


***TR 2001/D12 - Income tax: whether the holding of pre-emptive rights, call options and put options constitute a contingent entitlement to acquire for controlled foreign company (CFC) and foreign investment fund (FIF) purposes***

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This document has been finalised by TR 2002/3.



## Draft Taxation Ruling

Income tax: whether the holding of pre-emptive rights, call options and put options constitute a contingent entitlement to acquire for controlled foreign company (CFC) and foreign investment fund (FIF) purposes

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### *Preamble*

*Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.*

## What this Ruling is about

1. This Ruling is concerned with:
  - the meaning of ‘contingently entitled’ in section 322 of Part X controlled foreign company (CFC) and section 475 of Part XI foreign investment fund (FIF) of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - the meanings of pre-emptive rights, and instruments known as call options and put options; and
  - whether pre-emptive rights, call options and put options constitute contingent entitlements to acquire for the purposes of determining CFC status and determining Australian residents’ interests in companies and trusts under the CFC and FIF measures.
2. The Ruling applies to Australian residents with interests in foreign companies or trusts.

## Background

### The law

3. Section 322 in Part X and section 475 in Part XI both state:

‘For the purposes of this Part, an entity is entitled to acquire anything that the entity is absolutely or contingently entitled to acquire, whether because of any constituent document of a company, the exercise of any right or option or for any other reason.’

4. Sections 317 and 470 ITAA 1936 define ‘entity’ to mean a company, a partnership, a person in the capacity of trustee, or any other person. In determining an entity’s direct control interest in a company or a trust, in either Parts X or XI, an entity’s actual interests as well as an entitlement to acquire an interest are to be taken into account.

### **Interests in companies**

5. In Part X, an Australian entity’s interest in a foreign company comprises voting and value rights (rights to dividends and capital), of which there are six alternative tests set out in section 350 ITAA 1936. The highest percentage held will constitute the entity’s direct control interest. As already noted, direct control interest includes actual interests and interests that the entity is entitled to acquire. Direct control is measured by reference to direct interest, indirect interest after tracing through interposed entities, and direct and indirect interests of associates. The aggregate of these four sub-interests is referred to as the associate-inclusive control interest: section 349(1) ITAA 1936.

6. In Part XI, an interest in a foreign company may comprise a share in the company or an instrument that confers an entitlement to acquire such a share, such as an option or convertible note: section 483 ITAA 1936.

### **Interests in trusts**

7. In both Parts X and XI, where the entity is a beneficiary in a trust, the direct control interest is equal to the percentage of income of the trust, or of the corpus of the trust, to which the beneficiary is entitled, or entitled to acquire. Where the income/corpus percentages differ, the higher percentage is the measure of direct control in the trust.

### **Pre-emptive rights, call options and put options**

8. This Ruling is specifically concerned with the question of whether interests in a foreign company, such as those represented by a percentage of share capital, or interests in the income or corpus of a trust, comprise a contingent entitlement within the scope of sections

322 or 475 where they are subject to a pre-emptive agreement, call option or put option. In answering this question, the Ruling considers the legal meanings of these types of interests.

## **Ruling**

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9. For the purposes of determining direct control interests in foreign companies and trusts:

- pre-emptive rights are not treated as contingent entitlements within sections 322 and 475, until such time as they are able to be exercised, due to their crystallisation or a triggering event;
- call options are either an absolute or a contingent entitlement to acquire within sections 322 and 475; and
- put options are merely a right to impose an obligation on another and do not amount to a contingent entitlement to acquire within sections 322 and 475.

## **Date of effect**

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10. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## **Explanations**

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### **Contingent entitlement**

11. Sections 322 and 475 of Part X and Part XI refer to a contingent entitlement to acquire. They make it clear that a contingent entitlement or right is to be counted towards the computation of a taxpayer's control interest and attribution percentage.

12. Contingent entitlement is not defined in Part X and Part XI, and the Explanatory Memoranda do not contain much guidance on its scope.

13. The ordinary meanings of 'entitled' cover 'entitled in interest' and 'entitled in possession': The *Will of Borger* [1912] VLR 310, at 313. The Oxford Dictionary defines entitlement as: 'a rightful claim (to a thing)...' To have a contingent entitlement, one must first have

an entitlement. Therefore, a contingent entitlement is an existing entitlement (a rightful claim) which is contingent on an event that may or may not happen: per Nourse J in *IRC v. Sir John Aird's Settlement*. [1912] 2 All ER 929; at 940.

### **Pre-emptive rights**

14. A key issue raised by industry has been whether the legal meaning of contingent rights is broad enough to include pre-emptive rights. This is in light of the commercial reality that it is quite commonplace for Australian business entities to engage in joint ventures with foreign firms in overseas business operations or undertakings. Within those business undertakings it is equally common for pre-emptive rights agreements to exist which prescribe the conditions under which the joint venture parties may dispose of their interests or shareholdings.

15. A pre-emptive right or first right of refusal gives the holder the entitlement to purchase the property of the owner, who conferred the right. The owner has an absolute discretion whether or not to sell property. In the case of the owner deciding to sell, the property must first be offered to the holder of the right. At that point, the buyer acquires the right of election of whether or not to buy.

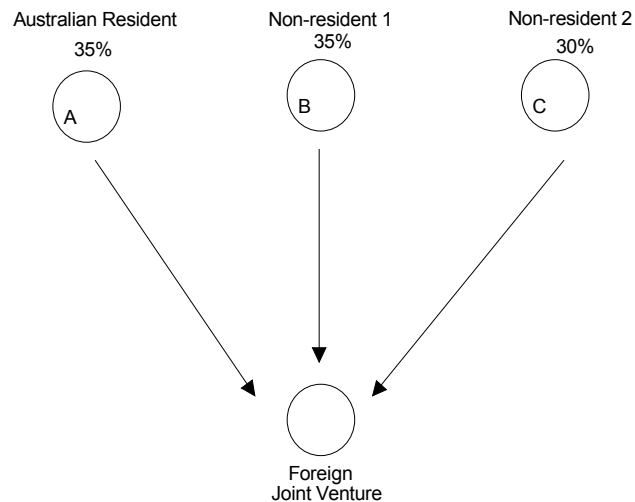
16. The majority view of Templeman and Stephenson LJJ in *Pritchard v. Briggs* (1980) Ch 338 (Court of Appeal, Chancery Division) held that initially the character of a pre-emptive right is that of a personal contract, and when the first right of refusal is exercised, it changes to confer an interest in property. Conversely, the dissenting view of Goff LJ was that a pre-emptive right was a personal contract not capable of conferring an interest in property.

17. A pre-emptive right can only be triggered by property being offered to the holder of the right, and in absence of that offer cannot be exercised. At the time of commencement of the agreement, the rights are latent and do not exist in practical terms until such time as the property is offered for sale or acquisition, at which point the right crystallises. This means that in the initial agreement stage of a pre-emptive right, there is no exercisable or suable right, but only a mere expectation. The Commissioner's view therefore is that a pre-emptive right at the point of commencement of the applicable agreement, and prior to any opportunity for exercise of the right, will not constitute a contingent entitlement under sections 322 or 475.

18. Once activated or triggered, a pre-emptive right vests in the buyer a contingent entitlement, at the very least, in the property. The Commissioner's further view is that this contingent entitlement continues until either actual acquisition of the subject interest, or

formal decline, rejection, or lapsing of offer period under the entitlement, which extinguishes any rights of the holder.

***Example of pre-emptive rights agreements in joint venture arrangements***



19. For the purposes of this example, the pre-emptive rights agreement provides for A and B to take C's shares or interest in equal proportion, in the event of C wishing to exit the joint venture.

20. Based on the interpretation provided by this Ruling, A will only have a contingent entitlement to acquire the additional 15% holding or interest from the point of crystallisation where C actually advises that it wishes to exit.

21. If no such action is taken by C, but it continues as a party to the joint venture, then no contingent entitlement to acquire is held by A over that 15%.

**Call options**

22. A call option grants a right to the holder (also the buyer, grantee, or taker of the option) to acquire the underlying asset from the seller (also the grantor or writer of the option). Thus, a call option over issued shares refers to an existing asset which can be delivered at settlement.

23. Call options will constitute either an absolute or contingent entitlement to acquire. They are an absolute entitlement if it is within the holder's power to exercise the option, but a contingent entitlement if the exercise is dependent upon factors outside the control of both the holder and seller.

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24. Call options that are of the straightforward or date-deferred type, whether on a date or time basis, do not give a contingent entitlement but rather an absolute one. Employee share schemes, which commonly impose a minimum qualifying period of employment before an option to purchase shares under the scheme can be exercised, provide an example of this type of entitlement.

25. Where the option's exercise depends upon such factors as a market price increase or decrease, or approval by an independent regulatory body, then that truly is a contingent entitlement. An example of such an option would be one where the exercise requires the prior approval of the Foreign Investment Review Board before it can proceed.

26. From the first inception of such an option agreement, the holder therefore has a current entitlement, either absolute or contingent, to acquire the subject asset to which the call option refers.

27. Accordingly, the Commissioner's view is that at commencement of such an option agreement, a call option will comprise an entitlement of the holder to which sections 322 and 475 apply.

28. Where the option entitlement process consists of several steps, then the existence of either an absolute or contingent entitlement will be determined on a 'look-through' basis, for example an option to acquire an option to acquire shares.

29. The Commissioner's view is that sections 322 and 475 would be wide enough to capture even options over unissued shares. However, for the purpose of sections 350 and 501 ITAA 1936, the calculation of percentage of direct ownership interest refers to entitlement to acquire at a particular measurement point in time. In the case of both sections the entitlement is measured with respect to paid-up share capital. Therefore, at this point, the entitlements in question can only relate to issued shares, or other rights or interests in existence at that particular measurement time.

## **Put options**

30. A put option, in the present context of Parts X and XI, gives the holder (grantee or taker) of the option the right to sell a shareholding or interest in a foreign entity, to the Australian writer or grantor, at or before a specified date for a specified price.

31. The Commissioner's view is that a put option constitutes a right to impose an obligation on another. Accordingly, it does not amount to a contingent entitlement to acquire.

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## Detailed contents list

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## Your comments

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33. If you wish to comment on this draft Ruling, please send your comments promptly by **30 November 2001** to

**Contact Officer: Aruna Rao**

**E-Mail address: [aruna.rao@ato.gov.au](mailto:aruna.rao@ato.gov.au)**

**Telephone: (02) 621 65992**

**Facsimile: (02) 621 65899**

**Address: Australian Taxation Office  
PO Box 900  
CIVIC SQUARE ACT 2608**



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## Commissioner of Taxation

17 October 2001

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*Previous draft*

Not previously released in draft form

- ITAA 1936 322
- ITAA 1936 349(1)
- ITAA 1936 350

*Subject references*

- absolute entitlement
- call options
- contingent entitlement
- controlled foreign companies
- direct control interest
- foreign investment funds
- pre-emptive rights
- put options

- ITAA 1936 Part XI
- ITAA 1936 470
- ITAA 1936 475
- ITAA 1936 483
- ITAA 1936 501

*Case references*

- IRC v. Sir John Aird's Settlement [1912] 2 All ER 929
- The Will of Borger [1912] VLR 310
- Pritchard v. Briggs (1980) Ch 338

*Legislative references*

- ITAA 1936 Part X
- ITAA 1936 317

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ATO references:

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