


IT 2063 - Taxation (unpaid company tax) : shareholders in public companies

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TAXATION RULING NO. IT 2063

TAXATION (UNPAID COMPANY TAX) : SHAREHOLDERS IN PUBLIC COMPANIES

F.O.I. EMBARGO: May be released

REF

H.O. REF: J209/110/3

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F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1115298	T(UCT) RECOUPMENT TAX LEGISLATION PUBLIC COMPANY VENDOR SHAREHOLDERS	T(UCT)AA 5(4) T(UCT)AA 6(2) T(UCT)AA 6(18) T(UCT)AA 19

PREAMBLE

The discretion in terms of sub-section 6(2) of the Taxation (Unpaid Company Tax) Assessment Act has been exercised in respect of a number of public companies that had sold subsidiaries to pre-tax profit strippers where it was considered that, because of subsequent changes in shareholdings, it would be unreasonable for the vendor company itself to pay recoupment tax. As a result, the shareholders in those public companies at the relevant times are faced with potential liabilities for recoupment tax. Before a person actually becomes liable to pay recoupment tax the tax liability of the subsidiaries must have been confirmed and their tax still be unpaid.

2. The purpose of this ruling is to establish guidelines in relation to -

- (a) the extent to which the legislation provides particular avenues for relief from recoupment tax for persons who might otherwise have liabilities for that tax; and
- (b) the procedures to be adopted in respect of payments made by persons who are eligible for relief and by persons who, in attempting to meet the requirements of section 19 of the Act, pay an amount marginally less than the required amount.

3. While this ruling has been prepared with former owners of public companies in mind, the principles that it expresses are also applicable in respect of private companies.

RULING

4. Where it is found that a recoupment tax liability would otherwise exist, sub-section 5(4), for persons at the primary level, and sub-section 6(18), for those at the secondary level, authorise the Commissioner to grant total relief from recoupment tax in certain circumstances.

5. These sub-sections authorise the Commissioner to

determine that a recoupment tax liability does not exist in relation to a person where the amount is less than \$100 and in other circumstances of a special kind.

6. It has been decided that where, at either the primary or secondary level, there exists in relation to a person only the one taxable amount (the amount that represents the person's share of unpaid company tax payable under a particular assessment against a stripped company) and that amount is less than \$100, complete relief from recoupment tax is to be granted. If, in relation to a person's shareholding in a public company, there are a number of taxable amounts involving one or more subsidiaries, and those amounts in the aggregate do not exceed \$100, complete relief is also to be granted.

7. Further, where the taxable amount or taxable amounts exceed \$100 only because of additional tax for late payment accruing on the account of the company or companies concerned, complete relief should be granted provided the person concerned was not in any way associated with the management of the public company.

8. Apart from "under \$100" cases, the legislation does not specify the circumstances in which the particular sub-sections will apply. However, the broad principle that emerges from the legislation as a whole is that a person should be granted relief where that person and closely associated persons have not in any way benefited from the evasion giving rise to the recoupment liability in question. This will mean that the circumstances of particular cases will need to be examined to ascertain whether a benefit was enjoyed.

9. The situations in which it may be possible to establish that no benefit was enjoyed will vary considerably. It is not practicable, therefore, to lay down hard and fast rules as to the various circumstances in which the relieving power will be exercised. However, the examples outlined below are illustrative of situations where the granting of relief could be expected.

Example 1

A person acquired shares in a public company through a stock exchange. Subsequently some of the subsidiaries of that public company were stripped of pre-tax profits. However, no dividends or other benefits were thereafter received from the company and the shares are now worthless.

Example 2

A person, who held shares in a public company at the time some of its subsidiaries were stripped of pre-tax profits, has sold those shares at the then ruling market price and, having enjoyed no other benefits from the evasion in the meantime, at a time when the market price did not reflect any benefit in relation to the stripping of the subsidiaries.

10. Generally speaking, it is accepted that where shares have been sold shortly after the stripping of the subsidiary the market price would not reflect any benefit. Conversely, where shares have been disposed of as a result of a takeover, and the takeover price represents a valuation of the company that has taken into account the benefit which accrued to it from evasion of the tax liabilities of the subsidiaries, exercise of the relieving power ordinarily would not be appropriate. In other words, the situation would be one where a benefit of the evasion has flowed to the vendor in the price received for the shares. Between these two extremes the question of benefit can only be determined by the facts of the case. In forming an opinion, regard needs to be had to such factors as movement in the market price of the shares in question, movement in the share market generally, public announcements, accounting records and reports, issues of bonus shares and rights issues, participation in the management of the company, the level of dividends paid and the use made by the company of its benefit from the evasion.

11. In the event that a person pays an amount that he or she expects to be liable to pay in due course as recoupment tax, but the case is one in which the person is found to be entitled to full relief, then the person should, once entitlement to relief is confirmed, have that amount refunded or applied to other outstanding taxation debts.

12. Finally, numerous cases are being encountered where, in an attempt to satisfy the requirements of section 19, a person has paid an amount that then appears sufficient to meet his or her share of overdue company tax, but is not sufficient to meet the additional tax for late payment that continues to accrue on the company account. In these circumstances, the view is taken that where the person making the payment could reasonably have expected the amount paid to satisfy the requirements of section 19, the payment is made within a reasonable period of time, and the shortfall is marginal, the amount paid should be accepted as full settlement of that person's recoupment tax liability.

13. The above views reflect the law as now enacted. In a statement of 26 October 1983 the Treasurer announced that the Government would be proposing legislation to authorise further relief in cases where a public company was involved in the chain of ownership. Further advice about this proposal will be sent in due course.

COMMISSIONER OF TAXATION

28 October 1983