

11 December 2023

[Redacted]

Dear [Redacted]

Thank you for your requests made under the Official Information Act 1982 (OIA), received on 23 November 2023. The information you requested is enclosed as **Appendix A**.

### **24OIA1473 – Section FE 16B(3) of the Income Tax Act 2007**

Section FE 16B(3) was inserted into the Income Tax Act 2007 as part of the amendments made to section FE 16B by section 120 of the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Act 2020. Section 120 was first introduced into the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Bill at the second reading stage as clause 81B. The changes made by section 120 were discussed in an officials' report (report) to the Bill at pages 143-144. The relevant information from pages 143-144 is set out below. The full report is available on Inland Revenue's website at [Taxation \(KiwiSaver, Student Loans and Remedial Matters\) Bill – officials' report to the Finance and Expenditure Committee on submissions on the Bill \(October 2019\) \(ird.govt.nz\)](https://www.ird.govt.nz/taxation-kiwisaver-student-loans-and-remedial-matters-bill-officials-report-to-the-finance-and-expenditure-committee-on-submissions-on-the-bill-october-2019).

#### ***Issue: Non-debt liabilities – shareholder loans***

##### ***Submission***

*(Deloitte)*

*The wording "a shareholder that is a member of the group" in section FE 16B(1)(b) should read "a shareholder". This wording is likely to be an unintentional drafting error. This is because the wording will, essentially make the provision redundant as, if the shareholder was a member of the New Zealand group, the debt would be consolidated away.*

##### ***Comment***

*Section FE 16B(1)(b) excludes from non-debt liabilities, in the thin capitalisation rules, financial arrangements providing funding that are pro rata with shareholding or by a substantial shareholder.*

*As thin capitalisation is calculated on a group basis, a financial arrangement between a company and a shareholder where both were members of the group would not increase the debt of the group as the arrangement would disappear upon consolidation. Therefore, the submitter is correct that the current wording would apply only to arrangements that would not affect the group's debt levels.*

*Also, officials have been made aware of situations where two members of a wholly-owned group exist where the first member is a shareholder of a New Zealand group member and the second member provides either an interest free loan or redeemable preference shares in proportion with the first members shareholding. By removing the wording discussed in the paragraph above this situation will be covered by the associated person reference in section FE 16B(1)(b)(ii) and (c)(ii) but there is no equivalent for proportional shareholdings where the total shareholding in the New Zealand group member is less than ten percent. Officials recommend changes to section FE 16B(1)(b)(i) and (c)(i) to ensure this situation is also excluded from being a non-debt liability.*

##### ***Recommendation***

*That the submission be accepted, subject to officials' comments.*

**24OIA1473 – Section CD 44(7)(b) of the Income Tax Act 2007**

With the exclusion for gifted capital gains having been introduced in 1959 and the Public Information Bulletin only being introduced in 1963, Inland Revenue is unable to provide any discussion on the exclusion of gifted capital gains from the meaning of dividend. Your request for this information is therefore refused under section 18(g) of the OIA, as the information is not held by Inland Revenue, and we do not believe it is held by another agency.

Section CD 44(7)(b) of the Income Tax Act 2007 can be traced back through section CD 33(7)(b) of the Income Tax Act 2004, section CF 3(7) of the Income Tax Act 1994 and section 4(5)(b) of the Income Tax Act 1976 to section 4(3)(b) of the Land and Income Tax Act 1954.

The specific wording of section CD 44(7)(b) has been in place with effect from 1 April 2005, following the amendment of section CD 33(7)(b) of the Income Tax Act 2004 by section 12(2) of the Taxation (Depreciation, Payment Dates Alignment, FBT, and Miscellaneous Provisions) Act 2006. However, the exclusion of gifted capital gains from the meaning of "dividends" has been included in the legislation in some form with effect from 27 August 1959, following the amendment of section 4 of the Land and Income Tax Act 1954 by section 3 of the Land and Income Tax Amendment Act 1961. Screenshots of the relevant provisions from archived legislation are enclosed in **Appendix B**.

**Right of review**

If you disagree with my decision on your OIA request, you can ask an Inland Revenue review officer to review my decision. To ask for an internal review, please email the Commissioner of Inland Revenue at: [commissionerscorrespondence@ird.govt.nz](mailto:commissionerscorrespondence@ird.govt.nz).

Alternatively, under section 28(3) of the OIA, you have the right to ask the Ombudsman to investigate and review my decision. You can contact the office of the Ombudsman by email at: [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz).

If you choose to have an internal review, you can still ask the Ombudsman for a review.

**Publishing of OIA response**

We intend to publish our response to your request on Inland Revenue's website ([www.ird.govt.nz](http://www.ird.govt.nz)) as this information may be of interest to other members of the public. This letter, with your personal details removed, will be published in its entirety. Publishing responses increases the availability of information to the public and is consistent with the OIA's purpose of enabling more effective participation in the making and administration of laws and policies and promoting the accountability of officials.

Thank you for your request.

Yours sincerely



Peter Frawley  
**Policy Lead, Policy & Regulatory Stewardship**

## **Appendix A – OIA requests**

24OIA1472:

1. *What were the policy reasons (officials report and any other IRD analysis) behind the addition of s FE16B(3) into the Income Tax Act 2007 by virtue of the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Act 2020?*
2. *Please provide copies of the relevant documents.*

24OIA1473:

3. *Please provide the reasoning for the insertion of CD 44(7)(b) into the Income Tax Act 2007, excluding the fact that it carried over from a previous New Zealand income tax act.*
4. *Please provide the initial reasoning of including in any earlier New Zealand income tax acts, including a provision for gifted capital gains - i.e., the relevant sections that were equivalent to CD 44(7)(b). Please provide any policy documents - officials reports, tax bulletins etc. regarding the introduction of CD 44(7)(b).*
5. *Please provide any relevant policy documents for including in the previous equivalent sections in previous income tax acts a provision for excluding gifted capital gains from the meaning of dividend. What was the original Act that a provision for treating gifted capital gains like in ITA 2007, CD 44(7)(b), was included?*
6. *What was the reasoning for including in the original act this treatment of capital gains?*
7. *Please provide any policy documents about this - including tax bulletins, official reports, or any other reasoning for the inclusion.*
8. *If the reasoning was a particular case before NZ courts, what was that case?*

**Appendix B – History of section CD 44(7)(b) of the Income Tax Act 2007**

Section 4(3)(b) of the Land and Income Tax Act 1954

“(3) Where—

“(a) Any of the capital assets of a company have been realised, whether voluntarily or involuntarily, or a company has written up any of its capital assets, and the Commissioner is satisfied that the whole or part of any profit or increase arising from any such realisation or writing up in excess of the cost to the company of that asset (not being an amount that is required to be taken into account under any provision of this Act for the purpose of assessing ordinary income tax) is subsequently included in any payment or other transaction referred to in subsection (1) of this section; or

“(b) The Commissioner is satisfied that a company has otherwise made a capital profit or a capital gain, including a capital gain by way of gift, and that the whole or part of any such profit or gain (not being an amount that is required to be taken into account under any provision of this Act for the purpose of assessing ordinary income tax) is subsequently included in any payment or other transaction referred to in subsection (1) of this section,—

the expression ‘dividends’ shall, for the purposes of this Act, be deemed not to include that profit or increase or gain to the extent to which that profit or increase or gain exceeds any capital losses incurred in the income year (or, as the case may be, the accounting year of the company corresponding with that year) in which that profit or increase or gain was made or in any subsequent year (being losses not already taken into account under this subsection or in calculating the assessable income of the company for any year).”

## Section 4(5)(b) of the Income Tax Act 1976

(5) Where—

(a) Any capital asset of a company has been realised, whether voluntarily or involuntarily, and the Commissioner is satisfied that the whole or part of any profit arising from any such realisation in excess of the cost to the company of that asset (not being an amount that is required to be taken into account under this Act for the purpose of assessing income

tax) is subsequently included in any payment or other transaction referred to in subsection (1) of this section; or

(b) The Commissioner is satisfied that a company has otherwise made a capital profit or a capital gain, including a capital gain by way of gift, and that the whole or part of any such profit or gain (not being an amount that is required to be taken into account under this Act for the purpose of assessing income tax) is subsequently included in any payment or other transaction referred to in subsection (1) of this section,—

the term “dividends” shall, for the purposes of this Act, be deemed not to include that profit or gain to the extent to which that profit or gain exceeds any capital losses incurred in the income year (or, as the case may be, the accounting year of the company corresponding with that year) in which that profit or gain was made or in any subsequent year (being losses not already taken into account under this subsection or under section 3 (3) of this Act or in calculating the assessable income of the company for any year):

Provided that where any amount, being the whole or part of any increase arising from the writing up of any asset, has been excluded from—

(i) The term “dividends” in accordance with section 4 (3) of the Land and Income Tax Act 1954 (as enacted before the amendment of that section by subsections (1) to (3) of section 5 of the Land and Income Tax Amendment Act 1965); or

(ii) The term “bonus issue” in accordance with section 3 (3) of this Act,—

the cost of that asset shall, for the purposes of this subsection, be deemed to be increased by that amount.

## Section CF 3(7)(b) of the Income Tax Act 1994

**CF 3(7) [Capital gain amount]**

Subject to subsections (8) to (10), the **capital gain amount** of a **company**, on or after 1 April 1988, is—

(a) In respect of each realisation by the **company** of a capital asset, whether voluntarily or involuntarily, for an **amount** in excess of the **cost** to the **company** of the asset, where the **amount** received in respect of the realisation is not **gross income** of the **company**, an **amount** calculated in accordance with the following formula:

$$a - b$$

where—

a is the **amount** realised on the asset's realisation; and

b is the **cost** to the **company** of the asset.

(b) In respect of each other instance in which the **company** has made a capital **gain**, including a capital **gain** by way of **gift**, where no **amount** in respect of that capital **gain** is **gross income** of the **company**, the **amount** of the capital **gain**.

## Section CD 33(7)(b) of the Income Tax Act 2004

**CD 33(7) CAPITAL GAIN AMOUNT: WHEN CAPITAL GAIN AMOUNTS ARISE**

For the purposes of this section, a **company** derives a capital gain **amount** if,—

(a) after 31 March 1988, it **disposes** of **capital property** for an **amount** of **consideration** that is more than the **cost** of the **property** to the **company**, including a disposal that the **company** is treated as making under section **DB 19** (**Amount** from **profit-making** undertaking or scheme and not already in **income**) or **DB 20** (**Amount** from major **development** or division and not already in **income**); the capital gain **amount** is the excess; or

(b) after 31 March 1988, it receives a capital gain, including a **gift**, and no part is **assessable income** of the **company**; the capital gain **amount** is the **amount** of the capital gain; or

(c) an **amount** is derived by the **company** from another **company** on **liquidation** of the other **company** that is excluded from being a **dividend** as a result of section **CD 18(2)(b)** and this section; or

(d) an **amount** is derived by the **company** that is attributable to a revaluation of livestock in the 1992–93 or a later **tax year** under section **86D** of the Income Tax Act 1976 or section **EC 16** (Valuation under **herd scheme**) or **EC 20** (**Herd livestock** disposed of before values determined); or

(e) the **amount** is described in section **CZ 9(1)** (**Available capital distribution amount: 1965 and 1985 to 1992**).

**History**

S CD 33(7) amended by No 3 of 2006, s 12(2), by replacing para (b); effective 1 April 2005, with application for income years corresponding to the 2005–06 and subsequent tax years. See also cl 11B(2) of the *Taxation (Depreciation, Payment Dates Alignment, FBT, and Miscellaneous Provisions) Bill 2005* (No 268-2). Former para (b) read:

(b) after 31 March 1988, it receives a gift and no part is the ~~income~~ of the company; the capital gain amount is the amount of the gift; or



## Section CD 44(7)(b) of the Income Tax Act 2007

**CD 44(7) CAPITAL GAIN AMOUNT: WHEN CAPITAL GAIN AMOUNTS ARISE**

For the purposes of this section, a **company** derives a capital gain **amount** if,—

- (a) after 31 March 1988, it **disposes** of **capital property** for an **amount** of **consideration** that is more than the **cost** of the **property** to the **company**, including a disposal that the **company** is treated as making under section **DB 26** (**Amount** from **profit-making** undertaking or scheme and not already in **income**) or **DB 27** (**Amount** from major **development** or division and not already in **income**); the capital gain **amount** is the excess; or
- (b) after 31 March 1988, it receives a capital gain, including a gift, and no part is **assessable income** of the **company**; the capital gain **amount** is the **amount** of the capital gain; or
- (c) an **amount** is derived by the **company** from another **company** on **liquidation** of the other **company** that is excluded from being a **dividend** as a result of section **CD 26(2)(b)** and this section; or
- (d) an **amount** is derived by the **company** that is attributable to a revaluation of livestock in the 1992–93 **tax year** or a later **tax year** under section 86D of the Income Tax Act 1976 or section **EC 16** (Valuation under **herd scheme**) or **EC 20** (**Herd livestock** disposed of before values determined); or
- (db) an **amount** is derived by the **company** that is attributable to the difference between the **consideration** for disposal or **acquisition** of livestock and the value of that livestock under section **EC 4C** (Value and timing of **transfers**); or
- (e) the **amount** is described in section **CZ 9(1)** (**Available capital distribution amount: 1965 and 1985–1992**).

**History**

S CD 44(7) amended by No 1 of 2016, s 75(1), by inserting para (db); **effective 28 March 2012**. See also the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill (7-2), cl 69(1).

S CD 44(7) amended by No 63 of 2011, s 4(1), by replacing in para (b) “no part is income” with “no part is assessable income”; **effective 1 April 2008, with application for the 2008–09 and later income years**. See also cl 3B(1) of the Taxation (Tax Administration and Remedial Matters) Bill (257-2).