

TECHNICAL DECISION SUMMARY > PRIVATE RULING

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA TŪMATAITI

Company restructure for commercial and estate planning

Decision date | Rā o te Whakatau: 22 May 2025

Issue date | Rā Tuku: 4 August 2025

TDS 25/19

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Subjects | Kaupapa

This item summarises a private ruling that considered whether a company restructure for commercial and estate planning is tax avoidance.

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Arrangement in this ruling is the restructure of a family business (the Company) as part of commercial and estate planning given the advancing years of the founding family members. The Arrangement involves several other companies that have been left out of this summary for simplicity.
2. The Company has issued classes of voting and non-voting shares. Three family members (a parent and two siblings) hold the voting shares. The majority of the non-voting shares are held by the family trusts of each of the three family members (Family Trusts A, B and C), with the spouse of each sibling holding a minority interest.
3. The stated commercial or private purposes of the Arrangement are to:
 - implement a commercial and estate plan to ensure the Company is effectively controlled and governed going forward by a holding company with a board of directors (including independent commercial directors) and for the benefit of the two siblings' family trusts, following the founding family members' deaths; and
 - preserve the imputation credits that have accumulated for future use by the Company's original trust shareholders.
4. To implement the commercial and estate plan, the following steps were proposed:
 - The spouses gift their minority interests in the non-voting shares to the relevant sibling's family trust.
 - Each of the three family trusts incorporates a separate company (NewCos A, B and C) and sells its non-voting shares to its respective NewCo for market value in a share-for-share exchange. All non-voting shares in the Company are then held by the three NewCos.
 - The Company pays a fully imputed dividend to the holders of the non-voting shares (that is, NewCos A, B and C), paid either as a credit to the shareholders

with the shareholders simultaneously reinvesting that amount as additional share equity into the Company or as a fully imputed taxable bonus issue.

- The voting shares the three family members hold are gifted to Family Trusts A and B (being the two siblings' family trusts). This results in all voting shares being held by the two siblings' family trusts.
 - Family Trusts A and B then sell these voting shares to NewCos A and B for market value in a share-for-share exchange.
 - NewCos A and B incorporate HoldCo and sell all the shares they hold in the Company for market value to HoldCo in a share-for-share exchange.
5. The result of the above transactions is that the two siblings' family trusts each owns 50% of a newly incorporated holding company that has a commercial board of directors and the holding company, in turn, holds all the voting shares and a majority of the non-voting shares in the Company. Some non-voting shares remain held by the parent's NewCo for now, and these are expected to transfer to the HoldCo structure following the parent's death. The Company's imputation credits pass to the three NewCos held by the original family trust shareholders, where they remain for future use.
6. The Agent stated (and it is conditioned in the ruling) that:
- no share-for-share transaction in the Arrangement will result in the issuing company recognising or claiming available subscribed capital (ASC) (as defined in s YA 1) in excess of the existing ASC of the shares acquired, whether by operation of s CD 43 or otherwise; and
 - no share disposal under the Arrangement that is on revenue account will result in the person disposing of those shares recognising or claiming a material loss for tax purposes.

Issue | Take

7. The issue considered in the ruling was whether s BG 1 applied to the payment by the Company of a fully imputed dividend to the NewCos and the use of HoldCo to acquire shares in the Company.

Decision | Whakataau

8. The Tax Counsel Office (TCO) concluded that s BG 1 did not apply to the payment by the Company of a fully imputed dividend to the NewCos and the use of HoldCo to acquire shares in the Company.

Reasons for decisions | Pūnga o ngā whakataau

Issue | Take: Application of s BG 1

9. 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.
10. 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.
11. TCO’s approach in making this decision is consistent with Interpretation Statement: 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.

12. Taking into account all of 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 concluded as follows.

The Arrangement

13. The Arrangement, for s BG 1 purposes, and the commercial or private purposes of the Arrangement are as set out in the summary of facts in [4] above.

The tax effects of the Arrangement

14. TCO was not asked to rule on the black letter tax effects. However, taking into account the Arrangement's description and the conditions to the ruling, TCO considered the tax effects of the Arrangement to be as follows.
15. The various share-for-share exchanges should not result in any uplift in ASC being recognised. Generally, any ASC created by the issue of shares in consideration for receiving shares under the Arrangement is limited by s CD 43(9) and (10). A technical question exists about whether s CD 43(9) and (10) applies to limit ASC created by the issue of shares by the NewCos in consideration for the non-voting shares in the Company. However, the Agent proposed (and it is conditioned in the ruling) that the share-for-share exchanges do not result in any uplift in ASC being recognised by the issuing company.
16. Several share disposals are assumed to be on capital account. To the extent a disposal is on revenue account under s CB 4 (that is, if shares are acquired and then disposed of under the Arrangement), the transactions occur immediately after each other and most transfers are for either market value or deemed market value (due to being a gift and the application of s FC 1(1)(e) and (2)), meaning any income should be offset against the related revenue account property deduction under s DB 23. A different revenue account outcome may occur if the imputed dividend is paid by way of a taxable bonus issue. However, the Agent proposed (and it is conditioned in the ruling) that no share

disposal under the Arrangement on revenue account results in the person disposing of those shares recognising or claiming a material loss for tax purposes.

17. The fully imputed dividend paid to the three NewCos, whether by way of taxable bonus issue under s CD 8 or by credit and reinvestment in share capital, effectively result in:
 - the Company's imputation credit account being debited by the amount of imputation credits attached to the dividends and each NewCo's imputation credit account being credited by the relevant amount (ss OB 30 and OB 9);
 - each NewCo deriving dividend income under s CD 1 that is able to be offset against the tax credit arising for imputation credits under s LE 1; and
 - the Company having an increase in ASC, either for the amount of dividend arising from the bonus issue not including the amount of attached imputation credits (s CD 43(6)(b) and (7)(ab)) or as the reinvested consideration gives rise to a "subscriptions" amount in the formula (s CD 43(2)(b)).
18. The only transaction that should affect the Company's shareholder continuity is the transfer of voting shares by the three family members to the two family trusts. The Company will already have distributed its imputation credits by then. None of the other share transfers changes who ultimately holds the voting interests in the Company.
19. No additional cashflow is created, or loan left outstanding, that can be used to transfer value from the Company outside the dividend regime. The only uplift in ASC arises by virtue of the taxable bonus issue, or credit that is reinvested, to pay the imputed dividend.

Parliamentary contemplation

20. TCO considered that the above tax effects are the legislation working as intended and do not cause any concern from a s BG 1 perspective for the reasons below.
21. The imputation regime operates on the basis that tax on a company's profits should eventually be paid at the relevant shareholder's correct rate. Tax paid at the company level generates imputation credits that can be attached to distributions by the company, meaning the company's income is taxed at the shareholders' marginal tax rates. The purpose of the imputation credits regime is to allow a company to pass on credits for tax it has paid on its profits to its shareholders when it pays them dividends to avoid double taxation.
22. In respect of a taxable bonus issue, Parliament intended that it could be a dividend if it met the requirements of s CD 8. It follows that Parliament would also have intended

that imputation credits should be attached to the dividend. This suggests Parliament would intend that a taxable bonus issue could be used to transfer imputation credits from a company to its shareholders without requiring a transfer of value to have taken place.

23. While the Company's imputation credits are not forfeited when the Company's shareholder continuity is breached (due to having passed to the NewCos), and new ASC is created in respect of this amount, these outcomes are permitted tax advantages that are within Parliament's contemplation. The imputation credits remain in the NewCo imputation credit accounts, underneath the Company's original trust shareholders. Accordingly, the imputation credits are still held for the same ultimate shareholders that economically bore the cost of the Company paying the tax.
24. While shares are being transferred within a group structure under the Arrangement, the usual dividend avoidance concerns do not arise. This is because the transfers do not generate any ability to remove funds from the Company outside the dividend regime under the guise of a capital receipt. This is due to share-for-share exchanges being used, which means no cash flows and no uplift in ASC are created. Any future funds the Company distributes will be subject to the dividend rules in the usual manner. Therefore, the transfers implement the Applicants' commercial and estate planning objectives and do not create any material tax advantage.

Conclusion

25. TCO concluded that Parliament would consider the Arrangement makes use of the relevant provisions in a manner that is consistent with Parliament's purpose for those provisions.
26. Therefore, the Arrangement does not have a tax avoidance purpose or effect.