that the rights attached to the shares be altered on 1 June 2013 so as to attract ordinary rights to dividends and full voting rights. Blue Ltd is among the majority of shareholders who vote in favour of the alteration. The shares are not formally cancelled or redeemed; nor are any new shares issued. Section CB 4 will not apply on 1 June 2013 when the share rights alter because Blue Ltd has not disposed of anything.
54. On 1 October 2013, due to a change in investment strategy, Blue Ltd decides to sell its shares in OTL. Section CB 4 will not apply to the amount that Blue Ltd derives on the disposal of its shares in OTL. This is because, even though Blue Ltd voted in favour of the alteration to share rights, the shares with altered rights are the same property as the shares before the alteration. When Blue Ltd acquired the shares on 10 April 2012, it did not have a purpose of disposing of them.

References

Subject references

Alteration of rights attached to shares
Disposal
Issue and cancellation of shares
Personal property
Shares

Legislative references

Companies Act 1955, s 34
Companies Act 1993, ss 26, 28, 31, 32, 35–38,
41–51, 58–75, 83, 107, 116–119
Income Tax Act 2007, s CB 4

Case references

Alex Russell (deceased), In re [1968] VR 285
Archibald Howie v Commissioner of Stamp Duties (NSW) (1948) 77 CLR 143
Borland's Trustee v Steel Brothers & Co Ltd [1901] 1 Ch 279
Bradbury v English Sewing Cotton Ltd [1923] AC 744 (HL)
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Herzog v Hertli (HC Blenheim CIV-2007-406-251, 23 March 2009)
IR Commrs v Laird Group plc [2003] UKHL 54

Lyttelton Port Co Ltd v CIR (1996) 17 NZTC 12,556 (HC)
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Robertson v FCT (1952) 86 CLR 463
Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd (2005) 2 NZCCLR 266 (HC)

Other references

"Commentary on Public Ruling BR Pub 16/05 and BR Pub 16/06", *Tax Information Bulletin* Vol 28, No 5 (June 2016): 5
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