

TECHNICAL DECISION SUMMARY > PRIVATE RULING

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA  
TŪMATAITI

# In-specie distribution of assets upon winding-up of a unit trust

Decision date | Rā o te Whakatau: 2 February 2023

Issue date | Rā Tuku: 1 May 2023

TDS 23/05

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## Subjects | Kaupapa

Income Tax: dividend; in-specie distribution of assets; winding-up of unit trust; on the liquidation of a company.

## Taxation laws | Ture tāke

All legislative references are to Income Tax Act 2007 (ITA) unless otherwise stated.

## Facts | Meka

1. The Applicant is a unit trust, as defined in s YA 1 (Unit Trust). The Unit Trust's assets consist of investments in New Zealand and overseas. The assets were funded from introduced capital and realised and unrealised capital gains on investments.
2. The sole unit holder of the Unit Trust (Unitholder) will provide written consent to the Trustee of the Unit Trust to determine (terminate) the Unit Trust (Date of Consent).
3. In the course of winding up the Unit Trust, the Trustee will transfer the assets held by the Unit Trust in-specie to the Unitholder.

## Issues | Take

4. The issue considered in this ruling is whether the in-specie distribution by the Unit Trust of its assets to the Unitholder in the course of winding up is a non-taxable distribution under ss CD 26 and CD 44.

## Decisions | Whakatau

5. The Tax Counsel Office (TCO) concluded that any in-specie distribution by the Unit Trust of its assets to the Unitholder after the Date of Consent will not be a dividend under s CD 26, to the extent to which the distribution consists of available subscribed capital calculated under ss CD 23 and CD 43 or an available capital distribution amount calculated under s CD 44.

## Reasons for decisions | Pūnga o ngā whakatau

### Issue 1 | Take tuatahi: In-specie distribution of assets upon winding up of a unit trust

6. Under s CD 4, a transfer of company value from a company to a shareholder is a dividend if the cause of the transfer is a shareholding in the company and none of the exclusions in ss CD 22 to CD 37 apply.
7. Section CD 26 relevantly provides that an amount paid to a shareholder in relation to a share on the liquidation of a company is only a dividend to the extent to which it is more than the available subscribed capital (ASC) per share (defined in s CD 43), or the available capital distribution amount (ACDA) (defined in s CD 44).

#### Is the Unit Trust a company?

8. A company is expressly defined as including a unit trust (s YA 1). Similarly, a share is defined as including a unit in a unit trust (s YA 1). A shareholder is defined as including a holder of a share (s YA 1), which given the other definitions would include the holder of a unit in a unit trust.
9. Given the Unit Trust is a unit trust as defined in s YA 1, the Unit Trust will be treated as a company for tax purposes, and the units in the Trust will be treated as shares. On that basis, references to a company, share or shareholders in s CD 26 refer to the Unit Trust, the units in the Unit Trust and the holders of the units in the Unit Trust respectively.

#### “On the liquidation of the company”

10. As noted, under s CD 26 an amount paid to a shareholder on the liquidation of a company is only a dividend to the extent to which it is more than the ASC or ACDA.
11. The Applicant confirmed that the distribution will consist only of ASC and ACDA, therefore, it was not necessary for TCO to consider these concepts further.
12. The only issue to be considered for the application of s CD 26 was when, in the context of a unit trust, an amount is paid “on the liquidation of the company”.
13. The definition of “liquidation” in s YA 1 refers to the liquidation process in the Companies Act and to the termination of the company’s existence under any other procedure of New Zealand or foreign law. The definition also refers to the concept of

“anything occurring on liquidation”, and states that it is anything occurring during the period that starts with a step that is legally necessary to achieve liquidation and that is for the purpose of liquidation.<sup>1</sup>

14. The winding-up process for a unit trust must also start with a step, or overt action, that is legally necessary and made to achieve liquidation, rather than for any other purpose.
15. Under trust law, there are several ways a trust can be terminated, including upon the trustees exercising a discretion to vest all of the trust funds in the beneficiaries.
16. Under the Trust Deed of the Unit Trust, the Trustee may, with the consent of a special majority of unit holders, determine (terminate) the Trust on the first day of the accounting period next following any such direction. That date is treated as the Vesting Day, which is defined in the Trust Deed to mean the date for final distribution of the trust fund.
17. TCO considered that the first step legally necessary to achieve the termination (or determination) of the Unit Trust is the provision of written consent by the Unitholder to the Trustee to determine the Unit Trust, that is, the Date of Consent. That will be the step that begins the process referred to in the ITA as “on liquidation” for the Unit Trust.
18. Therefore, any distributions made after the Date of Consent will be made “on the liquidation of the company” and will not be dividends to the extent they consist of ASC or ACDA.
19. On that basis, TCO concluded that any in-specie distribution by the Unit Trust of its assets to the Unitholder after the Date of Consent will not be a dividend under s CD 26, to the extent to which the distribution consists of ASC calculated under ss CD 23 and CD 43 or an ACDA calculated under s CD 44.

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<sup>1</sup> See BR Pub 14/09: *Meaning of ‘Anything occurring on liquidation’ when a company requests removal from the Register of Companies* and QB 20/03: *First step legally necessary to achieve liquidation when a liquidator is appointed*