Inland Revenue
Te Tari Taake

TECHNICAL DECISION SUMMARY > PRIVATE RULING

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA TŪMATAITI

Restructure and use of losses

Decision date | Rā o te Whakatau: 19 May 2026

Issue date | Rā Tuku: 28 September 2026

TDS 26/17

Subjects | Kaupapa

This item summarises a private ruling that considered the transfer of assets between group companies as part of a restructure and the carry forward and use of losses of the recipient company after the restructure.

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Arrangement in this ruling involves the restructure of a group of companies to clarify the role, functions, operations and financial performance of the different parts of the business. Before the Arrangement, the group's activities, including production and licensing, were spread across different entities in the group.

2. Under the proposed restructure, the activities of the group are reorganised so that the same entity carries out similar business functions. To achieve this, Company A, a wholly owned subsidiary of the parent company (HoldCo) but not part of a consolidated group, will purchase the assets used for production activity that Company B holds (production activity assets). Company B is another wholly owned subsidiary of HoldCo that is part of the consolidated group. The purchase price will give rise to a debt that Company A owes to Company B. The debt is to be forgiven immediately or left outstanding (and repaid or forgiven at a future date).

3. Company A has losses carried forward, which it incurred before 2018 when it was owned 50% by HoldCo and 50% by a third party. In 2018, HoldCo purchased the remaining 50% of shares from the third party, with the result that it wholly owned Company A.

4. The restructuring will result in separate business units for the licence activity (which will remain in Company B) and the production activity (where the transacted production activity assets will join other production assets and activities in Company A).

Issues | Take

5. The main issues that the Tax Counsel Office (TCO) considered in this ruling were whether:

- following the acquisition of the production activity assets, Company A would be able to carry forward its tax loss balance under s IA 3(4) and use the loss balance under s IA 4(1); and
- s BG 1 applied to the Arrangement.

Decisions | Whakatau

6. TCO concluded that:
   - following the acquisition of the production activity assets, Company A would be able to carry forward its tax loss balance under s IA 3(4) and use the loss balance under s IA 4(1), provided that Company A continues to satisfy the continuity requirements of s IA 5, and subject to any adjustment under ss IA 3B, IA 8, IA 9 and IA 10; and
   - s BG 1 did not apply to the Arrangement.
7. TCO issued this ruling on the conditions that HoldCo and Company A each have only one class of shares and no options over the shares, and all shares of each company carry the same decision-making rights.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Sections IA 3 and IA 4

8. Under s IA 3, a taxpayer may carry a loss forward to a future year and use it to reduce their net income in that year. The ability to carry forward and use losses is subject to:
   - maintaining minimum voting interests of 49% or more throughout the continuity period (s IA 5); and
   - restrictions on the use of losses where the Insolvency Act 2006 applies (s IA 3B), the use of losses to offset schedular income (s IA 8), and the use of the losses where there has been a reassessment (s IA 10).
9. A person's voting interest in a company equals the percentage of the total shareholder decision-making rights for the company carried by shares or options that the person holds (ss YA 1 and YC 2). Generally, a person's voting interest in a company will be the same as the percentage of shares they own. This will be the case if there is only one type of share, no options over the shares exist, and the shares carry standard decision-making rights.

10. Company A has carried forward tax losses that it incurred before 2018. Company A will be able to continue to carry forward and use the tax losses provided it has at least 49% continuity of shareholding during the continuity period and none of the restrictions applies.

11. Provided voting interests are consistent with shareholder decision-making rights, and no market value circumstance (defined in s YA 1) has arisen, the shareholders of HoldCo will be treated as holding HoldCo's voting interests in Company A (s YC 4). Shareholder continuity above 49% has been maintained from the time Company A incurred the losses through to the date of the ruling (s IA 5). Company A therefore has been able to carry forward, and will be able to use, the losses, provided it maintains shareholder continuity.

12. Section IA 4 provides for the use of loss balances carried forward to a tax year. There are no restrictions on Company A's ability to offset its carry-forward tax losses against income derived from the newly acquired assets.

13. Therefore, TCO concluded that, following the acquisition of the production activity assets, Company A would be able to carry forward its losses under s IA 3(4) and use the losses under s IA 4(1).

14. This conclusion is subject to the proviso that it will apply only if Company A continues to satisfy the continuity requirements of s IA 5 and is subject to any adjustment under ss IA 3B, IA 8, IA 9 and IA 10. Further, the ruling was issued on the conditions that HoldCo and Company A each have only one class of shares and no options over the shares, and all shares of each company carry the same decision-making rights.

Issue 2 | Take tuarua: Section BG 1

15. 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.

16. 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.

17. The 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.

18. 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) the TCO concluded as follows.

The Arrangement

19. The Arrangement is the steps by which the production activity assets will be transferred from Company B to Company A, and losses of Company A will be applied to reduce net income arising from operating the production activity assets in the future.

20. Prior to the sale of the production activity assets, Company A's losses were not available to reduce the net profits from operating the production activity assets. That is because the consolidated group companies and Company A did not have 66% or greater commonality at the time Company A incurred the losses.

Parliament's purposes

21. In enacting the relevant provisions on carry forward and use of losses, Parliament's purposes were to:

- allow for the carry forward and use of losses in an entity in circumstances in which the person or persons who gain the benefit of the tax losses are the same (or at least 49% the same) as the person or persons who have borne the losses;
- prevent loss trading; and
- ensure that the owners of a profit company who receive the benefit of a loss that another company carried forward are, at least to the extent of 66%, the same person or persons who suffered the economic burden of the loss when that other company incurred it. This is to prevent losses being freely traded between unrelated companies and protect the interests of minority shareholders from controlling shareholders diverting company losses to another company that the minority shareholders do not have interests in.

Commercial and economic reality

22. In relation to the commercial and economic reality of the Arrangement, TCO considered the following:

- There is a real transfer of economic risks and rewards of ownership of business assets between group companies at market value and on standard commercial terms.
- It is reasonable to expect that grouping similar business functions in one entity will meet the commercial purposes put forward for the transaction.
- There are no additional steps or complexity which are not explained by the commercial purposes that the Arrangement is set to achieve.
- The Arrangement contains no hallmarks of artificiality or contrivance.
- The transactions that together comprise the Arrangement have no circularity.
- While the use of losses in Company A may potentially accelerate, this tax effect is consistent with a real change in economic risks and rewards to the parties in relation to the transferred assets. The ultimate shareholders are not benefiting from tax losses that they were not previously entitled to.

Implications of the preceding steps

23. The Arrangement is consistent with Parliament's purpose for these reasons:

    - The ultimate shareholders have maintained their interest of more than 49% via HoldCo throughout the continuity period. The persons receiving the benefit of the carry forward and offset of losses in Company A are therefore sufficiently the same as the persons who had borne the economic consequence of losses prior to 2018 to meet the purposes of the relevant provision.
    - The use of tax losses is not limited to income derived from assets owned when those losses were incurred. Parliament would have contemplated that a company could apply those losses against income from assets acquired after the losses arose.
    - There are no circumstances suggesting that Company A has been the subject of loss trading in the sense Parliament appears to have intended to disallow it.
    - There are no minority shareholder concerns.

Conclusion

24. Accordingly, TCO considered the provisions of the Act were being used and had the effect that Parliament intended. Therefore, the Arrangement did not have a tax avoidance purpose or effect.

25. Given the conclusion that the Arrangement is not a tax avoidance arrangement, it was not necessary for TCO to consider the application of s GA 1.