Inland Revenue
Te Tari Taake

TECHNICAL DECISION SUMMARY > PRIVATE RULING

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA TŪMATAITI

Income tax – land transferred within a consolidated tax group

Decision date | Rā o te Whakatau: 24 January 2025

Issue date | Rā Tuku: 19 May 2025

TDS 25/13

Subjects | Kaupapa

Intragroup land transactions, consolidation rules, distribution in kind

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Taxpayer (Holding Company) was part of a tax consolidated group (the Group). The Group consisted of the Holding Company, an active company (Company A), and several non-active sister companies. Company A had available pre-consolidation losses to carry forward.
2. The Holding Company was the parent company which wholly-owned Company A and the sister companies within the Group.
3. A single shareholder (Person A) wholly-owned the Holding Company directly through shares and, indirectly, held 100% of the shareholding in the subsidiaries which, with the Holding Company, collectively formed the Group.
4. Company A held land used in its business on capital account. Person A decided to reduce risk by diversifying their investments and seeking investment opportunities in other industries. To raise these investment funds, Person A decided that some of the land owned by Company A should be sold to realise capital gains. There was an initial sale of land (Initial Sale Land) by Company A to the Holding Company at cost, and the Holding Company sold that land to a third party purchaser at market value. The Holding Company would then be liquidated to distribute the sales proceeds and shares in Company A and the sister companies to Person A.
5. Company A intended to sell another portion of the land (Further Sale Land) it held to the other companies in the Group at cost, and those companies would immediately sell the Further Land to third parties at market value. The Further Sale Land (which was already divided into separate lots) had been split between a number of sister companies to market and sell the land to third parties.
6. Person A's purpose for liquidating the Holding Company was to transfer the capital gain from selling the Initial Sale Land and the shares in the sister companies out of the Holding Company to themselves through their 100% shareholding. The sister companies would subsequently also be liquidated to transfer the capital gains from

selling the Further Sale Land through to Person A via their now direct 100% shareholding interest.

7. A further portion of the land owned by Company A (the Retained Land) would be sold at cost to several new sister companies, which were yet to be incorporated. These new sister companies would be directly and wholly-owned by Person A and would join the Group prior to the sale of the Retained Land. The new sister companies would hold the Retained Land long term and would lease it back to Company A for its trading activities.

Issues | Take

8. The main issues considered in this ruling were:

   - whether ss CA 1(2) and CB 6 applied to the sale of the land;
   - whether ss FC 1 and FC 2 applied to the intragroup land sales; and
   - whether s BG 1 applied to the arrangement.

Decisions | Whakatau

9. TCO concluded:

   - Sections CA 1(2) and CB 6 do not apply to the sale of the land to the third parties and, therefore, the proceeds from the sales were not taxable.
   - The provisions in ss FC 1 and FC 2 do not apply to the intragroup transactions, and the land could be sold to the sister companies for a non-market value. The sister companies (as consolidated group companies) are treated as a single economic entity that could not make a distribution in kind to itself.
   - Section BG 1 does not apply to negate or vary these conclusions.

Reasons for decisions | Pūnga o ngā whakatau

Preliminary issue | Take tōmua: Is a consolidated group a "person"

10. "Person" is defined for all legislation in s 13 of the Legislation Act 2019 to include a body corporate. A "company" as a body corporate is a "person".

11. The preliminary issue was whether a consolidated group is also a "person" when applying the other provisions of the Income Tax Act 2007, including ss CA 1(2) and CB 6.

12. Section 10 of the Legislation Act 2019 requires the meaning of legislation to be ascertained from its text and in light of its purposes and its context.

13. Subpart FM is part of the "consolidation rules" as that term is defined in s FM 2(2). Section FM 2(1) states that unless a provision of the Act expressly provides otherwise or the context requires another result, the Act applies to companies which are part of a consolidated group as if they were a single company.

14. Based on s FM 2(1), TCO concluded that a consolidated group, treated as a single company, was a person for the purposes of the Act and not the individual member companies. This was unless the specific provision being considered expressly provided otherwise, or there were strong contextual reasons requiring another result.

Issue 1 | Take tuatahi: Whether ss CA 1(2) and CB 6 applied to the sale of land

15. Company A sold the Initial Sale Land to the Holding Company and proposes to sell the Further Sale Land to the sister companies. The Holding Company immediately on-sold the Initial Sale Land to third parties. The sister companies will immediately, upon acquiring the Further Sale Land, begin the process of marketing and selling that land to third parties.

16. The issue is whether the proceeds derived or to be derived by the Holding Company and the sister companies from selling the Initial Sale Land and the Further Sale Land to the third parties will give rise to income for the Group under s CB 6 (Disposal: land acquired for purpose or with intention of disposal) or s CA 1(2) (Amounts that are income).

17. The facts show that the Holding Company and the sister companies will acquire the Initial Sale Land and the Further Sale Land, as relevant, with a purpose or intention of disposing of it. If those companies are the persons regulated by s CB 6 and it is their purpose or intention that must be tested for the purposes of that section, those land transactions would give rise to income under s CB 6. Also, the speculative nature of that activity would mean that the Holding Company and the sister companies would otherwise have income under ordinary concepts under s CA 1(2).

18. Despite this, as above, s FM 2(1) (Consolidation rules) states the Act is intended to apply to member companies of a consolidated group as if they were a single company

unless another provision expressly provides otherwise, or the context requires another result. For this purpose, ss CB 6 and CA 1(2) do not expressly provide they do not apply to a person that is a single company made up of the members of a consolidated group.

19. Also, the context does not require another result. Section CB 6 is directed to transactions that involve a degree of trading in land. Section CA 1(2) is intended to include income amounts derived by a person from activities they carry on that are of an income producing character. Those purposes will not be frustrated by treating consolidated group companies as a single company, as it recognises that intragroup transactions in economic terms amount to the common owner(s) trading with themselves. Also, single company treatment will not frustrate the purpose of s CB 6 where land has been appropriated to revenue account by transferring it intragroup subject to a change of intention in how the land will be used (rather than just promptly on selling it without more which was the situation here). If the land were appropriated to revenue account, the rule in *Sharkey v Wernher* would treat the land as having been disposed of and reacquired by the Group at the time it was appropriated to revenue account.[1] This would crystallise any capital gain at that point with the land afterwards being held on revenue account.

20. Therefore, the Group is the person that will be regulated by ss CB 6 and CA 1(2) when the Initial Sale Land and the Further Sale Land is sold to the third parties.

21. For the purposes of ss CA 1(2) and CB 6, the Group first acquired the Initial Sale Land and the Further Sale Land through Company A which had a purpose or intention of holding that land and using it as an income producing asset in its business. TCO concluded that the rule in *Sharkey v Wernher* did not apply to the land. Therefore, it is Company A's purpose or intention (as representative of the Group) on originally acquiring the Initial Sale Land and the Further Sale Land that is to be tested under s CB 6 and not the Holding Company's or the sister companies' subsequent purpose or intention. Thus, the Group will not have income under s CB 6 when it sells the Initial Sale Land and the Further Sale Land to the third parties. Neither will the Group have income under s CA 1(2) for those transactions as the Group's activities in holding, using and disposing of the Initial Sale Land and the Further Sale land did not amount to activities of an income producing character.

22. Consequently, the Group, the Holding Company, and the sister companies, as applicable, will not have income under ss CB 6 and CA 1(2) from the proceeds of selling the Initial Sale Land and the Further Sale Land to the third parties.

[1] *Sharkey v Wernher* [1956] AC 58 (HL)

23. Company A held the Initial Sale Land, the Further Sale Land on capital account at all times before transferring that land.

Issue 2 | Take tuarua: Whether ss FC 1 and FC 2 applied to the intragroup land sales

24. Company A will sell the Initial Sale Land, the Further Sale Land and the Retained Land to the Holding Company, the existing sister companies and the new sister companies, respectively at cost. The issue is whether ss FC 1 and FC 2 will apply to deem those transfers to have occurred at market value.

25. Section FC 1(1)(d) applies where property is transferred on a distribution in kind by a company in a transfer of company value caused by a shareholding in the company under s CD 6. Section FC 2 treats the transfer of property in those circumstances as a disposal by the transferor, and an acquisition by the transferee, on the date of the transaction at the market value for the transferor.

26. A distribution in kind however does not include a sale. As such, ss FC 1 and FC 2 do not apply to a non-market sale of company property to a shareholder of the company or their associate. The sale transaction itself creates an identifiable taxable event at the value allocated to the property by the sale and purchase agreement. This creates no mischief as the amount by which the transaction with the shareholder or their associate is below market price will prima facie fall within the dividend concept under s CD 5(1)(b). However, that transfer of value will occur incidentally as part of the sale of the property rather than the sale of the property being included or involved in the making of a distribution.

27. Company A would transfer the Initial Sale Land, the Further Sale Land and the Retained Land to Company A and the sister companies by way of sale. Therefore, ss FC 1 and FC 2 will not apply to any of the land sales by Company A.

28. TCO would have also reached this conclusion based on the application of the consolidation rules. Company A, the Holding Company, the existing sister companies and the new sister companies will all be members of the same consolidated group when the Initial Sale Land, the Further Sale Land and the Retained Land are transferred. As the consolidation rules require the Holding Company, Company A, and the sister companies to be treated as a single company, that single company cannot make an in kind distribution of company property to itself. Therefore, again, ss FC 1 and FC 2 will not apply.

Issue 3 | Take tuatoru: Whether s BG 1 applies to the arrangement

29. Section BG 1(1) provides that a "tax avoidance arrangement" is void as against the Commissioner. Section GA 1 enables the Commissioner to make an adjustment to counteract a tax advantage obtained from or under a tax avoidance arrangement.

30. The Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289 considered it desirable to settle the approach to applying s BG 1. This approach is referred to as the Parliamentary contemplation test, which is an intensely fact-based inquiry. *Ben Nevis* has been followed in subsequent judicial decisions.

31. TCO's approach in making this decision is consistent with interpretation statement: **IS 23/01: Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007** (3 February 2023) (IS 23/01). IS 23/01 will not be replicated in this TDS but in summary the steps are as follows:

- Understanding the legal form of the arrangement. This involves identifying and understanding the steps and transactions that make up the arrangement, the commercial or private purposes of the arrangement and the arrangement's tax effects.
- Determining whether the arrangement has a tax avoidance purpose or effect. This involves:
    - Identifying and understanding Parliament's purpose for the specific provisions that are used or circumvented by the arrangement.
    - Understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts. Artificiality and contrivance are significant factors.
    - Considering the implications of the preceding steps and answering the ultimate question under the Parliamentary contemplation test: Does the arrangement, when viewed in a commercially and economically realistic way, make use of or circumvent the specific provisions in a manner consistent with Parliament's purpose?
- If the arrangement has a tax avoidance purpose or effect that is not the sole purpose or effect of the arrangement, consider the merely incidental test. The merely incidental test considers many of the same matters that are considered under the Parliamentary contemplation test.

32. Considering all the relevant facts and circumstances (noting that as this is a summary it may not contain all the facts or assumptions relevant to the decision and, therefore, cannot be relied on) TCO has concluded as follows.

33. Company A will transfer the Initial Sale Land and the Further Sale Land to the Holding Company and the sister companies, and the Retained Land to new sister companies, at cost by way of an actual sale. The Holding Company, Company A, and all the sister companies were all members of the Group. The Group had held the Initial Sale Land, the Further Sale Land and the Retained Land at all times on capital account.

34. The Holding Company and the sister companies will then on-sell the Initial Sale Land and the Further Sale Land to the third parties, realising genuine capital gains. The Holding Company and the sister companies will then be liquidated to distribute those capital gains to Person A.

35. The Holding Company and the original sister companies have been members of the Group for a substantial period of time and well before the Arrangement commenced. The new sister companies are yet to be incorporated, but this will occur, and they will join the Group before they receive the Retained Land, which they will acquire without a purpose or intention of disposal. The Group will continue to use the Retained Land in its business carried on by Company A, which will continue in existence.

36. The tax outcomes of the above steps and transactions are that the Group continued to benefit from being able to use Company A's available pre-consolidation losses while at the same time being able to distribute genuine realised capital gains to Person A tax free. Importantly, these tax benefits are underpinned to a certain extent by real commercial purposes (i.e., the restructure of Person A's investments and meeting relevant regulatory requirements). The tax effects are otherwise consistent with Parliament's purpose for the use of:

    - the consolidation rules (i.e., treating the Group as a single economic entity with its sole shareholder, Person A); and
    - the loss rules (recognising that Person A has continuously owned the Group companies and has ultimately borne Company A's pre-consolidation losses).

37. Consequently, viewed as a whole, TCO considered that the real commercial outcomes of the Arrangement are consistent with its legal form. The Arrangement did not involve any artificiality or contrivance beyond what Parliament has contemplated in the context of the consolidation rules. Also, none of the other factors that could indicate there is a tax avoidance arrangement point in that direction.

38. TCO considered that the facts, features and attributes that Parliament's purpose for the specific provisions at issue expect to be present are all in fact present in the Arrangement as a matter of commercial and economic reality.

39. TCO also considered that the Arrangement is commercially explicable and is not artificial or contrived in the context of Parliament's purpose for the consolidation rules. The legal form of the Arrangement also corresponded to its commercial and economic reality.

40. Therefore, TCO considered it could rule that s BG 1 did not apply to negate or vary the other conclusions reached in the ruling.