TD 2014/1 - Income tax: is the 'dividend access share' arrangement of the type described in this Taxation Determination a scheme 'by way of or in the nature of dividend stripping' within the meaning of section 177E of Part IVA of the Income Tax Assessment Act 1936?

Taxation Determination

Income tax: is the ‘dividend access share’ arrangement of the type described in this Taxation Determination a scheme ‘by way of or in the nature of dividend stripping’ within the meaning of section 177E of Part IVA of the *Income Tax Assessment Act 1936*?

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Ruling

1. Yes, in the opinion of the Commissioner a dividend access share arrangement of the type described in this Determination is a scheme ‘by way of dividend stripping’ or ‘in the nature of dividend stripping’ within the meaning of section 177E of Part IVA. Consequently, the Commissioner’s powers under section 177E and 177F are enlivened.

2. In reaching this opinion the Commissioner has assumed that other potentially relevant provisions[1] do not apply.

[1] For example Division 7A of the *Income Tax Assessment Act 1936*, Divisions 725 or 974 of the *Income Tax Assessment Act 1997* potentially have application to such arrangements.

3. The application of Part IVA of the *Income Tax Assessment Act 1936*[2] to any particular arrangement depends on a careful weighing of all the relevant facts and surrounding circumstances of each case. Without all relevant information, it is not possible to state definitively whether a provision in Part IVA applies to a particular arrangement.

4. For the purposes of this Taxation Determination a 'dividend access share' has the following features:

(a) A private company (the 'target company') has accumulated significant profits which have been subject to income tax at the company tax rate.

(b) The target company's ordinary shares are held by an individual, or individuals (the 'original shareholder(s)'), one or more of whom is also the director of the target company.

(c) The target company's constitution is amended[3] to allow for the creation of a new class of shares (the 'Z class shares')[4] which have the following characteristics:

- a right to receive a dividend distribution at the discretion of the target company's director(s);
- no voting rights or rights to participate in the surplus assets of the target company upon its winding up; and
- a right by the target company to redeem the Z class shares within four years of the share's issue date. If the Z class shares are not redeemed, they will cease to exist at the expiration of four years from their issue.

(d) The original shareholder may incorporate new companies and establish new discretionary trusts or employ existing companies and trusts to implement the remaining steps of the arrangement. The interposed companies and trusts will typically be controlled by the original shareholder and the beneficiaries of the trusts will likely comprise the original shareholder and his or her associates.

(e) The target company issues Z class shares for nominal consideration to either the company controlled by the original shareholder or to a company acting as trustee of a discretionary trust.

(f) The target company declares and pays a fully franked dividend on the Z class shares of an amount approximately equal to the accumulated profits in the target company. The dividend payment is satisfied by way of a promissory note issued by the target company.[5]

(g) A series of transactions are then carried out that have the effect of ensuring that the original shareholder(s) and/or associates receive the economic benefit of the target company's profits in a tax-free or substantially tax-free form. Examples of this include:

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[2] All legislative references are to the ITAA 1936 unless otherwise indicated.

[3] It may be that the company's constitution does not need amending but already allows for the creation of the new class of shares.

[4] In this Taxation Determination, the newly created shares issued by the target company will be referred to as Z class shares. In practice these newly created shares issued by the target company could be ascribed a different name.

[5] There may also be a loan agreement between the target company and trustee company. Alternatively, the target company may simply acknowledge the debt by way of journal entries in its general ledger.

- where the Z class shares are issued to a company, the company need not pay tax on the fully franked dividend as it gets enough franking credits to offset any tax liability. In many of these arrangements, the company is wholly owned by a discretionary trust. This allows the original shareholder to direct any subsequent dividend distributions by the company to tax-preferred entities such as non-resident associates of the original shareholder, other related individuals exposed to a lower marginal tax rate or entities with carried forward tax losses.
- where the Z class shares are issued to the trustee of a discretionary trust, the trustee appoints the net income of the trust to a second trust without immediately paying out that entitlement. This amount will represent an unpaid present entitlement (a 'UPE') of the second trust. The trustee of the second trust then appoints its net income to a private company beneficiary[6] without immediately paying out that entitlement. This amount represents a UPE of the private company beneficiary.[7] Absent any consequences under Division 7A[8], the UPE will remain an asset of the private company beneficiary indefinitely. In many of these arrangements, the assets represented by the fully franked dividend on the Z class shares are lent by the trustee of the trust to the original shareholder and/or his or her family for their personal use under an interest free loan repayable only on demand by the trustee company, which is controlled by the original shareholder.

5. While the application of Part IVA depends on the facts of the particular case the Commissioner considers that a dividend access share arrangement that includes all of the elements described in paragraph 4 of this Determination is a scheme 'by way of or in the nature of dividend stripping' within the meaning of section 177E where the relevant purpose exists (see paragraph 6 below). However, the absence from an arrangement of one or more of the factors set out in paragraph 4 of this Ruling could result in a different conclusion being reached as to whether there is a scheme 'by way of dividend stripping' or 'in the nature of dividend stripping' within the meaning of section 177E of Part IVA.

6. In deciding whether there is a scheme 'by way of dividend stripping' or 'in the nature of dividend stripping' within the meaning of section 177E of Part IVA it is necessary to determine if there is an objective purpose of tax avoidance in respect of the scheme. In determining objective purpose, a simple assertion that another non-tax purpose exists will not of itself conclusively determine the issue. Any such assertion must:

- be supported by the other available evidence; and
- not be inconsistent with the objective facts of the case having regard to all the other relevant evidence.

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[6] The private company is typically wholly owned by a discretionary family trust whose beneficiaries comprise the original shareholder, their family members and their associates.

[7] The private company beneficiary does not incur any tax liability in respect of the UPE as it has also been allocated a share of the franking credits sufficient to offset any tax liability.

8 Division 7A will often apply to an arrangement as described in this Determination. The dividend stripping provisions in Part IVA will apply if for some reason Division 7A does not otherwise apply or as an alternative to the application of Division 7A.

7. In this context it is also necessary to consider whether the alleged non-tax purpose could have been achieved in a simpler and/or more commercially usual manner. For example if it is alleged that the arrangement was entered into for ‘asset protection’ purposes it will be necessary to consider why that purpose could not have been achieved by simply declaring and paying a dividend on the ordinary shares held by the original shareholder(s).

8. Accordingly, in considering whether a particular arrangement suggests a tax avoidance purpose the Commissioner will examine all of the evidence of each case and consider the relevant objective features of an arrangement to determine whether the arrangement has been carried out with the sole or dominant purpose of avoiding tax on distributions of profits from the target company. An arrangement that has a non-tax purpose may nevertheless, depending on the facts, be undertaken for the dominant purpose of avoiding tax.

9. Depending on the facts of a particular case, the other provisions in Part IVA may also apply to the arrangement. That is, it may also be open for a reasonable person to conclude, having regard to the matters in paragraph 177D(b), that one or more of the parties that entered into or carried out a scheme consisting of the arrangement did so for the sole or dominant purpose of enabling the taxpayer(s) to obtain a tax benefit in connection with the scheme.

Date of effect

10. This Determination applies both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
26 February 2014

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Explanation

11. Taxpayer Alert TA 2012/4 (TA 2012/4), issued on 12 July 2012, describes arrangements which have been carefully planned so that ordinary shareholders of a private company and/or their associates derive the economic benefit of significant profits accumulating in the private company in a substantially (if not entirely) tax-free form.

12. Although there is significant variety in the timing, nature and scope of the final transactions chosen, the substance in all these arrangements is a reduction or elimination of the ordinary shareholder's tax liability. That is, the final form of the transactions generally result in a reduction or elimination of the taxation liabilities that would normally arise with the payment of dividends if those dividends had been paid to the company's original ordinary shareholders. The important question is whether the form of the transactions is the result of an objective tax avoidance purpose or the result of an objective purpose of achieving a non-tax purpose such as asset protection.

Section 177E of Part IVA

13. Generally speaking, Part IVA allows the Commissioner to cancel all or part of a tax benefit that has been obtained, or would, but for section 177F, be obtained, by a taxpayer in connection with a scheme to which Part IVA applies.

14. Section 177E, within the framework of Part IVA, is an additional rule designed to counter particular kinds of scheme which would otherwise effectively place company profits in the hands of shareholders in a tax-free form; namely 'dividend stripping' schemes and variations of it.[9] Specifically, the section will apply where, inter alia, any property of a company is disposed of as a result of a scheme that is:

(a) by way of or in the nature of dividend stripping; or

(b) having substantially the effect of a scheme by way of or in the nature of dividend stripping.[10]

15. This Taxation Determination deals with schemes of the type in paragraph 14(a) above. A 'scheme' for the purposes of section 177E is broadly defined under subsection 177A(1) and for the purposes of this Determination comprises all the features described in paragraph 4 above.[11]

[9] Schemes to which section 177E applies may also come within the ambit of Part IVA by reason of section 177D however this Taxation Determination only deals with the application of section 177E.
[10] See subparagraph 177E(1)(a)(i)
[11] The Commissioner may advance alternative schemes including a narrower scheme within a wider scheme, *Federal Commissioner of Taxation v. Peabody* (1994) 181 CLR 359 at 382; 123 ALR 451 at 459; 94 ATC 4663 at 4670; 28 ATR 344 at 351.

Is there a scheme by way of or in the nature of dividend stripping?

16. The term ‘dividend stripping’ has no precise legal meaning; however it has been the subject of judicial discussion, including recently by the Full Federal Court in *Lawrence*[12] and the High Court in *Consolidated Press.*[13]

17. In *Consolidated Press*,[14] the High Court cited with approval the Full Federal Court’s[15] adoption of Gibbs J’s list, in *Patcorp Investments*,[16] of the ‘common characteristics’ of earlier dividend stripping cases. Those characteristics, subsequently adopted in *Lawrence,* include:

i. a target company with substantial undistributed profits creating a potential tax liability, either for the company or its shareholders;

ii. the sale or allotment of shares in the target company to another party;

iii. the payment of a dividend to the purchaser or allottee of the shares out of the target company’s profits;

iv. the purchaser or allottee escaping Australian income tax on the dividend so declared;

v. the vendor shareholders receiving a capital sum for the shares in an amount the same as or very close to the dividends paid to the purchasers (there being no capital gains tax at the relevant times);[17] and

vi. the scheme being carefully planned, with all the parties acting in concert, for the predominant if not the sole purpose of the vendor shareholders, in particular, avoiding tax on a distribution of dividends by the target company.

18. The first four characteristics of a dividend stripping scheme as described in paragraphs 17(i) to (iv) are satisfied by the arrangement that is the subject of this Taxation Determination because:

- Firstly, the target company carries substantial undistributed profits which would expose the original shareholder to a potential tax liability if the profits were paid as a dividend to the original shareholder;
- Secondly, Z class shares in the target company are issued[18] to an entity other than the original shareholder, that is, a trustee company or another company controlled by the original shareholder;
- Thirdly, fully franked dividends are paid to the holder of the Z class shares out of the target company’s accumulated profits; and

[12] *Lawrence v. Commissioner of Taxation* [2009] FCAFC 29; (2009) 175 FCR 277; (2009) 2009 ATC 20-096; (2009) 75 ATR 306.
[13] *FC of T v. Consolidated Press Holdings and Ors; CPH Property Pty Ltd v. FC of T* (2001) 207 CLR 235; [2001] HCA 32; 2001 ATC 4343; 47 ATR 229.
[14] (2001) 207 CLR 235; [2001] HCA 32 at 126
[15] *Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd and Ors (No 1)* (1999) 91 FCR 524; [1999] FCA 1199 at 136.
[16] *Federal Commissioner of Taxation v. Patcorp Investments Ltd* (1976) 140 CLR 247; 76 ATC 4225 (1976) 6 ATR 420.
[17] Despite the advent of a comprehensive taxation regime for capital gains, this factor remains relevant because the methods of calculating capital gains inevitably lead to a lower amount of tax.
[18] The *Corporations Act 2001* (Cth) no longer requires that shares be allotted prior to issue.

- Fourthly, the company controlled by the taxpayer, the trustee of the discretionary trusts and/or the private company beneficiary does not incur any tax liability in respect of the payment of the dividends as the benefit of the franking credits attaching to the dividend on the Z class shares wholly offsets any tax liability.

19. In relation to the fifth characteristic as outlined in paragraph 17(v), the original shareholder is not a vendor shareholder as such because the target company has issued Z class shares to other entities so the original shareholder does not directly receive a capital sum on the allotment of the Z class shares. However, in considering the central characteristics of a dividend stripping scheme, the Full Federal Court in *Consolidated Press*[19] observed that:

> The terms of the first limb of s 177E(1)(a) suggests that a scheme may fall within its scope, even though not all the elements of a standard dividend stripping scheme are present. The use of the words ‘by way of or in the nature of’ suggests that variations from the paradigm will not necessarily result in the scheme being excluded from the first limb, provided it retains the central characteristics of a dividend stripping scheme.

20. In other words, variations from ‘the paradigm’ that, in effect, retain the substance of the central characteristics of a dividend stripping scheme, if not their exact form, could fall within the scope of section 177E. In relation to the fifth characteristic the Full Court noted that the critical point was that the vendor shareholders receive a consideration which is in a tax-free or largely tax-free form.[20] Thus a scheme satisfies the fifth characteristic if the substance of the scheme ensures that the target company’s profits are directed away from original shareholders to another party with the original shareholders being compensated in a substantially tax-free form for the profits being ‘directed away’ in that manner.

21. In *Lawrence*, although discussed in the context of the second limb of paragraph 177E(1)(a), there appeared to be an acceptance that the taxpayer in that case had received consideration – as capital – for the value of the undistributed profits by way of accretions to the capital of the trusts; capital to which the applicant and his associates were the only entities beneficially entitled.

22. The Commissioner’s view is that *Lawrence* is applicable to the types of arrangements that are the subject of this Taxation Determination. For example, where the series of transactions involve the appointment of income which remain unpaid by the discretionary trusts, the capital of the ultimate private company beneficiary, and by extension the capital of the discretionary family trust, has increased as the UPE represents an asset of the private company beneficiary. As the original shareholder and his or her family are the only entities beneficially entitled to the assets of the discretionary family trust, this accretion to capital would constitute a capital sum being received by the original shareholder to compensate him or her for the target company’s profits which were paid on the Z class shares to an associated entity.

[19] (1999) 91 FCR 524; [1999] FCA 1199 at 156.
[20] (1999) 91 FCR 524; [1999] FCA 1199 at 159.

23. In relation to the sixth characteristic that is the tax avoidance purpose, the taxpayer in *Lawrence* claimed that his business activities carried significant risk and, accordingly, the main driver for the scheme was said to be 'asset protection'. However, the taxpayer failed to provide an evidential basis to substantiate that claim. The Full Federal Court did not disturb Jessup J's conclusions at first instance, that the mere assertion of some other purpose by the taxpayer was insufficient; the objective facts must support the taxpayer's assertions and, in the taxpayer's case in *Lawrence,* there was no objective evidence to support his claims of asset protection. In particular, there was no evidence of the taxpayer in *Lawrence* having ever being sued or threatened with proceedings or of the riskiness of the business activities at the time of the transaction.

24. One objective matter relates to the complexity of these types of arrangements. Before carrying out the scheme, the only means, or at any rate the most obvious and straightforward means, by which the target company could liberate its profits and reduce the assets of the target company[21] is by paying a dividend to the original shareholder. That dividend would ordinarily be subject to a rate of tax above the company tax rate,[22] though the original shareholder would have the benefit of any available franking credits. However, after the scheme is carried out all of the accumulated profits of the target company have in effect been distributed in a relatively complex and contrived manner to entities associated with the original shareholder while avoiding any additional tax to the original shareholder.

25. In short, the original shareholder's reference to asset protection could arguably be achieved more '*conveniently, commercially and frugally*'[23] without the creation of new companies and trusts, new shares and debts and the round robin circulation of promissory notes.

26. There are also particular features of the arrangement which appear to have been included to avoid specific provisions within the income tax legislation. For example, the requirement that the Z class shares must be redeemed within four years is a feature which is inexplicable but for the avoidance of the direct value shifting provisions.[24]

27. Accordingly, it is the Commissioner's view that the arrangement of the type described in paragraph 4 of this Taxation Determination is capable of constituting a scheme 'by way of or in the nature of dividend stripping' within the meaning of section 177E of Part IVA.

28. Against the possibility that the views expressed above on the application of subparagraph 177E(1)(a)(i) are found to be incorrect in a particular case, the Commissioner would argue in the alternative, relying once again on *Lawrence*, that subparagraph 177E(1)(a)(ii) applies. That is, the arrangement would amount to a scheme having substantially the effect of a scheme by way of, or in the nature of, a dividend stripping.

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[21] This reduction in the net asset position of the target company would prima facie provide 'asset protection'.

[22] The difference between an individual's marginal tax rate and the company tax rate is referred to in this Taxation Determination as the 'top-up tax'.

[23] Similarly in *Federal Commissioner of Taxation v. Hart* [2004] 217 CLR 216; HCA 26 at 94, Callinan J, in the context of subparagraph 177D(b)(ii), noted that it was relevant to consider whether the substance of the transaction in question (tax implications apart) could more conveniently, or commercially, or frugally have been achieved by a different transaction or form of transaction.

[24] Generally speaking, under section 725-90 of the *Income Tax Assessment Act 1997*, if, at the time of a direct value shift the 'state of affairs' brought about by the direct value shift will more likely than not cease to exist within four years the direct value shift will have no consequences under Division 725 of the ITAA 1997.

Consequences of section 177E

29. Where there is a scheme which results in property of a company being disposed of 'by way of or in the nature of dividend stripping' and the Commissioner forms an opinion that the disposal of that property represents, in whole or in part, a distribution of profits of the company,[25] paragraphs 177E(1)(e) to (g) have effect as follows:

- the scheme is taken to be a scheme to which Part IVA applies;
- for the purposes of section 177F, the original shareholder (being the relevant taxpayer) is taken to have obtained a tax benefit in connection with the scheme; and
- the tax benefit is taken to be an amount of profits which is determined by the Commissioner to represent the disposal of property which if, immediately before the scheme was entered into, the company had paid as a dividend to the original shareholder would have been included in the shareholder's assessable income for the particular year of income.

30. Accordingly, it would be open for the Commissioner to exercise his discretion to make a determination under subsection 177F(1) to include the 'tax benefit' in the original shareholder's assessable income.

Examples

Example 1

31. Jack and Dianne are the sole shareholders and directors of Aust Co, an Australian private company which has accumulated profits of $5m.

32. Jack and Dianne wish to liberate the accumulated profits of Aust Co for reasons that are said to include 'asset protection', because they believe Aust Co operates in an industry which exposes it to legal risks. If Aust Co were to pay a dividend of $5m to Jack and Dianne, it would create a potential tax liability in Jack and Dianne's hands at the highest marginal tax rate net the benefit of franking credits.

33. On 10 June 2009, Jack and Dianne approve a resolution to issue a new class of shares, 'Z' class shares, in Aust Co. The new class of shares carries no right to vote however does carry the right to receive a dividend from Aust Co. The new shares must be redeemed by Aust Co within 4 years.

34. 5 new 'Z' class shares are issued and are acquired for nominal consideration of $1 per share by the Jack and Dianne Trust, a discretionary trust established on 10 June 2009, to which Jack, Dianne and their immediate family members are beneficiaries. The trust carries on a business.

35. On 10 June 2009, Jack and Dianne resolve to declare a fully franked dividend of $1m per 'Z' class share in Aust Co to the Jack and Dianne Trust. $3 million of those funds are used by Jack and Dianne Trust to acquire income producing assets for the new business.

[25] The 'profits' referred to in section 177E may comprise profits of the company of the accounting period in which the disposal occurred or of any earlier or later income years.

36. In July 2010 Tommy (Jack and Dianne's son) leaves Australia to set up business overseas. However, at the time the dividend access share was issued Tommy was an Australian resident and it was not contemplated that he would become a non-resident. On 30 July 2010 the Trustee of the Jack and Dianne Trust makes a trust distribution of $2m to Jack and Dianne's son Tommy, a non-resident. Tommy is not subject to further Australian tax on the $2m.[26]

37. Jack and Dianne have little objective evidence to support their claims of asset protection. In any case, they are unable to explain why the asset protection in question could not have been achieved more simply by having Aust Co declare a dividend to them as ordinary shareholders. It is considered that Jack and Dianne have entered into a scheme 'by way of or in the nature of dividend stripping' within the meaning of section 177E of Part IVA. Only $2 million has been released in a tax preferred manner. The Commissioner can make a determination under Part IVA in respect of this proportion of the dividend strip arrangement.

Example 2

38. Ian is the sole shareholder and director of XYZ Co, an Australian private company which has accumulated profits of $5m. Ian and Tracey are in divorce proceedings. As part of a Family Court settlement, XYZ Co issues 5 new 'Z' class shares to a newly established company, New Co for consideration of $1 per share. The new class of shares carries no right to vote however does carry the right to receive a dividend from XYZ Co. The new shares must be redeemed by XYZ Co within 4 years. Ian is the sole shareholder of New Co.

39. A fully franked dividend of $1 million per share is paid on those shares and New Co is liable to tax on these dividends, but also entitled to imputation credits on them. As part of the family court settlement Ian's shareholding in New Co is transferred to Tracey. New Co later pays Tracey a fully franked dividend of $5 million. Tracey includes this income in her income tax return in the year in which she receives it.

40. On the particular circumstance of this arrangement there does not appear to be an objective purpose of avoiding tax on dividends; tax is paid at the individual marginal tax rate. The relevant facts include that:

- *Tracey is liable for income tax on the fully franked dividend she receives on her shareholding in New Co, but is also entitled to imputation credits on it. She is subject to tax at her marginal rate and, overall, no tax is avoided.*
- *The particular manner of the arrangement is explicable by the terms of the Family Court settlement.*

[26] The fully franked dividend is non-assessable non-exempt income under section 128D and is not subject to withholding tax pursuant to paragraph 128B(3)(ga).

References

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TD 2013/D5

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TR 2006/10

Subject references:
- accumulated profits
- direct value shifts
- dividend access share
- dividend stripping
- Part IVA

Legislative references:
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- ITAA 1936 Div 7A
- ITAA 1936 128D
- ITAA 1936 128B(3)(ga)
- ITAA 1936 Part IVA
- ITAA 1936 177A(1)
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 177D(b)(ii)
- ITAA 1936 177E
- ITAA 1936 177E(1)(a)
- ITAA 1936 177E(1)(a)(i)
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- ITAA 1936 177E(1)(e)
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- ITAA 1936 177F
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- ITAA 1997
- ITAA 1997 Div 725
- ITAA 1997 725-90
- ITAA 1997 Div 974
- Corporations Act 2001

Case references:
- Lawrence v. Commissioner of Taxation [2008] FCA 1497; 2008 ATC 20-052; (2008) 70 ATR 376
- Lawrence v. Commissioner of Taxation [2009] FCAFC 29; (2009) 175 FCR 277; (2009) 2009 ATC 20-096; (2009) 75 ATR 306
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Other references:
- TA 2012/4

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