Draft Taxation Determination

Income tax: capital gains: how is a distribution of the 'exempt' component of a capital gain attributable to goodwill treated for the purposes of:

(a) section 47 of *the Income Tax Assessment Act 1936* ('the 1936 Act'); and

(b) the capital gains provisions;

when a company's business ends and the capital gain is distributed to shareholders by a liquidator in the course of winding up the company?

Preamble

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office (ATO). DTDs may not be relied on; only final TDs are authoritative statements of the ATO.

1. A distribution of the 'exempt' component is not deemed to be a dividend under subsection 47(1) of the 1936 Act.

2. It is not income derived by the company according to ordinary concepts for the purposes of subsection 47(1) of the 1936 Act. Nor is it income derived by the company under the extended definition in subsection 47(1A) of the 1936 Act.

3. This 'exempt' component would not be included in the assessable income of the company under section 102-5 of the *Income Tax Assessment Act 1997* ('the 1997 Act') for the purposes of subsection 47(1A) of the 1936 Act. Notwithstanding the provisions of paragraph 47(1A)(b) of the 1936 Act, subsection 47(1A) does not disregard exempting provisions such as section 118-250 of the 1997 Act. Paragraph 47(1A)(b) of the 1936 Act requires that indexation and capital losses be disregarded in working out the amount of a net capital gain that is included as 'income derived by a company'.

4. For the capital gains provisions, the distribution of the 'exempt' component represents capital proceeds for the cancellation of the shares in the case of a final distribution or an interim distribution which is followed within 18 months by the dissolution of the company: see also Taxation Determination TD 98/D24. It is an amount to which CGT event G1 (about capital payments for shares) in section 104-135 of the 1997 Act applies in the case of other interim

liquidations distributions in respect of post-CGT shares: see also Taxation Determination TD 98/D24.

5. A reference in this Determination to 'the "exempt" component', in relation to a capital gain attributable to goodwill, means that part of the capital gain which is disregarded by subsection 118-250(1) of the 1997 Act.

Example

Company's position

6. X Pty Ltd, a resident company, was incorporated and acquired a business after 19 September 1985. The business was acquired for $1,100,000, and of that amount its goodwill was acquired for $100,000. The business was sold and the goodwill disposed of for $200,000 in the 1998-99 year of income.

7. Assuming the cost base of the goodwill after indexation was $110,000, the company made a capital gain of $90,000 of which $45,000 was exempt under section 118-250. The company paid tax of $16,200 on the gain (i.e., 36% x $45,000).

8. The company transferred the after-tax amount of $83,800 to its capital profits reserve.

9. The company was placed in liquidation. The liquidator distributed $83,800 appropriated from the capital profits reserve.

Shareholder's position

10. Subsection 47(1), read with subsection 47(1A), deems a shareholder to have received a dividend to the extent that an amount would have been a capital gain to the company disregarding indexation and losses.

11. In this particular case, the capital gain to the company (disregarding indexation, as subsection 47(1A) requires) would have been $100,000. Fifty percent ($50,000) would have qualified for exemption under section 118-250. The balance of the distribution ($33800 - i.e. $50,000 less $16,200 tax paid) is deemed by subsection 47(1) to be a dividend.

12. If the distribution is a final distribution or an interim distribution followed within 18 months by the dissolution of the company, the full amount of $83,800 would represent capital proceeds for the cancellation of the shares and would need to be taken into account in calculating the extent of any capital gain or loss. Subsection 118-20(1)) would operate to ensure an appropriate reduction is made to any capital gain that would otherwise arise to the extent of the $33800 deemed dividend.

13. If the distribution is an interim distribution not followed within 18 months by the dissolution of the company, the application of section 104-135 would need to be considered in relation to the amount of the distribution that is not deemed to be a dividend (i.e. $50,000 [$83,800 - $33,800]).

Note:

14. This Determination rewrites and replaces Taxation Determination TD 95/14. It will be withdrawn when this Determination is finalised.

15. This Determination implements a change in the law effected by *Tax Law Improvement Act (No 1) 1998*. This change aligns the treatment of interim liquidation distributions with that of final distributions if the company is dissolved within 18 months from the interim payment.

Date of effect

16. This Determination applies in working out whether you have made a capital gain or loss from a CGT event that happens in relation to a CGT asset in the 1998-99 or any later income year.

Your comments

17. If you wish to comment on this draft Determination, please send your comments by 28 May 1999 to:

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Commissioner of Taxation
28 April 1999

Previous draft:

TD 95/14

Related Rulings/Determinations:

TD 95/10; TD 95/11; TD 95/12; TD 95/13; TD 95/15

Subject references:

capital gains; disposal of assets; distributions; dividends; exemption of gains and losses; goodwill; liquidation; shares

Legislative references:

ITAA36 47(1); ITAA36 47(1A); ITAA36 47(1A)(b); ITAA97 102-5; ITAA97 104 –135; ITAA97 118-20(1); ITAA97 118-250; ITAA97 118-250(1)

Case references:

ATO References:
NO 94/8637-2; 98/6927-1
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