

The edited version of the Compendium of Comments is a Tax Office communication that is not intended to be relied upon as it provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law. In accordance with PS LA 2008/3 it only affords level 3 protection.

Page status: **not legally binding**

Page 1 of 3

Ruling Compendium – TD 2009/4

This is a compendium of responses to the issues raised by external parties to draft TD 2008/D17 – Income tax: in accounting for a Dividend Re-investment Plan, can a company taint its share capital account for the purposes of Division 197 of the *Income Tax Assessment Act 1997*?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Entity/ies commenting	Issue raised	Tax Office Response/Action taken
1	A, B	Agree with the conclusion in the Determination that a Dividend Reinvestment Plan (DRP) should not taint the issuing company's share capital account.	Noted.
2	A	The Determination should provide further guidance on why there is a transfer to the share capital account under a DRP for the purposes of section 197-5 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997). The Determination suggests that whether there is a transfer is determined solely by the accounting entries. The accounting entries should be relevant, but not determinative, of whether there has been a transfer. Solely focussing on the accounting entries may give rise to capricious results. It is not clear why ATO ID 2001/63 has been withdrawn. In ATO ID 2001/63, which also held that a DRP does not result in share capital tainting, the Tax Office took the approach that there was no transfer because the DRP involves a constructive payment of dividends by the company to the shareholder. The Determination should explain why the Tax Office now thinks a DRP gives rise to a transfer.	Paragraphs 19 and 20 of the Determination address why there is a transfer in each of the factual situations under consideration. The Tax Office view is that in these two factual situations there is a transfer on the basis of the accounting entries. The subject of the Determination is not the meaning of 'transfer' under section 197-5 of the ITAA 1997 and it will not be extended to provide further guidance on this issue. A fact sheet on Share Capital Tainting issued on the 23 October 2007 that is available on the Australian Taxation Office website provides further guidance on when there is a transfer for the purposes of section 197-5 of the ITAA 1997. ATO ID 2001/63 was withdrawn because, although its conclusion was correct, its reasoning was considered wrong. It is now considered that in the circumstances of ATO ID 2001/63 there is a transfer to the share capital account for the purposes of section 197-5 of the ITAA 1997.

The edited version of the Compendium of Comments is a Tax Office communication that is not intended to be relied upon as it provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law. In accordance with PS LA 2008/3 it only affords level 3 protection.

Page status: **not legally binding**

Page 2 of 3

Issue No.	Entity/ies commenting	Issue raised	Tax Office Response/Action taken
3	A	The view in the Determination that shares acquired under a DRP are issued in respect of the shareholder's original shares is contrary to the view expressed in Taxation Determination TD 2000/3. It is agreed that Parliament intended that subsection 6BA(5) of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) apply to DRPs. However, a conclusion that subsection 6BA(5) applies to DRPs requires a conclusion that subsection 6BA(1) covers DRPs. Subsection 6BA(1) is very similarly worded to subsection 130-20(1) of the ITAA 1997. TD 2000/3 provides in relation to subsection 130-20(1) of the ITAA 1997, that shares acquired under a DRP are not issued in relation to the shareholder's original shares, and therefore that Subdivision 130-A of the ITAA 1997 does not apply to shares acquired under a DRP.	The Tax Office considers the view on the meaning of subsection 6BA(1) of the ITAA 1936 in the Determination to be the preferable view. It is acknowledged that similar words are used in subsection 130-20(1) of the ITAA 1997. However, words are not necessarily used consistently within or between Acts. The context and objects of section 6BA of the ITAA 1936 supports the view reached in the Determination that it is not only concerned with bonus shares within a legal technical meaning. The Explanatory Memorandum to the Taxation Laws Amendment (Company Law Review) Bill 1998 (the Explanatory Memorandum) also supports that view.
4	A	A consequence of section 6BA of the ITAA 1936 applying to DRPs for corporate participants is that they are denied consideration for the DRP shares to the extent that the dividend is rebateable under sections 46 and 46A of the ITAA 1936. What is the situation for corporate participants in DRPs who took the position that section 6BA does not apply on the basis of TD 2000/3?	TD 2000/3 is concerned with the treatment of DRPs under Subdivision 130-A of the ITAA 1997, and does not provide any views on the application of section 6BA of the ITAA 1936 to DRPs. However, the inter corporate dividend rebate does not apply to franked dividends paid on or after 1 July 2002. Further, the inter corporate dividend rebate for unfranked inter group dividends does not apply with effect from 1 July 2003 (subject to section 46AC for SAP taxpayers who elect to consolidate on the first day of their income year that commences after 1 July 2003 and before 1 July 2004). These dates are all prior to the date of effect of the Determination.

The edited version of the Compendium of Comments is a Tax Office communication that is not intended to be relied upon as it provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law. In accordance with PS LA 2008/3 it only affords level 3 protection.

Page status: **not legally binding**

Page 3 of 3

Issue No.	Entity/ies commenting	Issue raised	Tax Office Response/Action taken
5	B	The legal distinction between bonus shares and DRPs is relevant to the interpretation of subsection 6BA(1) of the ITAA 1936. Section 6BA was drafted to preserve this distinction. Subsection 6BA(1) applies to bonus shares (that is, shares issued under a bonus share plan (BSP)) and not to shares issued under a DRP. This is because shares acquired under a DRP are not bonus shares. In contrast, subsection 6BA(5) only applies to shares issued under DRPs and does not apply to bonus shares.	The Determination is only concerned with the application of section 6BA to DRPs. BSPs are outside the scope of the Determination. The comment agrees with the Determination that subsection 6BA(5) applies to DRPs. However, for this to be the case DRPs must fall within subsection 6BA(1); the application provision of section 6BA. The context, purpose and the Explanatory Memorandum all suggest that section 6BA covers both DRPs and bonus shares (within a legal technical sense).
6	B	Paragraph 25 of the Determination incorrectly states that the expressions 'bonus share' and 'DRP' are used interchangeably in the Explanatory Memorandum. Paragraphs 1.90 and 1.99 to 1.101 of the Explanatory Memorandum distinguish bonus shares from shares issued under a DRP.	The Tax Office disagrees. At paragraphs 1.99 and 1.101 the Explanatory Memorandum calls the shares issued under a DRP bonus shares. However, paragraph 25 has been amended to clarify this point.
7	B	Subsection 6BA(5) does not apply to BSPs. The choice referred to in subsection 6BA(5) of the ITAA 1936 is a choice to have a dividend entitlement satisfied by a different means. A shareholder that elects to participate in a BSP does not have this type of choice. There is nothing in the Explanatory Memorandum to indicate that it was the intention of Parliament that subsection 6BA(5) apply to BSPs.	The Determination does not provide the Commissioner's views on the meaning of 'choice' as used in section 6BA of the ITAA 1936 nor does it provide that subsection 6BA(5) applies to BSPs. This is outside the scope of its subject matter. It merely notes that a DRP involves the relevant choice and therefore falls within the terms of subsection 6BA(5).