IT 2023 - Taxation (unpaid company tax) legislation sections 5(7) and 3(12)

TAXATION RULING NO. IT 2023

TAXATION (UNPAID COMPANY TAX) LEGISLATION
SECTIONS 5(7) AND 3(12)

F.O.I. EMBARGO: Edited for FOI purposes

REF N.O. REF: J209/110/2F186 DATE OF EFFECT: 02.03.1983

B.O. REF: DATE ORIG. MEMO ISSUED:

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1103686	T(UCT)	T(UCT) AA 3(12)
	RECOUPMENT TAX LEGISLATION	T(UCT) AA 5(7)

PREAMBLE Guidelines to assist in determining whether a company is subject to the recoupment tax legislation were previously forwarded under cover of a memorandum dated 30 December 1982. Among the matters covered by those guidelines was the interpretation of the provisions which, in effect, operate in some circumstances to exclude from the scope of the legislation those companies that had entered into certain tax avoidance arrangements, either before, or after the sale of shares to a promoter (ss 5(7) and 3(12) respectively). The purpose of this Ruling is to explain in more detail the practical effect of those provisions.

RULING Sub-Section 3(12)

2. Where a tax avoidance arrangement was entered into by a company after the sale of shares to a promoter and the arrangement subsequently fails, there will be no liability for recoupment tax if s. 3(12) applies. For the sub-section to apply, each of the following criteria must be met:

- it must have been reasonable to expect that the arrangement would operate to eliminate or reduce the company tax liability;

- the participation in the avoidance arrangement must not have been the means by which the company was stripped; and

- the stripping of the company's assets must not have been done for the purpose of placing the company in the position of not being able to pay its tax.

3. In the majority of cases where a company enters into a tax avoidance arrangement these criteria will not be met. Objectively viewed it could be argued in many cases that it would not be reasonable to expect that avoidance arrangements would secure the result of eliminating or reducing the liability

to tax. Further, it is apparent that most schemes had the effect of stripping the company of assets and had the purpose of placing the company in a position of not being able to meet its taxation liability. Generally speaking therefore ss. 5(7) and 3(12) do not preclude action being taken to issue/re-issue company assessments to those in the representative class.

4. (Paragraph 4 edited for FOI purposes)

Sub-Section 5(7)

5. Where a company entered into a tax avoidance arrangement prior to the sale of the company to a promoter, the arrangement must be considered in applying the formula C A - (L + T). The amounts comprising the component T are set out in s. 5(7)(c) and are basically the amounts of tax assessed prior to the sale of the target company to a promoter, plus any amounts of tax that might reasonably have been expected to become payable in the future. The application of the formula will therefore entail a consideration as to whether it could reasonably have been expected that at the time of the sale of the company, the tax avoidance arrangement would have the effect of reducing the tax that would otherwise be payable by the company.

6. In this context, regard must be had to matters such as whether, prior to the sale of the company, the Commissioner had indicated by means such as assessment, press release, etc., that the efficacy of the arrangement would be contested or whether there had been any amending legislation introduced or Treasurer's announcements heralding measures to be taken to counter the particular arrangement. Where this is the case the view is taken that s. 5(7) will not operate to exclude the company from the provisions of the legislation. As in the case of post-sale schemes, the faulty implementation of an avoidance arrangement will preclude a company from taking advantage of the excluding provisions.

7. The tests encapsulated in ss. 3(12) and 5(7) are, of course, objective and will in the final analysis have to be determined by the courts.

COMMISSIONER OF TAXATION
2 March 1983