TD 94/D113 - Income tax: capital gains: how is the 'exempt' component of a capital gain that arises on the disposal of goodwill treated when distributed to shareholders by a liquidator in the course of winding up a company?

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Australian Taxation Office

Taxation Determination **TD 94/D113**

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Draft Taxation Determination

Income tax: capital gains: how is the 'exempt' component of a capital gain that arises on the disposal of goodwill treated when distributed to shareholders by a liquidator in the course of winding up a company?

1. The component is not deemed to be a dividend under subsection 47(1) of the *Income Tax Assessment Act 1936*. It does not represent income derived by the company under ordinary concepts or under the extended definition of income in subsection 47(1A).

2. In terms of paragraph 47(1A)(b), this component would not be included in the assessable income of the company under section 160ZO notwithstanding the requirement that the capital gain be recalculated in accordance with the provision. There is nothing in subsection 47(1A) to indicate that the usual exempting provisions, including section 160ZZR, are not to be taken into account in recalculating the gain. The only additional requirement in paragraph 47(1A)(b) is to ignore indexation and capital losses.

3. The exempt component will represent consideration in respect of the disposal of the shares (in the case of a final distribution) or an amount to which section 160ZL applies (in the case of an interim distribution).

Example:

Company's Position

X Pty Ltd was incorporated and acquired a business after 19 September 1985. The business was acquired for $100,000 with the only asset being goodwill. The business was sold and the goodwill disposed of in the 1992/1993 year of income for $200,000.

Assuming that the indexed cost base was $110,000, the company made a capital gain of $90,000 of which $45,000 was exempt under section 160ZZR. The company paid tax of $17,550 on the assessable gain (i.e. 39% x $45,000).

After tax, an amount of $82,450 was transferred to the capital profits reserve.

The company goes into liquidation. Of the funds distributed by the liquidator, $82,450 is appropriated from the capital profits reserve.

Shareholder's Position

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 without taking into account indexation and losses.

In this particular case, the capital gain (disregarding indexation) would have been $100,000. Fifty percent would have qualified for exemption under section 160ZZR.. The balance of the distribution ($32,450 i.e. $50,000 less tax paid $17,550) is deemed by subsection 47(1) to be a dividend.

If the distribution is a final distribution, the full amount of $82,450 would represent consideration in respect of the disposal of the shares and would need to be taken into account in calculating the extent of any capital gain or loss. Subsection 160ZA(4) would operate to ensure an appropriate reduction is made to any capital gain that would otherwise arise to the extent of the $32,450 deemed dividend.

If the distribution is an interim distribution, the application of section 160ZL 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 [$82,450 - $32,450]).

Commissioner of Taxation
8/12/94

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