

INTERPRETATION STATEMENT IS 12/01

INCOME TAX: TIMING OF SHARE TRANSFERS FOR THE PURPOSES OF THE CONTINUITY PROVISIONS

All legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the appendix to this commentary.

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Scope of this statement

1. This Interpretation Statement considers:
 - who **holds** shares issued by a company;
 - **when**, during a sale or transfer of shares, there is a change in who holds those shares.

The Commissioner is aware that people have had difficulty in determining the latter point in particular.
2. The person who holds shares issued by a company will have a “voting interest” in the company. The amount of the person’s voting interest in the company must be calculated when applying the “continuity provisions” of the Act. The continuity provisions govern the ability of companies to:
 - carry forward losses;
 - offset losses with other companies;
 - carry forward credits in any memoranda accounts (eg, imputation credit accounts);
 - carry forward excess tax credits.
3. The continuity provisions are set out in ss GB 3, GB 4, IA 3 to IA 5, IC 1, LP 3(4), OB 41, OC 24, OE 10 and OK 15.¹ Generally, these provisions require that over a period a group of persons’ combined voting interests in a company or companies exceed certain minimum levels.

¹ Section OE 10 has been repealed, effective from 1 July 2012: see the Appendix.

4. Under s YC 2 the amount of a person's voting interest in a company is a product of two factors. One factor is the number of shares the person holds. The other factor is the "shareholder decision-making rights" carried by those shares. This Interpretation Statement considers the first factor only.
5. This Interpretation Statement also does not apply to:
 - market value interests under s YC 3 that arise where there is a "market value circumstance" as defined in s YA 1;
 - rectification (where there is a mistake in a company's share register);
 - options over shares.
6. In respect of the last item above, in certain circumstances (involving "shareholder decision-making rights" as defined in s YA 1) the calculation of voting interests under s YC 2 and market value interests under s YC 3 include options where an "option" includes an "agreement for sale at a time when beneficial ownership of the property sold has not completely passed to the purchaser". In addition, a "market value circumstance" can include an occasion or a situation in which an option exists. Accordingly, in addition to the matters concerning agreements for the sale and purchase of shares discussed in this Interpretation Statement, continuity implications may arise from some uncompleted agreements in terms of options and market value circumstances. In particular, this may be the case if an agreement provides for an alteration of any of the vendor's shareholder decision-making rights.
7. This Interpretation Statement applies to "shares" issued by a company registered under the Companies Act 1993 where those shares are an "interest in the capital of a company" (as per para (a) of the definition of "share" in s YA 1). The definition of "share" includes other items such as certain debentures, stapled debt securities and units in a unit trust. None of these additional items falling under the definition is dealt with in this Interpretation Statement.

Summary

8. As a rule, shares issued by a company will be held by the registered holder of those shares. The registered holder of shares is the person whose name appears on the share register of the company.
9. There are two exceptions to this rule.
10. The first exception is if those shares are held by the registered holder as "nominee" for another person. If so, under s YB 21, the registered holder is "looked through" and the other person will hold the shares for the purposes of the Act, unless the second exception applies.
11. The second exception is if any of ss YC 8 to YC 19 and s FB 10 apply. These provisions apply in specific circumstances (eg, where a person has a voting interest of less than 10% in a company). If any of these provisions apply, someone other than the registered holder of the shares may be considered to hold the shares. This Interpretation Statement does not consider these provisions in depth.
12. Where shares are transferred from one person to another, a change in who holds the shares occurs at the earlier of when:
 - the purchaser of the shares becomes the registered holder of the shares (ie, when the purchaser's name is entered onto the company's share register in accordance with the agreement); or
 - under s YB 21, the vendor holds the shares as "nominee" for the purchaser.
13. The vendor will hold the shares as "nominee" for the purchaser when one of the following occurs:

- The vendor and the purchaser enter into an agreement, either as part of the transfer agreement or separately, that explicitly or implicitly creates a “nominee” relationship in relation to the shares.
 - The vendor is the bare trustee for the purchaser of shares under an agreement that has been settled, but the purchaser is not the registered holder of the shares. In such a case, the purchaser may go on to be registered or may never be registered (eg, where it is agreed the vendor will hold the shares as bare trustee for the purchaser indefinitely).
14. In the nominee situation, exceptions to when the purchaser is then the holder of the shares could arise if:
- the purchaser is themselves a “nominee” for someone else (in which case s YB 21 will deem the shares to be “held” by that other person); or
 - any of the provisions of ss YC 8 to YC 19 or s FB 10 apply so that someone other than the purchaser is the holder of the shares.
15. Where the vendor is the purchaser’s nominee, entering the purchaser’s name onto the share register of the company later does not affect who holds the shares. In that situation, the purchaser is already considered the holder of the shares.
16. A flowchart showing when during a transfer of shares there is a change in who “holds” shares is in paragraph 155. Examples follow the flowchart. In all cases and for the avoidance of doubt, the outcomes in terms of the application of the continuity provisions suggested by the flowchart and in the examples may not apply where s BG 1 applies.

Analysis

17. The issues to consider are:
- who shares are “held” by; and
 - when under a share transfer agreement there is a change in who holds those shares.
18. These issues are important for applying the continuity provisions. Therefore, it is useful to first review those provisions.

What are the continuity provisions?

19. The continuity provisions relate to whether a company may:
- carry forward losses;
 - offset losses with other companies;
 - carry forward credits in its memorandum accounts (eg, imputation credit account);
 - carry forward excess tax credits.
20. As will be seen in the following paragraphs, pivotal to the continuity rules is the measurement of voting interests under s YC 2.

Carry forward of losses

21. The continuity provision relating to the carrying forward of company losses is s IA 5. Section IA 5 provides that a company’s tax loss is carried forward only if a group of persons holds for the relevant period a minimum voting interest in the company that adds up to at least 49%.
22. A “minimum voting interest” for a person is defined by s IA 5(6) as the lowest “voting interest” the person has in the company during the relevant period. “Voting interest” is defined in s YA 1 as the percentage voting

interest that a person is treated as holding in the company under ss YC 2 to YC 20.

Offset of losses with other companies

23. The continuity provision relating to the offset of losses between companies is s IC 1. Section IC 1 provides that if a company has a tax loss for an income year and is a member of a group of companies, the company may make its tax loss available to another company in the group. Section IC 1 requires s IC 2 to be satisfied.
24. Section IC 2 sets out requirements for the continuity of ownership of the loss company itself and for the commonality of ownership of the two companies seeking to offset losses.
25. The continuity of ownership of the loss company referred to in s IC 2 is set by reference to s IA 5. Section IA 5 is mentioned under "Carry forward of losses" in paragraphs 21 to 22.
26. The commonality of ownership of the two companies seeking to offset losses referred to in s IC 2 is set by s IC 3.
27. Section IC 3 refers to two or more companies in relation to which a group of persons hold common voting interests that add up to at least 66%. Section IC 3(3) provides that the common voting interests of the group are found from the percentage of each individual's voting interests in each of the companies at the time, as decided by reference to s YC 2.
28. Accordingly, the offset of losses between companies can occur only when there is both continuity of ownership of the loss company and commonality of ownership between the companies concerned. Both requirements are decided with reference to voting interests under s YC 2.

Carry forward of credits in memorandum accounts

29. Section OA 8 in certain circumstances prevents a company from maintaining credits in its memorandum accounts. Section OA 8 provides that a credit in a memorandum account may be carried forward only if a group of persons continues to hold aggregate minimum voting interests in the company of at least 66%. Where continuity is breached, s OA 8 refers to a debit arising under the specific continuity provision that relates to each type of memorandum account. For instance, the continuity provision relating to imputation credit accounts is s OB 41.
30. Accordingly, the ability of a company to carry forward credits in its memorandum accounts depends on whether a group of persons holds a certain level of minimum "voting interests" that is decided by reference to s YC 2.

Carry forward of excess tax credits

31. The continuity provision relating to the carrying forward of excess tax credits is s LP 3(4). Section LP 3(4) provides that if a company has an amount of tax credit remaining for the tax year the amount must be carried forward. Where this occurs, s LP 4 provides the continuity rules that then apply. Section LP 4 requires that a group of persons, for the relevant period, must have minimum voting interests in the company that add up to 49%. Section LP 4(3) defines "minimum voting interests" as the lowest voting interest that a person has in the company for the relevant period.
32. Thus, similar to other continuity provisions, whether a company can carry forward excess tax credits is decided by reference to s YC 2.

Who holds shares?

Section YC 2

33. Section YC 2 provides:

Percentage of shareholder decision-making rights

- (1) A person's voting interest in a company equals the percentage of the total shareholder decision-making rights for the company **carried by shares** or options **held by the person**.

When decision-making rights vary

- (2) Despite subsection (1), if the percentage of **shareholder decision-making rights for a company carried by shares** or options **held by any person** differs as between the types of decision-making listed in the definition of shareholder decision-making right, the person's voting interest in the company equals the average of those differing percentages. [Emphasis added]

34. On an ordinary reading, s YC 2 is referring to two concepts:

- shareholder decision-making rights for the company carried by shares;
- "shares ... held" by the person.

35. That is, the section is concerned with shareholder decision-making rights held by a person via the means of that person holding shares. This interpretation is supported by the word "held" appearing immediately after the phrase "shares or options". This suggests the verb "held" relates to the holding of shares or options and not to the holding of shareholder decision-making rights.

36. Accordingly, the person's voting interest in a company is calculated firstly, by determining the total number of shares the person "holds", and secondly, by determining the "shareholder decision-making rights" carried by those shares. Consideration of this latter point is not included in this Interpretation Statement.

37. In relation to what determines the meaning of "shares ... held" as used in s YC 2 and, as a result, what determines who holds shares, the following matters are considered important:

- the meaning of "shares";
- the ordinary meaning of "shares ... held";
- the courts' view on the meaning of "shares ... held";
- the context of s YC 2.

Ordinary meaning of "shares"

38. The Companies Act 1993 (CA 1993) provides that every company must have one or more shares, and that, after registration, shares must be issued to the people named in the company's application for registration. Thereafter, the board of a registered company may issue further shares subject to the CA 1993 and the constitution of the company. Under s 51 of the CA 1993 a share is issued by a registered company when the name of the holder is entered on the share register of the company.

39. For tax purposes, the term "share" is broadly defined in s YA 1. It includes, in para (a) of the definition, "any interest in the capital of a company".

40. The expression "interest in" can be given a wide meaning. *Black's Law Dictionary* (9th ed, West, St Paul, 2009) defines "interest" as:

2. A legal share in something; all or part of a legal or equitable claim to or right in property.

41. The English Court of Appeal in *IRC v R Woolf (Rubber) Ltd* [1962] 1 Ch 35 considered the meaning of s 255(2) of the Income Tax Act 1952 (UK). This section defined a “member” in relation to a company as including “any person having a share or interest in the capital or profits or income of the company”. Donovan LJ stated at 45–46:

It is in this context, and against this background, that the word “interest” must, in my view, be construed; and, so construed, I think it connotes an interest which gives the possessor a right or expectation to share in a company’s profits even though they might come to him via liquidation.

42. And at 46, Upjohn LJ stated:

The share or interest of a member in the capital of a company has no precise legal signification. In the context it may refer to the share or interest of the member in the issued share capital, or it may refer to his ultimate right to receive a dividend in liquidation after all creditors have been discharged ...

43. The meaning of capital and share capital in particular is discussed in *NZ Company Law and Practice Commentary* (online ed, CCH, accessed 12 June 2012, at [15-005]):

The term capital loosely describes the funds to which a company has access for the purpose of its business and development.

...

Share capital represents the funds of the company contributed by the issue of shares to shareholders. The concept of share capital is of much less significance under the [Companies Act 1993] than formerly: see ¶15-125. In fact, the term *capital* appears only once in the Act, in s 37(2)(b). The provisions of the *Companies Act* 1955 relating to share capital were based upon the existence of an identifiable capital fund (albeit represented by assets) which was required to be maintained intact for the benefit of creditors and, to a lesser extent, shareholders.

...

The terms *authorised*, *issued* and *nominal* share capital are now obsolete. The term share capital is now a misnomer if it implies the existence of a capital fund. **The share structure of the company under the *Companies Act* 1993 is significant for the rights of the shareholders against the company and between themselves;** it has no significance for the protection of creditors.

A share has been described as a fractional part of the capital: *Bradbury v English Sewing Cotton Co Ltd* [1923] AC 744 at p 767. This concept was easily understood in the case of a company having an issued share capital, say, of \$100,000 comprising 100,000 shares of a nominal value of \$1 each. But, as noted above, the legal concept of *capital* has all but disappeared under the 1993 Act. **A share now represents not so much a fraction of the capital, but an entitlement to benefits, such as dividends and voting rights.** [Emphasis added]

44. The House of Lords discussed the nature of a share in *IRC v Laird Group plc* [2003] BTC 385. The issue was whether a payment of a dividend was “a transaction relating to” shares. Lord Millett said at [35]:

The juridical nature of a share is not easy to describe. It is not a share in the company’s undertaking, for the company owns its property beneficially and not in trust for its members: “shareholders are not, in the eye of the law, part owners of the undertaking” (see *Short v Treasury Commissioners* [1948] 1 KB 116 at p122 (CA)). It is classified as a chose in action, but this merely tells us that it is a species of intangible personal property. **It is customary to describe it as “a bundle of rights and liabilities”, and this is probably the nearest that one can get to its character,** provided that it is appreciated that it is more than a bundle of contractual rights. The most widely quoted definition of a share is that of *Farwell J in Borland’s Trustee v Steel* [1901] 1 Ch 279 at p288 which was approved by your Lordships’ House in *IR Commrs v Crossman* [1937] AC 26. It was usefully and in my respectful opinion accurately summarised by Lord Russell of Killowen in his speech (dissenting on the facts) in that case, at p66:

“It is the interest of a person in the company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company.”

These rights, however, are not purely personal rights. They confer proprietary rights in the company though not in its property. The company is at one and the same time a juridical person with rights and duties of its own, and a res owned by its shareholders: see *Gower’s Principles of Modern Company Law* (6th ed, 1997 p301). [Emphasis added]

45. The standard bundle of rights that attaches to a share is set by s 89(2) of the CA 1993. Section 89(2) provides that:

- (2) A company may treat the registered holder of a share as the only person entitled to—
 - (a) Exercise the right to vote attaching to the share; and
 - (b) Receive notices; and
 - (c) Receive a distribution in respect of the share; and
 - (d) Exercise the other rights and powers attaching to the share.

46. Section 89(2) of the CA 1993 is clear that the registered holder of shares issued by a company in terms of s 51 of the CA 1993 would be entitled to, among other things, vote and receive distributions in relation to those shares. These shares would give the holder an interest in the capital or profits or income of the company. Therefore, they would constitute an “interest in the capital” of the company. Accordingly, a share issued under s 51 of the CA 1993 would be a “share” as defined in the Income Tax Act 2007.

Ordinary meaning of “shares ... held”

47. The Act does not define “held”, “hold” or “shares held”. However, s YA 1 defines “shareholder” as:

- (a) includes—
 - (i) a **holder** of a share; and
 - (ii) a member of a company, whether the company’s capital is divided into shares or not ... [Emphasis added]

48. Therefore, the reference in s YC 2 to shares “held” would cover those instances where, in terms of the definition of “shareholder”, someone “holds” those shares. However, this does not clarify what decides **who** it is that holds the shares.

49. The *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, New York, 2007) describes “held” as the past tense and past participle of hold. “Hold” is defined as:

5 Have or keep as one’s own: possess, be the owner ...

50. In this context, “held” seems to be about ownership. This definition suggests that determining who shares are “held” by requires a decision about who is the legal owner of the shares.

51. Section 89(1) of the CA 1993 states:

- (1) Subject to section 91 of this Act, the entry of the name of a person in the share register as holder of a share is prima facie evidence that **legal title to the share vests in that person**. [Emphasis added]

52. Similarly, s 84 of the CA 1993 states:

- (1) Subject to the constitution of the company, shares in a company may be transferred by entry of the name of the transferee on the share register ...

53. Furthermore, s 96(a) of the CA 1993 defines “shareholder” as:

- (a) a person whose name is entered in the share register as the holder for the time being of 1 or more shares in the company ...

Therefore, the legal title or ownership of shares issued by a company in terms of s 51 of the CA 1993 would be determined by who is the registered holder of those shares. The ordinary dictionary definition of “hold” suggests that the legal owner of shares would “hold” those shares. Therefore, the dictionary definition of “hold” provides some support for the view that the

reference to “shares ... held” in s YC 2 should be read as referring to the registered holder of those shares.

54. However, this interpretation of “shares ... held” needs to be consistent with the interpretation the courts have adopted.

Courts’ view of meaning of “shares ... held”

55. Several cases have looked at the meaning of “held” or “hold” in relation to shares issued by a company. A leading case in this area is the High Court of Australia case *Dalgety Downs Pastoral Company Pty Ltd v FCT* (1952) 86 CLR 335.

56. The court in *Dalgety* looked at s 80(5) of the Australian legislation that governed the carrying forward of company losses. The section required that shares carrying at least 25% of the voting power in the company be “beneficially held” by the same persons during the relevant period. The issue was whether continuity of shareholding had been maintained when a shareholder transferred his shares as security for a loan. The court concluded the shares were held by the person whose name appeared in the company’s share register. The court stated at 341–342:

we are of opinion that the construction of s 80(5) upon which the deputy commissioner acted is correct. Dixon J so held in *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353, basing his conclusion upon the view that **in the terminology of company law shares are said to be “held” by the person who is registered as a shareholder** in respect thereof, and that s 80(5), being concerned with voting power, should be treated as using that terminology. We share this view. Indeed **it is not too much to say that the verb “hold” and its variants, when used in relation to shares in companies, normally refers to the legal ownership of the shares according to the register of members.** The Companies Acts of the United Kingdom and of several States of the Commonwealth have uniformly used the word in this sense, and common usage has followed their example. **Before a different meaning is accepted, some justification must be found in the context, or the subject-matter.** No such justification is provided by the fact that “held” is modified by the adverb “beneficially”. This word serves more naturally the purpose of excluding the case of a holding for the benefit of others than the purpose of so broadening the meaning of the word “held” beyond the particular significance which it normally has in relation to shares as to make it equivalent to “owned” in the most general sense of that word. [Emphasis added]

57. Therefore, the court in *Dalgety* held that the verb “hold” and its variants (eg, “held”), when used in relation to shares in a company, normally refer to the legal ownership of the company’s shares. Shares that have been issued by a company are, as noted above, legally owned by the person who is listed on the company’s share register as being the legal holder of those shares. Therefore, this suggests that shares issued by a company are “held” in terms of s YC 2 by the registered shareholder.

58. Similarly, in *Patrick Corporation Ltd v FCT* (1974) 74 ATC 4,149 at 4,164 Mason J held:

For the appellants it was submitted that the word “shareholder” should be read as signifying not only a person who is entitled as against the company to be entered as a member in the register but also a purchaser of shares who is beneficially entitled to them as against the person registered as the holder of them. Reliance was placed upon the principle that a contract for the sale of shares in a company whose shares are not available for sale on the market is capable of specific performance and that the vendor of such shares holds them as trustee for the purchaser on completion of the contract. To my mind, this argument does not assist in resolving the problem, which is essentially a question of elucidating the meaning of the word in the light of the extended definition contained in sec. 6(1). It is not enough that the word includes a member. **A person who is a beneficial holder of shares in a company (save, perhaps, a subscriber to the memorandum) but who is not, and has not, been entered in the register as the holder of those shares cannot accurately be described as a “shareholder” or a “member” of the company within the meaning of the Act** (see *Norman v. F. C. of T.* (1963), 109 C.L.R. 9, at p. 16). [Emphasis added]

59. *Patrick* was appealed to the High Court of Australia as *Patcorp Investments Ltd v FCT* (1976) 76 ATC 4,225, where the majority dismissed the appeal. However, the whole court agreed on the issue of whether Patcorp was a “shareholder”. After considering various decisions on the meaning of “shareholder”, Gibbs J stated at 4,234:
- that entry on the register is necessary to constitute membership of a company, and clearly establish that **beneficial ownership of shares, without registration, does not make a person a shareholder**. [Emphasis added]
60. A similar approach was taken by the court in *Spencer v Kennedy* [1926] Ch 125. The court in *Spencer* considered whether someone who was absolutely entitled to be registered as a shareholder of a company, but who had not yet been entered onto the share register, could be said to “hold a share” in the company. The court held at 132:
- Now under Table A, art 70, the qualification of a director is “the holding of at least one share”. But, **a man does not “hold a share” until he is registered**. [Emphasis added]
61. The court in *Spencer* considered whether the claimant could be said to “hold a share” in the company. The court held that no one “holds a share” in a company until their name has been entered onto the company’s share register as the registered holder of that share. See also the English Court of Appeal decision in *Bainbridge v Smith* (1889) LR 41 Ch D 462 at 470 where the same conclusion is reached.
62. This interpretation of the circumstances when shares will be “held” has also been adopted in a New Zealand context. *BHL v CIR* (2011) 25 NZTC 20-088 concerned whether the taxpayer company (BHL) could offset its profits against the losses of another company. Who “held” the shares in each company and, in particular, whether one individual (Mrs B) “held” certain shares in BHL, was relevant to determining this issue. The High Court concluded that Mrs B did not “hold” the shares in question at the relevant time because her name was not entered in the share register of BHL as the shareholder of those shares. Courtney J stated at [14]-[16]:
- However, none of these provisions [of the Income Tax Act 2004] assist in deciding what constitute shares “held by the person”. **Mr Dempster, for the Commissioner, argued that, although “held” is not defined in any of the ITAs [Income Tax Acts], the concept of “holding” a share is well known in company law to mean having one’s name entered in the share register as a shareholder**. Section 96 of the Companies Act 1993 defines a shareholder as:
- ...a person whose name is entered in the register as the holder for the time being of 1 or more shares in the company.
- There is very strong support for this argument** in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* and *Dalgety Downs Pastoral Pty Ltd v Federal Commissioner of Taxation*. Both concerned the deduction of losses for tax purposes under the relevant Australian legislation. In *Dalgety Downs* the High Court of Australia held that shares “beneficially held” for the purposes of determining who held the voting power in a company at the relevant time (in the context of income in one year against losses from prior years) required that the name of the shareholder be entered in the register of members:
- ...
- I accept that, for the purposes of the group company offset provisions of the ITA, Mrs B had to be recorded in the share register of the company as being a shareholder at least to the extent of 50% of the company’s shares**. It is common ground that she was not and that alone should be sufficient to determine the issues raised by BHL. [Emphasis added]
63. Another New Zealand case is the Taxation Review Authority (TRA) decision *Case D27* (1980) 4 NZTC 60,621. That case concerned the carrying forward of losses by the company. The bulk of the shares in the company had been transferred by the original shareholders (the M Family) to another party (WF) with a nominal single share held by the company’s secretary (TP). This transfer occurred before the losses at issue were incurred. The purchase money for the shares had been advanced under debenture by the former

shareholders. WF eventually defaulted on the debenture. Arising from this default, WF transferred his shares back to the original shareholders. The company argued that the re-transfer of the shares back to the original shareholders plus the stringent conditions attached to the debentures gave practical control of the company and a practical continuation of the shareholding rights of the original shareholders throughout the relevant period. The TRA looked at the meaning of the words "held" and "on behalf of" in relation to shares. At 60,628 the TRA cited *Dalgety and Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353, before concluding that there had been a change in who "held" the shares concerned:

From the evidence it is clear that WF was shown as the holder of 1,999 shares, TP holding the remaining one share in the Objector. There was no evidence that WF held his share in trust for any member of the M family in any way. Had there not been losses incurred which it was desired to write off, there would have been no argument that WF held such shares by and on behalf of himself only.

64. Therefore, the TRA, like the High Court in *BHL*, concluded that shares will be "held" by the person who is entered onto the share register as being the holder of those shares (ie, the legal holder of the shares). See also *Case N26* (1991) 13 NZTC 3,219 at 3,228.
65. These cases are clear that beneficial or equitable ownership of shares without registration does not make a person a "holder" of a share that has been issued by a company. A person does not "hold" shares that have been issued by a company until their name is entered onto the company's share register as being the holder of those shares. When the name of the person is inserted onto the share register that person obtains the legal title to the shares. This legal title makes that person the "holder" of the shares. This is consistent with the dictionary definition of "hold" and the CA 1993. Therefore, this suggests that shares issued by a company will be "held" in terms of s YC 2 by the registered holder of those shares. This is subject to consideration of whether the context of s YC 2 requires some other conclusion.

Context of section YC 2

66. The court in *Dalgety* considered that if some justification could be found in the relevant context, a reference to "shares ... held" in an enactment might not refer to the legal ownership of shares (see the quotation from that case in paragraph 56).
67. It is necessary then to consider whether the relevant context provides any assistance in clarifying what the reference to "shares ... held" in s YC 2 means. This involves considering the legislative scheme and intent underpinning s YC 2.

Legislative intent of section YC 2

68. To consider the legislative intention underpinning s YC 2 it is useful to outline the history of the section.
69. Section YC 2 can be traced back to s 188 of the Income Tax Act 1976 (the 1976 Act). Section 188 dealt with the ability of a company to carry forward accumulated losses. This depended on whether there was sufficient continuity of who shares in the company were "held" by.
70. The Income Tax Amendment Act (No 2) 1992 introduced ss 8A to 8F to the 1976 Act. This amendment Act introduced new ownership tests of "voting interest" and "market value interest" to provide a measure of a person's interest in a company. These interest tests were relevant in several regimes such as the continuity provisions, tax recovery provisions and qualifying company regime.

71. Section 8C of the 1976 Act provided the “voting interest” measure of a person’s interest in a company. This measure changed the legislative focus from who shares were “held” by to a broader consideration of whether there was sufficient continuity of who had a “voting interest” in the company over a continuity period.
72. Section 8C of the 1976 Act was essentially replicated in s OD 3 of the Income Tax Act 1994 and s OD 3 of the Income Tax Act 2004. It is now set out in s YC 2 of the Income Tax Act 2007. Section 8C referred to “shareholder decision-making rights”. “Shareholder decision-making rights” were defined in s 8B of the 1976 Act. Section 8B was replicated in the definitions in s OB 1 of the Income Tax Act 1994 and s OB 1 of the Income Tax Act 2004 and now appears in the definitions in s YA 1 of the Income Tax Act 2007.
73. The policy intent underpinning (the equivalent of) s YC 2 is summarised in “Measurement of Voting and Market Value Interests” *Tax Information Bulletin* Vol 3, No 7 (April 1992): 18:
- Under the new provisions, shareholders’ economic interests in a company will generally be measured by reference to their voting interests held in that company, both directly and indirectly through interposed companies.
74. The quotation above shows the intention for the “voting interest” test was to base the measurement of a shareholder’s economic interest in a company on that shareholder’s voting interests in the company. This “voting interest” was determined by the shareholder decision-making rights carried by shares “held” by a person.
75. Therefore, s YC 2 is intended to measure the economic interest a person has in a company based on that person’s voting interests in the company. In turn, these voting interests in the company relate to the right of the person to vote on decisions affecting dividends, the constitution of the company, capital variations and the appointment of directors.
76. As noted at paragraphs 45 and 51, s 89 of the CA 1993 provides that a registered holder of a share has the ability to vote and share in the company’s capital, income and profits. It is the share in the company that carries these rights. This means that a registered holder of a share will have an economic interest (reflected by these rights) in the company. Section YC 2 was intended to capture such economic interests. Therefore, the view that shares issued by a company will be “held” in terms of s YC 2 by the registered holder is arguably consistent with the legislative intention. Next, any other legislative context that clarifies this point is considered.

Legislative scheme re the meaning of “shares ... held”

77. Several sections (namely, ss DC 13, DC 15, GB 5, HA 7 and YC 9) state that a trustee, rather than a beneficiary, “holds” shares. Similarly, as detailed in paragraph 86, s YB 21 assumes that trustees (including bare trustees) can “hold” things (including, for instance, shares). No section in the Act states that a beneficiary holds shares for tax purposes.
78. A trustee has the legal interest in trust property (including any shares that are trust property). Therefore, the holder of the shares, in terms of these sections, will be the legal, rather than the equitable or beneficial, owner of the share (ie, the trustee).
79. This suggests that Parliament intended that shares would generally be “held” by the legal owner of those shares. This owner would be the registered holder. This result makes sense; otherwise a trustee and a beneficiary could “hold” the same share at the same time. This would raise the issue of whether the legal holder or equitable holder would be assessable for tax on dividend income arising from the shares. It is reasonable to believe that

Parliament would not have intended these compliance costs. There would also be the possibility that both holders would be assessable for dividend income, raising double taxation issues. This provides further support for the view that the reference to “shares ... held” in s YC 2 should generally be read as referring to the registered holder.

80. Section YC 13(7) is also relevant. Section YC 13(7) relates to the overriding of the look-through rules in the context of corporate spin-outs. The issue of corporate spin-outs is beyond the scope of this Interpretation Statement. However, s YC 13(7) provides useful contextual guidance about the intended scope of s YB 21. Section YC 13(7) states:

For the purposes of measuring common interests, neither section YB 21 (Transparency of nominees) nor YC 4 apply to treat a nominee's or company's voting interest or market value interest in the original parent or the spun-out company to be held by another person, if the interest the other person would be treated as holding would be less than 10%.

81. Section YC 13(7) is based on the assumption that, but for s YB 21, a “nominee” shareholder would be a shareholder who has a “voting interest” in a company. As is explained in paragraphs 114 to 118, a nominee shareholder has the legal interest in a share. Therefore, s YC 13(7) provides further support for the view that the reference to shares “held” in s YC 2 should (subject to, for instance, s YB 21 applying) generally be read as covering the person who has the legal interest in the share.
82. Therefore, despite the comments of the court in *Dalgety* noted in paragraph 56, the relevant context of the scheme and intent of the legislation in relation to s YC 2 does not support departing from the view that legal ownership of shares is what determines who holds shares.

Conclusion about who holds shares

83. The Commissioner considers that, as a rule, shares issued by a registered company in accordance with s 51 of the CA 1993 will be “held” in terms of s YC 2 by the registered holder of those shares. The registered holder of shares is the person whose name has been entered onto the share register of the company as the holder of those shares. This is consistent with the plain and ordinary meaning of “shares ... held”, the approach that the courts have adopted in relation to this issue, and the relevant context of the Act.
84. However, there are exceptions to this rule. One exception applies if a “nominee” holds the shares in terms of s YB 21. Other exceptions are set out in ss YC 8 to YC 19 and FB 10.
85. These exceptions are looked at next.

What are the exceptions to the rule of who “holds” shares?

Nominees and section YB 21

86. Section YB 21 provides that:
- (1) In this Act, unless the context otherwise requires, **if a person holds something or does something as a nominee for another person, the other person holds or does that thing and the nominee is ignored.**
 - (2) **A person holds or does something as a nominee for another person if the person acts on the other person's behalf. However, a trustee is a nominee only if the trustee is a bare trustee.**
 - (3) A person making a nominal settlement at the request of another person is treated for the purposes of this Act as a nominee in relation to the settlement. [Emphasis added]
87. Section YB 21 has general application and operates as an exception to various provisions of the Act. Section YB 21(2) provides that a person is a nominee of another person, if the person “acts on the other person’s behalf”.

Where s YB 21 applies, the result is that if someone acts as a nominee for another person, that other person is deemed to hold or do something and the nominee is ignored. This helps to determine where the real economic control resides. In this sense, s YB 21 has a similar legislative intent as s YC 2.

88. Accordingly, s YB 21 is relevant to the application of s YC 2 because s YB 21 can deem that a registered holder acts, and so holds their shares as nominee, on behalf of someone else. If so, that other person will be deemed to “hold” the shares in terms of s YC 2.
89. Section YB 21(2) refers to a person (the “nominee”) who “acts on the other person’s behalf”, including where the nominee is a “bare trustee” for the other person. The meaning of these terms is looked at next. Following that, the application of s YB 21 in the context of shares is considered.

When the person “acts on the other person’s behalf”

90. The Act does not define the meaning of “act” or “acts” for the purposes of s YB 21. Therefore, the reference to “acts” is to be read as having its ordinary meaning.
91. The *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011) defines “act” as:

act □ v. **1** take action; do something... **2** (act for/on behalf of) representing on a contractual or legal basis.
92. The Commissioner considers that a person will “act” in terms of s YB 21, if they take action or do something on that other person’s behalf, including representing the other person on a legal basis. Although the holding of shares may appear to be passive and not requiring the holder to take action or do something, it does require the person to act as the legal holder of shares such as exercising voting rights as directed by the other person.
93. The Act also does not define “on the other person’s behalf”. Therefore, this phrase is also to be read as having its ordinary meaning. The courts have considered the ordinary meaning of “on behalf of” many times. This is a slightly different phrase from that set out in s YB 21(2). However, given the similarity between the phrase “on the other person’s behalf” and the phrase “on behalf of”, cases considering the latter are relevant.
94. Latham CJ discussed the general view of the phrase “on behalf of” in the Australian case *R v Portus, ex p Federated Clerk’s Union of Australia* (1949) 79 CLR 428. Latham CJ stated at 435,:

The phrase **on behalf of is not an expression which has a strict legal meaning**, it bears no single and constant significance. Instead it may be used in conjunction with a wide range of relationships, **all however in some way [are] concerned with the standing of one person as auxiliary to or representative of another person or thing**. [Emphasis added]
95. As noted in *Portus* above, “on behalf of” can apply to a wide variety of relationships. For instance, in *Lewis v Nicholson* (1852) 18 QB 503 the court considered that an agreement entered into by one party “on behalf of” another party meant the relationship between the parties was one of agent and principal.
96. In *Case D27*, the TRA, in relation to the expression “on behalf of”, stated at 60,628:

In *Words and Phrases Legally Defined*, vol. 4, cases are cited under the words “ON BEHALF OF”. Lord Hatherley in *Gillespie v City of Glasgow Bank* (1879) 4 App. Cas. 632 at p. 642 said:

I cannot perceive a difference between the words “for behoof of” and “in trust for”. I hold the expression “for behoof of” to mean exactly the same as if the words used had been “on behalf of” or “for the benefit

of", or any of those other words, of which many might be suggested, which indicate that although to the bank you are the absolute owner of the shares, yet as regards a third person, with whom you have entered into an arrangement you are not that owner. [Emphasis added]

97. This passage indicates that "on behalf of" and similar terms mean "in trust for" another person. The TRA does not analyse the term further. It is apparent, however, from the TRA's direct application of the law to the facts that to prove that one person was holding shares on behalf of another evidence of a trust or another similar arrangement or agreement is required.

98. Although the concept of a "nominee" is discussed later in this Interpretation Statement (at paragraphs 114 to 118), the term is used sometimes to signify an agent or a trustee in the sense of someone acting for another in representation of another. For instance, in *Schuh Trading Co v Comm'r* 95 F 2d 404 (7th Cir 1938) a case concerning the transfer of company assets to a nominee, the judge said at 411:

The word nominee ordinarily indicates **one designated to act for another** as his [or her] representative in a rather limited sense. **It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another**, in representation of another, or as the grantee of another. [Emphasis added]

99. Similarly, in *Butterworths New Zealand Law Dictionary* (6th ed, LexisNexis, Wellington, 2005), the term "nominee" is defined to mean an agent acting on behalf of a principal:

nominee An agent **acting on behalf** of a principal, often employed in the buying and selling of securities. [Emphasis added]

100. This extract means, consistent with the court's approach in *Schuh*, "on behalf of" covers a nominee or an agent who is acting on behalf of a principal.

101. It can be concluded that the expression "on behalf of":

- is not an expression that has a strict legal meaning; instead, it takes its meaning from the context in which it is used (*Portus*);
- it may be used in conjunction with a wide variety of relationships (*Portus*);
- is concerned with the standing of one person as auxiliary to or representative of another person or thing (*Portus*);
- may be satisfied by a trust, a nominee or an agency arrangement with another person (*Case D27, Lewis, Schuh and Butterworths New Zealand Law Dictionary*).

102. Therefore, the reference to "on the other person's behalf" in s YB 21(2) covers those instances where something is held or done (the acting) "on trust" for someone else. The inclusion of acting "on trust" is supported by what is effectively a proviso in s YB 21(2) that excludes all but "bare trustees" from being nominees under the section.

103. Of all the relationships that may be encompassed by the phrase "acts on the other person's behalf", of most relevance in the present context is that of a "bare trustee". This relationship is considered next.

When a person acts as "bare trustee"

104. The Act does not define "bare trustee". Therefore, this phrase is to be read as having its ordinary meaning. The meaning of "bare trustee" has been stated in *Halsbury's Laws of England* (Trusts, vol 48 (2007 Reissue) at [755]) as:

A bare trustee has been defined as a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has himself no present beneficial interest in

it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so.

105. *Lewin on Trusts* (16th ed, Sweet and Maxwell, London, 1964) provides a useful definition of a “bare trust”, as compared with a “special trust”. It also refers to a “bare trustee” in the context of someone who holds shares in a company. *Lewin on Trusts* states at 6:

The simple or bare trust is where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of law. In this case the beneficiary has...the right to be put into actual possession of the property, and ... the right to call upon the trustee to execute conveyances of the legal estate as the beneficiary directs.

A bare or simple trustee, especially of shares in a limited company, is often called a nominee.² He is a mere name or “dummy” for the true owner....

The special trust is where the machinery of a trustee is introduced for the execution of the purpose particularly pointed out, and the trustee is not, as before, a mere passive depository of the estate, but is called upon to exert himself actively in the execution of the settlor’s intention, as in the ordinary case of a trustee holding property on the express trusts of a settlement or of a will, or where a conveyance is made to trustees upon trust to sell for payment of debts. [Emphasis added]

106. In *Herdegen v FCT* (1988) 20 ATR 24, the frequently cited decision on the meaning of a bare trust, Gummow J said at 32-33:

Today the usually **accepted meaning of “bare” trust is a trust under which the trustee or trustees hold property without any interest therein, other than that existing by reason of the office and the legal title as trustee,** and without any duty or further duty to perform, except to convey it upon demand to the beneficiary or beneficiaries or as directed by them, for example on sale to a third party. The term is usually used in relation to trusts created by express declaration. But it has been said that the assignor under an Agreement for Value for Assignment of so-called “future” property becomes, on acquisition of the title to the property, trustee of that property for the assignee. [Emphasis added]

107. A later edition of *Lewin on Trusts* (18th ed, Sweet and Maxwell, London, 2008) provides at 15:

A distinction has traditionally been drawn between “bare” trusts, or “simple” or “naked” trusts, and “special” trusts. According to that distinction, **a bare trustee holds property in trust for a single beneficiary absolutely and indefeasibly, and is a mere passive repository for the beneficial owner, having no duties other than a duty to transfer the property to the beneficial owner or as he directs.** By contrast a trustee holding property on special trusts has active duties to perform, for example in executing the trusts of a will or settlement, with administrative (and perhaps, also dispositive) powers accompanying his active duties. It is still possible to distinguish between an absolute trust for a single beneficiary, which might still be called a bare or simple trust, and other types of trust. [Emphasis added]

108. These descriptions of a “bare trustee” refer to the trustee’s duty to transfer the property held to the beneficial owner on demand. *Halsbury’s Laws of England* adds further that the beneficial owner or person for whose benefit the trust was created needs to be “of full age and *sui juris*” in respect of the property. *Sui juris* is a legal phrase used to describe people who are under no disability affecting their legal capacity to deal with their property, to bind themselves by contracts, and to sue and be sued. People who do not have full legal capacity, so are not *sui juris*, can include minors and people who are mentally incapable.

109. A “bare trustee” is often referred to as being a “nominee” in the context of shares. This seems to be consistent with the definition of “nominee” in s YB 21 specifically including bare trustees.

² Subsequent editions of this publication omit the reference to nominee.

110. Furthermore, before a bare trust can be found to exist, there must be a valid trust. This is because a bare trust is a type of trust. The trust must possess the “three certainties”:
- certainty of intention (ie, evidence of an intention to create a trust);
 - certainty of subject matter (ie, the property that is subject to the trust relationship must be clearly identifiable); and
 - certainty of objects (ie, ascertainable beneficiaries who have the power to enforce the trust: see *Knight v Knight* (1840) 3 Beav 148).
111. These elements have been firmly accepted in New Zealand law. See, for example, the Court of Appeal’s judgments in *Royal Forest and Bird Protection Society of NZ Inc v Nelson City Council* [1984] 2 NZLR 480 at 486 and *Foreman v Hazard* [1984] 1 NZLR 586 at 594.
112. Three principles can be distilled from these authorities:
- A “bare trustee” is a person who holds property on trust for the absolute benefit and at the absolute disposal of other persons, and has no beneficial interest in the property.
 - A “bare trustee” does not have any duties to perform in regard to the property, except to convey or transfer it to a person entitled to hold it when required to do so.
 - For a bare trust relationship to exist, the three certainties of a trust must be satisfied.
113. Furthermore, the courts have also deemed a bare trust relationship (in relation to property) to exist in certain other circumstances: see *Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964. The court in *Musselwhite* noted that a vendor of a share under an agreement is deemed to hold that share on bare trust for the purchaser at the point of settlement and before the purchaser’s name has been entered onto the company’s share register. This case is discussed from paragraph 133 in relation to when a change in “shares ... held” occurs.

When a person acts as “nominee”

114. Finally, s YB 21 uses the term “nominee”. The *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011) defines “nominee” as:
- 2 a person or company, not the owner, in whose name a company, stock, etc. is registered.
115. As noted at paragraph 99, in *Butterworths New Zealand Law Dictionary* (6th ed, LexisNexis, Wellington, 2005), the term “nominee” is defined to mean an agent acting on behalf of a principal:
- nominee** An agent acting on behalf of a principal, often employed in the buying and selling of securities.
116. Furthermore, as noted at paragraph 105, in *Lewin on Trusts* (16th ed, Sweet and Maxwell, London, 1964) a bare or simple trustee, especially of shares in a limited company, is often called a nominee.
117. Therefore, a nominee would include a person who, for instance, is employed in the buying and selling of shares as agent for a principal. This means the meanings of “nominee” and “agent” overlap.
118. A nominee would also include a person who is, for instance, the registered holder of shares, albeit that someone else beneficially “owns” the shares. As noted above, the same test applies to determine whether shares are held on “bare trust”. This means there is also an overlap between the meanings of “nominee” and “bare trustee”, particularly in the context of shares.

Application of section YB 21

119. Having considered the terms used in s YB 21, it is necessary to consider how the section might apply in the context of shares. The circumstances when a registered holder will hold shares as bare trustee or nominee for someone else depends on whether the:
- shares are held by the registered holder for that other person on a bare trust that satisfies the three certainties of a trust or on a bare trust that is deemed to exist by operation of the law (see the discussion from paragraph 131); or
 - registered holder merely holds the shares as nominee for someone else (who holds all of the beneficial interest in the shares).
120. Section YB 21(1) deems that, in such instances, the thing will be “held” by that other person and not by the bare trustee or nominee. This is directly relevant to the main interpretive issue of who shares are “held” by in a company in terms of s YC 2. This is because if the registered holder of a share holds a share as bare trustee or nominee for someone else, this means that they “act” for that other person in terms of s YB 21(2). Therefore, unless varied by any other provision in the Act, that share will be deemed by s YB 21(1) to be held by that other person and not to be held by the registered holder in terms of s YC 2.
121. This view is also consistent with the conclusion reached in the Question We’ve Been Asked “QB 10/06: Elections for Qualifying Company Status” *Tax Information Bulletin* Vol 23, No 1 (February 2011). QB 10/06 states at 114:
- A nominee shareholder**
- Where a person uses a nominee to hold shares in a company, the nominee is the shareholder on the company’s share register. However, the nominee holds the shares for the other person (the beneficial owner of the shares).
122. Accordingly, s YB 21 operates as an exception to the rule that shares issued by a company are “held” by the registered holder in terms of s YC 2.
123. As mentioned in paragraph 84, in addition to s YB 21 there are other exceptions to the rule that shares are “held” in terms of s YC 2 by the registered holder of those shares. These other exceptions are in ss YC 8 to YC 19 and FB 10.

Sections YC 8 to YC 19 and FB 10

124. Sections YC 8 to YC 19 and FB 10 deal with:
- the death of the share or option holder (s YC 8);
 - shares or options held by trustees (s YC 9);
 - shareholders holding less than 10% direct interests (s YC 10);
 - the no look-through rule for companies in certain cases (s YC 11);
 - public unit trusts (s YC 12);
 - corporate spin-outs (s YC 13);
 - disregarding concessionary rules (s YC 14);
 - directors’ knowledge of failure to meet requirements of continuity provision (s YC 15);
 - disregarding market value changes (s YC 16);
 - the demutualisation of insurers (s YC 17);
 - reverse takeovers (s YC 18);
 - corporate reorganisations not affecting economic ownership (s YC 18B);

- the legislative conversion of foreign company of proprietors (s YC 19); and
 - continuity provisions: shares and options (s FB 10; settlements of relationship property).
125. It is beyond the scope of this Interpretation Statement to discuss these provisions in any depth but they generally apply when certain events occur (eg, the death of a shareholder).
126. These sections (in particular, ss YC 9 to YC 11) will sometimes be relevant to agreements for the sale and purchase of shares. For instance, if the purchaser is a trustee (s YC 9), holds direct interests of less than 10% in the target company (s YC 10) or is a company (s YC 11), these provisions could deem the shares to be “held” by someone other than the registered holder.
127. Accordingly, these provisions can operate as exceptions to the rule that shares will be “held” by the registered holder. Therefore, they must always be considered when the continuity provisions are applied.

When will there be a change in who holds shares?

128. Considered next is at what point in terms of s YC 2 there is a change in who shares are “held” by (ie, during a sale or transfer of shares).
129. It is helpful to first outline the stages of the share transfer process under which a purchaser becomes a registered holder of a company in terms of the CA 1993. The main stages in this process are listed below. These stages are not necessarily in sequential order. The precise order will always be a question of fact:
- An agreement for the sale and purchase of the shares is entered into. This agreement could be an oral agreement or in writing.
 - A share transfer form, share certificate (if applicable) and other relevant documentation (if applicable) is completed and delivered to the company pursuant to the share transfer process set out in the Securities Transfer Act 1991.
 - The purchaser pays for the shares (settlement).
 - The company decides, in accordance with its constitution and any relevant provision of the CA 1993, whether to accept the transfer of the shares.
 - If the company decides to accept the transfer, the purchaser is entitled to have their name entered into the company’s share register as being the holder of the shares.
 - The company enters the purchaser’s name onto the company’s share register in accordance with s 89 of the CA 1993.
130. However, the circumstances of a transfer of shares under the CA 1993 are not always the same as when there is a change in who “holds” shares in terms of s YC 2. This is because, as mentioned in paragraph 84, the Act includes exceptions so that it does not always treat the registered holder of the shares as the holder of the shares. At least one of those occasions (the look-through of nominees under s YB 21) can occur during a transfer of shares.

When the vendor holds the shares as “nominee” for the purchaser

131. The vendor of shares “holds” shares as “nominee” for the purchaser in the following circumstances:
- *An agreement creates a “nominee” relationship* – the vendor and the purchaser enter into an agreement, either as part of the transfer

agreement or separately, that explicitly or implicitly creates a “nominee” relationship in relation to the shares.

- *The share transfer agreement has been settled* – the vendor is the bare trustee for the purchaser of shares under an agreement that has been settled but the purchaser is not the registered holder of the shares. In such a case the purchaser may go on to be registered, or may never be registered (eg, where it is agreed the vendor will hold the shares as bare trustee for the purchaser indefinitely).

When the share transfer agreement has been settled

132. Unless the parties otherwise agree, when an agreement for the sale and purchase of shares has been entered into, the vendor will continue to hold those shares in terms of s YC 2 until the agreement has been settled. In such a case, provided the purchaser is *sui juris* and of full age, once the agreement has been settled the shares will be deemed to be held by the vendor as “bare trustee” for the purchaser. Therefore, the vendor will hold the shares as “nominee” in terms of s YB 21. This means that, unless varied by any of the statutory exceptions, the shares will be deemed (by s YB 21) to be “held” by the purchaser and not to be “held” by the vendor in terms of s YC 2. This is also assuming the purchaser’s name has not already been entered in the register of the company as the new holder of the shares before settlement in circumstances where the parties’ intention is that the change in ownership occurs before settlement. If this occurs, the purchaser will hold the shares from the date of their registration, consistent with the parties’ intention and s YB 21 will not apply.

133. The leading case in this area is *Musselwhite*. The court in that case considered whether an unpaid vendor of shares had voting rights in relation to those shares. The court decided that the purchaser merely had an equitable interest in those shares. Therefore, in the absence of a contrary provision in the contract, the vendor retained the prima facie right to vote in relation to those shares. The court referred, at 986, with approval to the comments of Jessel MR in *Lysaght v Edwards* (1876) 2 Ch D 505 at 505–506:

The matter was put thus by Jessel M.R. in *Lysaght v. Edwards*:

...

In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money ... In my judgment an unpaid vendor of shares remaining on the register after the contract for sale retains vis-a-vis the purchaser the prima facie right to vote in respect of those shares. [Emphasis added]

134. Therefore, the decision in *Musselwhite* shows that when an agreement for the sale and purchase of shares is entered into the shares will (before settlement) be held by the vendor with the purchaser having an equitable interest in those shares (see also *Hardoon v Belillos* [1901] AC 118 and *Loring v Davis* (1886) 32 Ch D 625). The vendor remaining on the share register would **not**, unless the parties had entered into an agreement creating a bare trustee relationship, hold the shares on bare trust for the purchaser at that point. Therefore, before settlement the shares would still be “held” by the vendor in terms of s YC 2.

135. The decision in *Musselwhite* was also cited with approval by the High Court in *Gillespie v Kinloch Golf Resort Ltd* (2008) 10 NZCLC 264,393 at 264,402. The court in *Gillespie* held:

An unpaid vendor of shares remaining on the register after the contract for sale retains vis-à-vis the purchaser the prima facie right to vote in respect of those shares: *Musselwhite v C. H. Musselwhite & Son Ltd* [1962] 1 All ER 201 at 208 ...

in the absence of any contractual restriction in the agreement to the contrary, the Gillespies were entitled to exercise their voting rights as they saw fit.

136. Furthermore, the TRA in *Case N26* held at 3,228 that:

Musselwhite's case ... sets forth the position with regard to such matters as voting rights. In that case an unpaid vendor of shares remained on the company's register of registered members or shareholders after the contract for the sale of those shares was made. It was decided in that case that the unpaid vendor, retained the rights to vote in respect of those shares, vis-a-vis the purchaser, unless the sale agreement restricted such a right.

137. The relationship between a vendor and purchaser of shares was also considered by the UK Court of Appeal in *Michaels v Harley House (Marylebone) Ltd* [1999] 1 All ER 356. The court held at 367, consistent with the court's approach in *Musselwhite*, that:

the vendor under an uncompleted contract for the sale and purchase of shares is prima facie entitled to exercise the voting rights ... A registered shareholder who is absolute beneficial owner can vote as he pleases ... A registered shareholder who is a nominee must vote in accordance with the directions of the absolute beneficial owner, to whom his voting rights are attributed. **A registered shareholder who is a vendor under an uncompleted contract is in an intermediate position, a fiduciary but not a nominee.** [Emphasis added]

138. These cases followed the approach adopted by the court in *Musselwhite*. They are clear that, when an agreement has been entered into for the sale and purchase of shares, the vendor retains a beneficial interest in those shares until settlement occurs. As noted at paragraph 112, a bare trustee in relation to an asset does **not** have **any** beneficial interest in that asset. Therefore, a vendor will not be a bare trustee before settlement. Therefore, s YB 21 would not apply.

139. However, the nature of this relationship between the vendor and purchaser (in relation to the shares) changes when the agreement for the sale and purchase of shares is settled. This point is summarised in *Avon Downs* at 365:

It seems to me that a transferor of a share who has been paid the consideration for the transfer, holds simply **as a passive trustee** until the registration of the transfer and entry of the transferee's name on the register. [Emphasis added]

140. In other words, the court considered that a transferor of shares holds those shares as passive or bare trustee for the purchaser when an agreement is settled.³ The characteristics of a bare trust were discussed at paragraphs 104 to 113. In the case of a settled agreement for the sale and purchase of shares, the court will recognise the existence of a bare trust relationship between a vendor and purchaser, although the parties may have had no intention of creating a trust. The transferor would have no beneficial interest in those shares at that stage. Therefore, they would be obliged to vote in accordance with the purchaser's instructions. This is consistent with the distinction drawn by the court in *Michaels* between a transferor under an uncompleted contract for the sale of shares and a transferor under a completed contract for the sale of shares (who would hold those shares as bare trustee or nominee for the purchaser).

141. The court adopted a similar approach in *Stern v McArthur* (1988) 165 CLR 489, although the case related to an agreement for the sale of land. The purchaser had not yet paid the full purchase price for that land. The court considered the nature of the purchaser's interest in that land. In their judgment, Deane and Dawson JJ stated at 522:

It has been said in a variety of ways that a vendor under a valid contract for the sale of land holds the land as trustee for the purchaser. He is, however, a trustee only in a qualified sense and the qualifications are such as to rob the proposition of much of its significance or, for some purposes, its

³ A "passive" trust is another way of referring to a "bare trust": see *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th ed, LexisNexis Butterworths, London, 2010, at 87).

validity ... **the vendor retains a substantial interest in the property until the whole of the purchase money is paid.** He is entitled, subject to the contract, to possession and to the rents and profits in addition to a lien on the land as security for any amount outstanding. Any right to equitable ownership on the part of the purchaser is contingent only ... it is not really possible with accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished. [Emphasis added]

142. The court considered that, when an agreement for the sale and purchase of land has been entered into, the vendor would retain a beneficial interest in that land until settlement. Therefore, the court considered that such a vendor would **not** hold the land on bare trust or as a nominee (for the purchaser) **until** the agreement had been settled. This is the point (settlement of the agreement) when the entire vendor's beneficial ownership would have transferred to the purchaser. This is consistent with the approach adopted by the courts for the transfer of shares in *Musselwhite, Michaels* and *Avon Downs*. Despite this, it may be possible for the parties to specifically agree that at settlement beneficial ownership does not pass until some later time. In such a case a bare trustee relationship may not be created. They might, for instance, agree beneficial ownership passes at the point of registration of the purchaser to avoid the possibility of the purchaser being unable to obtain registration – the next issue discussed.
143. There may be occasions where the purchaser does not ultimately have their name entered onto the share register of the company as the registered holder of the shares. Such a situation is explained by A Beck, in *Guidebook to NZ Companies and Securities Law* (8th ed, CCH, Auckland, 2010, at [546]):

On a sale of shares the transferor does not guarantee that the transferee will obtain registration. The transferor is bound only to do all that is necessary to put the transferee in a position to obtain registration, which is the responsibility of the latter (*Skinner v The City of London Marine Insurance Corp* (1885) 14 QBD 882 (CA)). The transferor is bound only to do no more than deliver to the transferee a completed transfer form and the relevant share certificate if one has been issued. If the company refuses to register the transfer, neither party may cancel the contract of sale and the purchaser is not entitled to recover the purchase price (*London Founders Assn Ltd & Palmer v Clarke* (1888) 20 QBD 576 (CA))

In such cases a bare trustee relationship would persist. The registered shareholder (vendor) would continue to be looked through under s YB 21 with the purchaser considered to "hold" the shares for tax purposes. It may be that the purchaser has no desire to become registered, but if the vendor and purchaser wished to protect themselves from such an outcome they could make the sale conditional on registration of the transfer or, as mentioned at paragraph 142, provide for beneficial ownership to pass only with registration.

144. On the basis of the above cases, it is concluded that when an agreement has been entered into for the sale and purchase of shares the shares can be held by the vendor as "bare trustee" for the purchaser. This will be the case where, subject to any agreement to the contrary, all of the following circumstances arise:
- The agreement has been settled so that the vendor has the legal obligation to vote in accordance with the purchaser's instructions but has no ongoing active duties as trustee. Absent any specific rules or agreements otherwise, all dividends received by the vendor would also be owned beneficially by the purchaser. The vendor would have no beneficial interest in the shares at that stage.
 - The purchaser's name has not been entered onto the company's share register as being the registered holder of those shares.
 - The purchaser is of full age and *sui juris* (see the quotation from *Halsbury's Laws of England* at paragraph 104).

145. If the three circumstances listed above arise, the vendor would hold the shares as “nominee” for the purchaser at that stage in terms of s YB 21; that is, unless any of the specific statutory exceptions applied or the purchaser was acting as nominee for someone else. Otherwise, the shares will, because of s YB 21, be deemed to be “held” by the purchaser in terms of s YC 2 and deemed not “held” by the vendor at that stage.
146. This interpretation of s YB 21 is consistent with the legislative intent underpinning s YC 2. As noted at paragraph 75, s YC 2 was intended to provide a means of determining a shareholders’ economic interest in the company in terms of their ability to control the company’s affairs. When shares are held by a “nominee” the principal or beneficiary has voting power (as they may instruct the nominee how to vote) and, generally, the beneficial right to any dividends in relation to the shares. They would clearly have an economic interest in the company and, depending on the size of their holding, be able to control the company’s affairs.

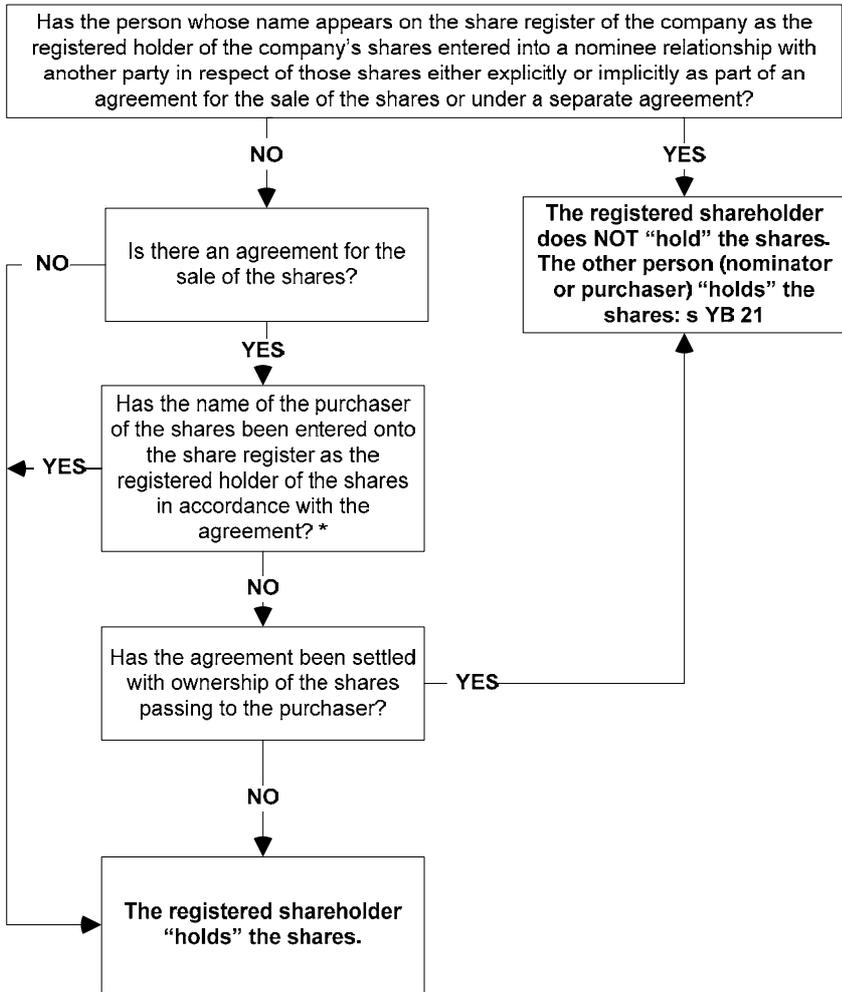
When an agreement creates a “nominee” relationship

147. Consistent with the comments made by the court in *Musselwhite* (see paragraph 133), a vendor of shares could enter into an agreement to become a “nominee” holder of shares for a purchaser (who is *sui juris* and of full age) under s YB 21. This could occur if the parties entered into an agreement having the effect of creating the situation where the vendor holds those shares either as nominee or bare trustee for the purchaser, although the purchaser’s name has not been entered onto the company’s share register as the holder of the shares. This could be achieved by, for instance, inserting the requisite clauses into the share transfer agreement creating such a relationship. Alternatively, the parties could enter into another contract setting out this relationship in relation to the shares in question. This will always be a question of fact and law and will be determined by the principles outlined in paragraphs 86 to 123. However, in terms of creating a nominee relationship the Commissioner considers that some situations where such a relationship would *not* necessarily arise before full settlement of an agreement include where:
- an agreement simply imposes a duty on the vendor not to act in a way detrimental to the purchaser’s interest in the shares;
 - the vendor must consult with the purchaser (but not necessarily follow the purchaser’s instructions) in relation to certain matters.
148. If there is such an agreement creating a nominee or bare trust relationship, the vendor will, at the time the agreement is entered into, become a “nominee” holder of the shares in terms of s YB 21. Therefore, the shares will (unless varied by any of the statutory exceptions referred to above) be deemed to be “held” by the purchaser and deemed not to be “held” by the vendor in terms of s YC 2.

Conclusion

149. As a rule, shares issued by a company under s 51 of the CA 1993 will be “held” in terms of s YC 2 by the registered holder of those shares. The registered holder of shares is the person whose name appears on the share register of the company (see *Dalgety, Patrick, Patcorp, Spencer, Bainbridge, BHL; Case D27 and Case N26*).
150. An exception to this rule is if those shares are “held” by the registered holder as “nominee” for someone else in terms of s YB 21. If so, that other person will, unless varied by any other provision in the Act, be deemed to hold those shares and the registered holder will be deemed not to hold those shares in terms of s YC 2.

151. Other provisions of the Act that can vary the above conclusions are set out in ss YC 8 to YC 19 and FB 10. If any of these exceptions apply, someone other than the registered holder may be deemed to hold those shares in terms of s YC 2 for the purposes of applying the continuity provisions.
152. An agreement for the sale and purchase of shares (as issued under s 51 of the CA 1993) will result in a change in who “holds” shares in terms of s YC 2 **at the earlier of when the:**
- purchaser’s name is entered onto the share register as the holder of the shares in accordance with the agreement;
 - vendor holds the shares as “nominee” for the purchaser (who is *sui juris* and of full age) in terms of s YB 21, which will occur if either the:
 - vendor and the purchaser enter into an agreement, either as part of the transfer agreement or separately, that explicitly or implicitly creates a nominee relationship in relation to the shares;
 - vendor is the bare trustee for the purchaser under an agreement that has been settled but the purchaser is not the registered holder of the shares; in such a case, the purchaser may go on to be registered or may never be registered (eg, where it is agreed the vendor will hold the shares as bare trustee for the purchaser indefinitely).
153. However, in the nominee situation, exceptions to when the purchaser is then the holder of the shares will arise if:
- the purchaser is themselves a “nominee” for someone else (in which case s YB 21 will deem the shares to be “held” by that other person);
 - any of ss YC 8 to YC 19 or s FB 10 apply.
154. Where the vendor is the purchaser’s nominee, the subsequent entering of the purchaser’s name onto the share register of the company does not affect who holds the shares. In the nominee situation, the purchaser is already treated as holding those shares before that time.
155. These conclusions are illustrated in the following flowchart. It is assumed that any purchaser of shares is acting in their own right and not as a nominee or bare trustee for a third party.



* If, contrary to the agreement, the name of the purchaser was entered onto the share register by mistake, the purchaser would be considered the bare trustee of the vendor and the registration of the purchaser ignored under s YB 21. That is, until such time as the share register is either rectified or the agreement is settled and ownership of the shares passes to the purchaser in accordance with the agreement.

Examples

156. The following five examples help to explain the application of the law. They illustrate situations where who holds shares and when there is a change in who holds shares affect the calculation of voting interests and the application of the continuity provisions. To illustrate these points, the tax consequences mentioned have been limited to a single continuity provision. However, in practice the change in who holds shares shown in each example could affect several continuity provisions.
157. The examples are:
- Example 1: Change in who holds shares after end of continuity period for carrying forward income tax losses.
 - Example 2: Change in who holds shares before end of continuity period for carrying forward of income tax losses.
 - Example 3: Change in who holds shares before end of continuity period for carrying forward of imputation credits — purchaser registered as shareholder before full settlement.
 - Example 4: Change in who holds shares before end of continuity period for carrying forward of imputation credits — purchaser registered as shareholder after full settlement by way of vendor finance.
 - Example 5: Change in who holds shares before end of continuity period for carrying forward of imputation credits — purchaser registered as shareholder after full settlement by way of cash.
158. In these examples the following is assumed:
- The company in each case has 100 shares and a standard 31 March balance date.
 - All the shares carry the same shareholder decision-making rights.
 - No transaction or arrangement has been entered into by the company that varies those shareholder decision-making rights.
 - No “options” carrying any shareholder decision-making rights have been issued or granted, either by the company or any shareholder, in relation to these shares in terms of s YC 2. In addition, it is assumed the agreement to transfer the shares does not give rise to an “option” (as defined).
 - There have not been any “market value circumstances”. In particular, it is assumed the agreement to transfer the shares does not give rise to a “market value circumstance” (as defined).
 - Neither the existing shareholders nor any of the new holders of shares are nominees for other persons (except, where noted, a nominee relationship arises during the transfer of the shares).
159. In all cases and for the avoidance of doubt, the outcomes in terms of the application of the continuity provisions shown in these examples may not apply where s BG 1 applies.

Example 1: Change in who holds shares after end of continuity period for carrying forward income tax losses

160. Company A incurred a net loss of \$100,000 for the year ended 31 March 2010. It has net income of \$200,000 for the year ended 31 March 2011.
161. Company A's shareholding for the 2010 income year (ie, from 1 April 2009 to 31 March 2010) was:
- Bill – 60% (60 shares)
 - Mary – 28% (28 shares)
 - Mike – 12% (12 shares)

162. The following events subsequently occur:
- On 20 March 2011 Bill enters into an agreement to transfer all of his shares to Tom.
 - On 4 April 2011 the agreement is settled in full.
 - On 5 April 2011 Company A agrees to the transfer of the shares.
 - On 10 April 2011 Company A enters Tom's name onto the company's share register as being the registered holder of the 60 shares.

Is Company A able to carry forward its 2010 net loss of \$100,000 and offset that loss against its 2011 net income of \$200,000?

163. A change in who holds Bill's 60 shares occurs for tax purposes on 4 April 2011. This is because when settlement in full occurs on 4 April 2011, s YB 21 will deem the shares to be held by Bill as nominee (bare trustee) for Tom for the purposes of s YC 2. Tom is deemed to hold the shares and Bill is deemed not to hold the shares.
164. There is no further change in who holds the shares when Tom becomes the registered holder of the shares on 10 April 2011. This is because for tax purposes Tom is treated as holding those shares already.
165. Assuming that none of the other statutory exceptions applies, the minimum voting interest of the shareholders over the continuity period (1 April 2009 – 31 March 2011) is:
- Bill – 60%
 - Mary – 28%
 - Mike – 12%
166. The combined minimum voting interest of the shareholders over the continuity period is 100%. This is because the change in who holds Bill's shares occurred after the end of the continuity period.
167. Section IA 5 provides that a tax loss is carried forward if a group of persons holds for the continuity period minimum voting interests in the company that add up to at least 49%. Therefore, the minimum voting interest of the shareholders in Company A over the continuity period of 100% is more than that required by s IA 5.
168. Company A may carry forward and offset its net loss for the 2010 income year against its net income for the 2011 income year.

Example 2: Change in who holds shares before end of continuity period for carrying forward of income tax losses

169. Company B incurs a net loss of \$100,000 for the year ended 31 March 2010. Of that loss \$80,000 relates to the period from 1 April 2009 to 31 October 2009. The \$20,000 balance relates to the period from 1 November 2009 to 31 March 2010. Company B has net income of \$200,000 for the year ended 31 March 2011.
170. Company B's shareholding as at 1 April 2009 was:
- Bill – 60% (60 shares)
 - Mary – 28% (28 shares)
 - Mike – 12% (12 shares)
171. The following events subsequently occur:
- On 20 October 2009 Bill enters into an agreement to transfer all of his shares to Tom.
 - On 31 October 2009 the agreement is settled in full.

- On 5 November 2009 Company B agrees to the transfer of the shares.
- On 10 November 2009 Company B enters Tom's name onto the company's share register as being the registered holder of the 60 shares.

Is Company B able to carry forward its 2010 net loss of \$100,000 and offset that loss against its 2011 net income of \$200,000?

172. A change in who holds Bill's 60 shares occurs for tax purposes on 31 October 2009. This is because when settlement in full occurs on 31 October 2009 s YB 21 will deem the shares to be held by Bill as nominee (bare trustee) for Tom in terms of s YC 2. Tom is deemed to hold the shares and Bill is deemed not to hold the shares.
173. There is no further change in who holds the shares when Tom becomes the registered holder of the shares on 10 November 2009. This is because for tax purposes Tom is treated as holding those shares already.
174. Assuming that none of the other statutory exceptions applies, the minimum voting interest of the shareholders over the continuity period (1 April 2009 – 31 March 2011) is:
- Bill – 0%
 - Mary – 28%
 - Mike – 12%
 - Tom – 0%
175. The combined minimum voting interest of the shareholders over the continuity period is 40%. This is because the change in who holds Bill's shares occurred before the end of the continuity period. Therefore, Bill's shares are excluded from the calculation.
176. Section IA 5 provides that a tax loss is carried forward only if a group of persons holds for the continuity period minimum voting interests in the company that add up to at least 49%. Therefore, the minimum voting interest of the shareholders in Company B over the period is less than that required by s IA 5(2).
177. However, Company B may still be able to carry forward and offset part of its tax losses for the 2010 income year against its net income for the 2011 income year. This will depend on whether the requirements set out in s IP 3 are satisfied. In particular, s IP 3(4) provides that, despite a breach of the requirements of s IA 5, a loss from part of an earlier year may be carried forward to the extent that the requirements for continuity would be met if the continuity period included only part of that earlier year. The amount of loss carried forward must be calculated by preparing financial statements in accordance with s IP 6. No amount of loss can be carried forward from a year, if, over that entire year, the company had net income; nor can the amount of the loss carried forward be more than the total loss for that entire year.
178. If the requirements set out in s IP 3 are satisfied, the continuity period can be treated as covering the period since Tom became a shareholder: 1 November 2009 – 31 March 2011. In that period, there would be 100% continuity of who holds the shares in the company. Of Company B's loss for the 2010 year, \$20,000 was incurred in this continuity period.
179. Company B could, provided these requirements are satisfied, carry forward and offset that \$20,000 against its net income for the 2011 income year.

Example 3: Change in who holds shares before end of continuity period for carrying forward of imputation credits— purchaser registered as shareholder before full settlement

180. Company C has the following imputation credits in its imputation credit account (arising as a result of tax payments):
- 28 August 2009 – \$20,000
 - 15 January 2010 – \$30,000
 - 7 May 2010 – \$50,000
181. There are no other entries in the company's imputation credit account.
182. On 1 April 2009 Company C's shareholding was:
- Bill – 60% (60 shares)
 - Mary – 28% (28 shares)
 - Mike – 12% (12 shares)
183. The following events subsequently occur:
- On 30 April 2010 Bill enters into an agreement to transfer all of his shares to Tom. The agreement provides for settlement to occur once there has been full payment for the shares. Full payment is to be made in two equal instalments. The first instalment is due on the date of the agreement and the second is due in six months' time. The agreement provides that ownership of the shares is to pass on the registration of Tom as the new shareholder following payment of the first instalment.
 - On 30 April 2010 Tom pays the first instalment and Bill delivers signed share transfer documents to Tom.
 - On 10 May 2010 Company C agrees to the transfer of the shares and enters Tom's name onto the company's share register as being the registered holder of the 60 shares.
 - On 12 May 2010 the board authorises and pays a dividend.
 - On 31 October 2010 Tom pays the second and final instalment for the shares.

Is Company C able to attach imputation credits when it pays the dividend?

184. A change in who holds Bill's 60 shares occurs for tax purposes on 10 May 2010. This is because Tom's name is entered onto Company C's share register as the holder of the shares on 10 May 2010 which is the date on which the agreement provides ownership is to pass.
185. There is no further change in who holds the shares when Tom pays in full for the shares on 31 October 2010. By that date Tom is already the registered holder of the shares. No bare trustee relationship arises between Bill and Tom and s YB 21 does not apply.
186. Assuming that none of the other statutory exceptions applies, the voting interest of the shareholders for the relevant period until the date the dividend is paid is:
- Bill – 0%
 - Mary – 28%
 - Mike – 12%
 - Tom – 0%
187. The combined minimum voting interest of the shareholders over the relevant period is 40%. This is because the change in who holds Bill's shares occurred before the date the imputation credits could be used by being

attached to the dividend paid. Therefore, Bill's shares are excluded from the calculation.

188. For each imputation credit, shareholder continuity is measured from the time the credit arises until the time it is used or continuity is breached. A combined minimum voting interest of 40% does not satisfy the continuity requirement of 66% or more set out in s OA 8. Section OB 41(1) states that an imputation credit account company has an imputation debit for the amount equal to the imputation credit retained in the imputation credit account and unused before the date on which shareholder continuity is breached. Therefore, as of 10 May 2010 there is a debit of the entire amount in Company C's imputation credit account (being the \$100,000 of tax that Company C paid up to that point).
189. This means Company C has no imputation credits in its imputation credit account that it can attach to the dividends that it authorised and paid on 12 May 2010.

Example 4: Change in who holds shares before end of continuity period for carrying forward of imputation credits— purchaser registered as shareholder after full settlement by way of vendor finance

190. The facts in this example are the same as the preceding example involving Company C with the following two differences in the terms of the agreement between Bill and Tom:
- There is no provision in the agreement specifying when ownership of the shares is to pass.
 - The agreement provides for Bill to provide vendor finance. Settlement of the agreement occurs in full on the provision of acceptable debt arrangements and the payment by Tom of the first instalment.

Is Company C able to attach imputation credits when it pays the dividend?

191. A change in who holds the shares occurs on 30 April 2010. This is because with settlement in full occurring at that date, Bill would hold the shares as bare trustee for Tom until Tom's name was entered onto the company's share register on 10 May 2010. Under s YB 21 Tom would be deemed to hold the shares from 30 April 2010.
192. There is a debit to Company C's imputation credit account for \$50,000 (being the amount of credits which arose before 30 April 2010). While the change in who holds the shares still occurs before the dividend is paid on 12 May 2010, the \$50,000 credit to the company's imputation credit account for the tax paid on 7 May 2010 would be available to attach to the dividend. This is because there has been continuity of the new shareholding of Company C from the date the tax is paid on 7 May 2010 until the date the dividend is paid a few days later.

Example 5: Change in who holds shares before end of continuity period for carrying forward of imputation credits — purchaser registered as shareholder after full settlement by way of cash

193. Company D has the following imputation credits in its imputation credit account (arising as a result of tax payments):
- 28 August 2009 – \$20,000
 - 15 January 2010 – \$30,000
 - 7 May 2010 – \$50,000
194. There are no other entries in the company's imputation credit account.
195. On 1 April 2009 Company D's shareholding was:

- Bill – 60% (60 shares)
- Mary – 28% (28 shares)
- Mike – 12% (12 shares)

196. The following events subsequently occur:

- On 30 April 2010 Bill enters into an agreement to transfer all of his shares to Tom.
- On 8 May 2010 the agreement is settled in full in cash.
- On 10 May 2010 Company D agrees to the transfer of the shares.
- On 12 May 2010 Company D enters Tom's name onto the company's share register as being the registered holder of the 60 shares.
- Also on 12 May 2010 the board authorises and pays a dividend.

Is Company D able to attach imputation credits when it pays the dividend?

197. A change in who holds Bill's 60 shares occurs for tax purposes on 8 May 2010. This is because when settlement in full occurs on 8 May 2010, s YB 21 will deem the shares to be held by Bill as nominee (bare trustee) for Tom in terms of s YC 2. Tom is deemed to hold the shares and Bill is deemed not to hold the shares.

198. There is no further change in who holds the shares when Tom becomes the registered holder of the shares on 12 May 2010. This is because for tax purposes Tom is treated as holding those shares already.

199. Assuming that none of the other statutory exceptions applies, the voting interest of the shareholders for the relevant period until the dividend is paid is:

- Bill – 0%
- Mary – 28%
- Mike – 12%
- Tom – 0%

200. The combined minimum voting interest of the shareholders over the continuity period is 40%. This is because the change in who holds Bill's shares occurred before the date the dividend is paid. Therefore, Bill's shares are excluded from the calculation.

201. For each imputation credit, shareholder continuity is measured from the time the credit arises until the time it is used or continuity is breached. A combined minimum voting interest of 40% does not satisfy the continuity requirement of 66% or more set out in s OA 8. Section OB 41(1) states that an imputation credit account company has an imputation debit for the amount equal to the imputation credit retained in the imputation credit account and unused before the date on which shareholder continuity is breached. Therefore, as of 8 May 2010 there is a debit of the entire amount in Company D's imputation credit account (being the \$100,000 of tax that Company D paid up to that point).

202. This means Company D has no imputation credits in its imputation credit account that it can attach to the dividends that it authorised and paid on 12 May 2010.

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"QB 10/06 Elections for Qualifying Company Status" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 114

Subject references

Bare trustee

Continuity provisions

Nominees

Shares "held"

Share transfers

Legislative references

Companies Act 1993: ss 10, 36, 37, 41, 42, 44, 51, 84, 89, 96

Income Tax Act 1976: ss 8A-8F, 188

Income Tax Act 1994: s OB 1 "shareholder decision-making rights", OD 3

Income Tax Act 2004: s OB 1 "shareholder decision-making rights", OD 3

Income Tax Act 2007: ss DC 13, DC 15, FB 10, GB 3-5, HA 7, IA 3-5, IC 1-3, LP 3(4), OA 8, OB 41, OC 24, OE 10, OK 15, YA 1 "continuity provisions", "excluded option", "market value circumstance", "option", "share", "shareholder", "shareholder decision-making right", "voting interest", YB 21, YC 2, YC 3, YC 8-19

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Appendix: Legislation

Income Tax Act 2007

A1. The following are the sections of the Income Tax Act 2007 relevant to this Interpretation Statement.

Definitions

A2. Section YA 1 defines “share” as:

- (a) includes any interest in the capital of a company;
- (b) includes a debenture to which section FA 2 (Recharacterisation of certain debentures) applies;
- (bb) includes a stapled debt security to which section FA 2B(2) (Stapled debt securities) applies;
- (c) includes a unit in a unit trust;
- (d) includes an investor’s interest in a group investment fund if—
 - (i) the fund is not a designated group investment fund; and
 - (ii) the interest does not result from an investment from a designated source; and
 - (iii) the investor’s interest does not result from an investment made in the fund on or before 22 June 1983, including an amount treated as invested at that date as **pre-1983 investments** under section HR 3(8) (Definitions for section HR 2: group investment funds):
- (e) does not include a withdrawable share in a building society, except in the definitions of **investment society dividend** and **withdrawable share**;
- (f) is further defined in section CE 6 (Meaning of share: when share acquired) for the purposes of sections CE 2 to CE 4 and CE 7 (which relate to share purchase agreements);
- (g) is further defined in section DC 15 (Some definitions) for the purposes of sections DC 12 to DC 15 (which relate to share purchase schemes).

A3. Section YA 1 defines “shareholder” as:

shareholder—

- (a) includes—
 - (i) a holder of a share; and
 - (ii) a member of a company, whether the company’s capital is divided into shares or not;
- (b) does not include a holder of a withdrawable share in a building society, except in the definitions of **investment society dividend** and **withdrawable share**;
- (c) in subparts HA (Qualifying companies (QC) and loss attributing qualifying companies (LAQC)) and OE (Branch equivalent tax accounts (BETA)) and OJ (Policyholder credit accounts [(PCA)]), in the FDP rules and the imputation rules, and in the definition of **shareholder dividend statement**, includes a sharemilker (as defined in section 2 of the Sharemilking Agreements Act 1937), to the extent to which the sharemilker derives payment for produce transactions directly from a co-operative dairy or milk company.

A4. Section YA 1 defines “shareholder decision-making right”:

shareholder decision-making right means a right, carried by a share issued by a company or an option over a share issued by a company, to vote or participate in any decision-making concerning—

- (a) a dividend or other distribution to be paid or made by the company, whether on a liquidation of the company or otherwise,

excluding decision-making undertaken by directors acting only in their capacity as directors; or

- (b) the constitution of the company; or
- (c) a variation in the capital of the company; or
- (d) the appointment of a director of the company.

A5. Section YA 1 defines the relevant portion of “voting interest”:

voting interest —

- (a) means, for a person and a company and a time, the percentage voting interest that the person is treated as holding in the company at the time under sections YC 2 to YC 20 (which relate to the measurement of control and ownership interests):
...
- (c) in section YC 13(4) and (5) (Corporate spin-outs), means, for a person and a company and a time, the percentage voting interest that the person is treated as holding in the company under section YC 2 (Voting interests), as modified by section YC 13(7)

A6. Section YA 1 defines “option”, “excluded option” and “market value circumstance” as meaning:

option, in sections FB 10 (Continuity provisions: shares and options), GB 5 (Arrangements involving trust beneficiaries), and YC 2, YC 3, YC 5, YC 8 and YC 9 (which relate to the measurement of control and ownership interests), and in the definitions of **excluded option**, **market value** (paragraphs (a) and (b)), **market value circumstance** (paragraphs (c) to (f)), **pre-1991 budget security**, **recognised exchange**, and **shareholder decision-making right**, includes an agreement for sale at a time when beneficial ownership of the property sold has not completely passed to the purchaser

excluded option means, for a company, an option to acquire or dispose of a share in the company if—

- (a) the directors of the company did not know and could not reasonably be expected to know that the option had been granted; or
- (b) neither the grantor of the option nor any person associated with the grantor of the option at the time the option is granted holds a share in the company over which the option is granted at the time the option is granted, whether directly or indirectly, but this paragraph does not apply in a case in which the grantor of the option is the company; or
- (c) the option is granted on arm’s length terms, without the grant having a purpose or effect of defeating the intent and application of any provision of this Act whose application is dependent on the measurement of voting and market value interests, and the holder of the option does not have, because of it, any right to vote or participate in any shareholder decision-making, except to the extent of any such right that—
 - (i) arises only in circumstances in which the position of the holder of the option in relation to it may be altered to the holder’s detriment; and
 - (ii) is granted to the holder of the option for the purpose of assisting the holder to prevent the alteration; and
 - (iii) at the time of the issue of the option, is not expected to arise; or
- (d) the price payable to acquire the share on the exercise of the option is equal to or not materially different from the market value of the share at the date of exercise, and the holder of the option does not have, because of it, any right to vote or participate in any shareholder decision-making, except to the extent of any such right that—
 - (i) arises only in circumstances in which the position of the holder of the option in relation to it may be altered to the holder’s detriment; and
 - (ii) is granted to the holder of the option for the purpose of assisting the holder to prevent the alteration; and
 - (iii) at the time of the issue of the option, is not expected to arise; or
- (e) the share is an excluded fixed rate security, subject to section YC 20 (Credit account continuity provisions: excluded fixed rate securities) in the case of the credit amount continuity provisions; or

- (f) the option—
 - (i) relates to a pre-1991 budget security; and
 - (ii) was itself granted before 8.00 pm New Zealand Standard Time on 30 July 1991 (the **specified time**), or was granted under a binding contract entered into before the specified time no term of which is altered at any time after the specified time; and
 - (iii) is not an option any term of which is altered at any time after the specified time (whether under a provision for roll-over or extension or under an option held at the specified time by the option holder or the grantor of the option, or both, or any other person, or otherwise), except when the term is altered under a binding contract entered into before the specified time no term of which is altered at any time after the specified time

market value circumstance, for a company at any time,—

- (a) means an occasion or situation in which, at the time, the company has on issue a debenture—
 - (i) that is not an excluded fixed rate security or pre-1991 budget security; and
 - (ii) to which section FA 2 (Recharacterisation of certain debentures) or FA 2B (Stapled debt securities) applies:
- (b) also means an occasion or situation in which, at the time,—
 - (i) the company has on issue a share that is not an excluded fixed rate security or a pre-1991 budget security; and
 - (ii) the payment of a dividend is guaranteed or secured to the holder by some person other than the company; and
 - (iii) the directors of the company know or could reasonably be expected to know at the time that the payment of a dividend is so guaranteed or secured:
- (c) also means an occasion or situation in which, at the time, an option exists that—
 - (i) is not an excluded option; and
 - (ii) is to acquire a share in the company; and
 - (iii) is granted by the company or a person other than the company:
- (d) also means an occasion or situation in which, at the time, an option exists that—
 - (i) is not an excluded option; and
 - (ii) is to require a person to acquire a share in the company:
- (e) also means an occasion or situation in which, at the time, an arrangement or a series of related or connected arrangements exists that—
 - (i) relates to shares or options over shares in the company issued by the company or any other person; and
 - (ii) has a purpose or effect of defeating the intent and application of any provision of this Act whose application is dependent on the measurement of voting and market value interests:
- (f) does not exist under any of paragraphs (a) to (e) if, at the time, no share in the company has a value higher than zero, except for an excluded fixed rate security or a pre-1991 budget security, and no option over a share in the company has a value higher than zero, except for an excluded option:
- (g) also means an occasion or situation in which, at the time,—
 - (i) under any of paragraphs (a) to (e), a direct market value circumstance exists for another company (the **shareholder company**); and
 - (ii) the shareholder company is associated with the company; and
 - (iii) under section YC 4 (Look-through rule for corporate shareholders), any fraction of any market value interest held, or treated under section YC 4 as held, by the shareholder company in the company is treated as held by any other person

Nominees

A7. Section YB 21 states:

- (1) In this Act, unless the context otherwise requires, if a person holds something or does something as a nominee for another person, the other person holds or does that thing and the nominee is ignored.
- (2) A person holds or does something as a nominee for another person if the person acts on the other person's behalf. However, a trustee is a nominee only if the trustee is a bare trustee.
- (3) A person making a nominal settlement at the request of another person is treated for the purposes of this Act as a nominee in relation to the settlement.

Voting interests

A8. Section YC 2 states:

Percentage of shareholder decision-making rights

- (1) A person's voting interest in a company equals the percentage of the total shareholder decision-making rights for the company carried by shares or options held by the person.

When decision-making rights vary

- (2) Despite subsection (1), if the percentage of shareholder decision-making rights for a company carried by shares or options held by any person differs as between the types of decision-making listed in the definition of shareholder decision-making right, the person's voting interest in the company equals the average of those differing percentages.

A9. Section YC 3 states:

Percentage of market value

- (1) A person's market value interest in a company equals the percentage of the total market value of shares and options over shares in the company that the market value of shares and options over shares in the company held by the person represents.

Adjustments for options

- (2) For the purposes of subsection (1), the market value of any share in a company that is subject to an option is calculated having regard to the terms of the option.

Continuity provisions

A10. Section YA 1 defines the "continuity provisions" as:

continuity provisions means—

- (a) section GB 3 (Arrangements for carrying forward loss balances: companies); and
- (b) section GB 4 (Arrangements for grouping tax losses: companies); and
- (c) sections IA 3 and IA 4 (which relate to the use of tax losses); and
- (d) section IA 5 (Restrictions on companies' loss balances carried forward); and
- (e) section IC 1 (Company A making tax loss available to company B); and
- (f) section LP 3(4) (Use of remaining credits); and
- (g) section OB 41 (ICA debit for loss of shareholder continuity); and
- (h) section OC 24 (FDPA debit for loss of shareholder continuity);⁴and

4 The liability of resident companies to pay foreign dividend payments on dividends they receive from foreign companies was repealed as from 30 June 2009. While existing credits to foreign dividend payment accounts are unaffected, no further credits for foreign dividend payments could be generated from that date.

- (i) section OE 10 (BETA credit for loss of shareholder continuity);⁵ and
- (j) section OK 15 (MACA debit for loss of shareholder continuity).

A11. Section GB 3 states:

- (1) This section applies when—
 - (a) a share in a company (the loss company) or another company has been subject to an arrangement, including an arrangement directly or indirectly altering rights attached to the shares; and
 - (b) the arrangement allows the loss company to meet the requirements of section IA 5 (Restrictions on companies' loss balances carried forward); and
 - (c) a purpose of the arrangement is to defeat the intent and application of sections IA 5 and IP 3 (Continuity breach: tax loss components of companies carried forward).
- (2) The loss company is treated as not meeting the requirements of section IA 5 in relation to the share.

A12. Section GB 4 states:

- (1) This section applies when—
 - (a) a share in a company (the offset company) or another company has been subject to an arrangement, including an arrangement directly or indirectly altering rights attached to the shares; and
 - (b) the arrangement allows the offset company to meet the requirements of subparts IC and IP, and section IZ 7 (which relate to the use of tax losses by group companies), as applicable; and
 - (c) a purpose of the arrangement is to defeat the intent and application of those provisions.
- (2) The offset company is treated as not meeting the requirements of subparts IC and IP and section IZ 7, as applicable, in relation to the share.

Carry forward of losses

A13. The continuity provisions providing for company losses to be carried forward are in ss IA 3 to IA 5. Section IA 3 states:

- (1) A person who has a tax loss for a tax year may use some or all of the amount of the tax loss under section IW 1 (Shortfall penalties) to pay a shortfall penalty.
- (2) A company that has a tax loss for a tax year may—
 - (a) make the amount available to another company under section IC 5 (Company B using company A's tax loss) to subtract from the other company's net income for the tax year; or
 - (b) use the amount under section RG 6 (Using loss balances) to satisfy a liability for a foreign dividend payment (FDP) payable in the corresponding income year; or
 - (c) use the amount under sections FM 26 to FM 28, or RM 21, (which relate to FDP) to obtain a refund of an overpayment of FDP made in the corresponding income year.
- (3) The amount of a tax loss for a tax year of a beneficiary of a non-complying trust may be used under section HC 22 (Use of tax losses to reduce taxable distributions from non-complying trusts) to adjust the amount of a taxable distribution derived in the corresponding income year.
- (4) If a person has a balance of tax loss remaining for a tax year after the uses described in this section, the balance is carried forward to the next tax year as a loss balance.
- (5) Sections IA 5, IA 8, and IA 10 override this section.

5 Sections 104 and 126(13) of the Taxation (International Investment and Remedial Matters) Act 2012 repealed s OE 10 and paragraph (i) of the definition of "continuity provisions" (branch equivalent tax accounts credit for loss of shareholder continuity) from 1 July 2012.

A14. Section IA 4 states:

- (1) A person's loss balance carried forward under section IA 3(4) to a tax year, must—
 - (a) first, be subtracted from their net income, so far as it extends, for the tax year; and
 - (b) secondly, to the extent of a remaining loss balance carried forward under section IA 2(2), be included in their tax loss for the tax year.
- (2) Sections IA 5 and IA 8 to IA 10 override this section.

A15. The relevant portions of s IA 5 are:

General statement

- (1) A company's tax loss component is carried forward in a loss balance only if the minimum continuity requirements of subsections (2) and (3) are met. The tax loss component includes an unused tax loss component carried forward from an earlier income year.

Continuity of voting interests

- (2) A tax loss component is carried forward in a loss balance under section IA 3(4) only if a group of persons holds for the continuity period minimum voting interests in the company that add up to at least 49%.

Continuity of market value interests

- (3) If a market value circumstance exists for the company at any time during the continuity period, the group of persons must also hold for the continuity period, minimum market value interests in the company that add up to at least 49%.

...

Some definitions

- (6) In this section,—
 - ...
 - minimum voting interest, for a person and a continuity period, means the lowest voting interest they have in the company during the continuity period.

Offset of losses with other companies

A16. The continuity provision relating to the offset of losses between companies is s IC 1 the relevant portions of which are:

- (1) This subpart applies if 1 company that is part of a group of companies (company A) has a tax loss for a tax year that it makes available to another group company (company B) to subtract from its net income for the tax year.
- (2) The amount of a tax loss that company A has for a tax year may be made available to company B to subtract from its net income for the tax year only if—
 - (a) the threshold levels in section IC 2 are met; ...

A17. The relevant portions of s IC 2 state:

- (1) Company A may group a tax loss in a tax year under section IC 5 only if the requirements of section IA 5 (Restrictions on companies' loss balances carried forward) are met.
- (2) In addition to meeting the requirements referred to in subsection (1), company A and company B must have the required common ownership under section IC 3 for the period referred to in section IC 6.

A18. The relevant portions of s IC 3 are:

- (1) A group of companies means 2 or more companies, none of which is a multi-rate PIE, in relation to which a group of persons holds—
- (a) common voting interests that add up to at least 66%; and
 - (b) if a market value circumstance exists for a company that is part of a group of companies, common market value interests that add up to at least 66%.
- ...
- (3) In subsection (1)(a), a person's common voting interest in the relevant companies at a particular time is the percentage of their voting interests under section YC 2 (Voting interests) in each of the companies at the time.
- (4) In subsection (1)(b), a person's common market value interest in the relevant companies at a particular time is the percentage of their market value interests under section YC 3 (Market value interests) in each of the companies at the time.

Carry forward of credits in memorandum accounts

A19. In certain circumstances, s OA 8 prevents a company from preserving credits in its memorandum accounts. The relevant provisions of s OA 8 are:

Shareholder continuity requirement

- (2) An amount that is a credit in the account may be carried forward from a credit date to a later time only if the company or consolidated group that has the credit maintains a 66% continuity of shareholding under subsection (7) from the credit date to the later time. Subsections (3B) to (5) override this subsection

...

When continuity lost

- (6) For a memorandum account and for a company or consolidated group that maintains the account when the continuity of shareholding required by subsection (7) is lost, a debit arises under the relevant section in each subpart only to the extent to which an unused amount of credit remains in the memorandum account. The relevant sections are—
- (a) section OB 41 (ICA debit for loss of shareholder continuity):
 - (b) section OC 24 (FDPA debit for loss of shareholder continuity)
 - (c) section OE 15 (BETA debit for loss of shareholder continuity):^[6]
 - (d) section OK 15 (MACA debit for loss of shareholder continuity):
 - (e) section OP 42 (Consolidated ICA debit for loss of shareholder continuity):
 - (f) section OP 73 (Consolidated FDPA debit for loss of shareholder continuity):
 - (g) section OP 108 (Consolidated BETA debit for loss of shareholder continuity).^[7]

Shareholder continuity requirement

- (7) The shareholder continuity requirement is that, while some or all of the credit still exists, a group of persons must continue to hold—
- (a) aggregate minimum voting interests in a company or consolidated group of at least 66%; and
 - (b) if a market value circumstance exists for a company or, in the case of a consolidated group, a group company, aggregate minimum market value interests in the company or group of at least 66%.

A20. Section OB 41 states:

6 In respect of branch equivalent tax accounts (BETAs), ss 80(2) and 104 of the Taxation (International Investment and Remedial Matters) Act 2012 has repealed ss OA 8(6)(c) and (g) and OE 15 for income years from 1 July 2012.

7 Section OA 8(6)(g) has been repealed from 1 July 2012 (see footnote 5). Section OP 108 was repealed for all income years from 1 July 2009.

- (1) An ICA company has an imputation debit for the amount equal to the amount of an imputation credit retained in the imputation credit account and unused at the time at which shareholder continuity is lost.
- (2) The imputation debit in subsection (1) is referred to in table O2: imputation debits, row 14 (debit for loss of shareholder continuity).
- (3) The debit arises at the time shareholder continuity is lost.

A21. Section OC 24 states:

- (1) An FDPA company has an FDP debit for the amount equal to the amount of an FDP credit retained in the FDP account and unused at the time at which shareholder continuity is lost.
- (2) The FDP debit in subsection (1) is referred to in table O4: FDP debits, row 13 (debit for loss of shareholder continuity).
- (3) The debit arises at the time shareholder continuity is lost.
- (3B) This section does not apply to a qualifying company in circumstances other than those set out in section HA 18 (Treatment of dividends when qualifying company status ends), and that section overrides subsections (1) to (3).
- (4) Section GB 41 (FDPA arrangements for carrying amounts forward) may apply to treat a company as not meeting the requirements of this section.

A22. Section OK 15 states:

- (1) A Maori authority has a Maori authority debit for the amount of a Maori authority credit retained in the Maori authority credit account and unused at the time at which shareholder continuity is lost.
- (2) The Maori authority debit in subsection (1) is referred to in table O18: Maori authority debits, row 7 (debit for loss of shareholder continuity).
- (3) The debit arises at the time shareholder continuity is lost.

Carry forward of excess tax credits

A23. The continuity provision providing for the carry forward of excess tax credits is s LP 3(4):

- (4) If, after applying subsections (2) and (3), the company has an amount of tax credit remaining for the tax year, the amount for the income year must be carried forward to the next tax year as a credit carried forward.

A24. When s LP 3(4) applies, s LP 4 provides the continuity rules that then apply:

When this section applies

- (1) This section applies for the purposes of section LA 5(3) (Treatment of remaining credits) when a company has an amount of a tax credit that must be carried forward under section LP 3(4).

Minimum interests required

- (2) The amount is available for use under section LP 3(4) if a group of persons exists that has, for the continuity period,—
 - (a) minimum voting interests in the company that add up to 49% or more; and
 - (b) when a market value circumstance exists for the company in the continuity period, minimum market value interests in the company that add up to 49% or more.

Companies Act 1993

A25. The following are the sections of the Companies Act 1993 relevant to this Interpretation Statement.

A26. Section 10 states:

10 Essential requirements

A company must have—

- (a) a name; and

- (b) 1 or more shares; and
- (c) 1 or more shareholders, having limited or unlimited liability for the obligations of the company; and
- (d) 1 or more directors.

A27. Section 36 provides that a share in a company confers rights on the holder:

36 Rights and powers attaching to shares

- (1) Subject to subsection (2), a share in a company confers on the holder—
 - (a) the right to 1 vote on a poll at a meeting of the company on any resolution, including any resolution to—
 - (i) appoint or remove a director or auditor:
 - (ii) adopt a constitution:
 - (iii) alter the company's constitution, if it has one:
 - (iv) approve a major transaction:
 - (v) approve an amalgamation of the company under section 221:
 - (vi) put the company into liquidation:
 - (b) the right to an equal share in dividends authorised by the board:
 - (c) the right to an equal share in the distribution of the surplus assets of the company.
- (2) Subject to section 53, the rights specified in subsection (1) may be negated, altered, or added to by the constitution of the company or in accordance with the terms on which the share is issued under section 41(b) or section 42 or section 44 or section 107(2), as the case may be.

A28. Section 37 states:

37 Types of shares

- (1) Subject to the constitution of the company, different classes of shares may be issued in a company.
- (2) Without limiting subsection (1), shares in a company may—
 - (a) be redeemable within the meaning of section 68; or
 - (b) confer preferential rights to distributions of capital or income; or
 - (c) confer special, limited, or conditional voting rights; or
 - (d) not confer voting rights.

A29. Section 41 provides that after registration a company must issue shares:

41 Issue of shares on registration and amalgamation

A company must,—

- (a) forthwith after the registration of the company, issue to any person or persons named in the application for registration as a shareholder or shareholders, the number of shares specified in the application as being the number of shares to be issued to that person or those persons:
- (b) in the case of an amalgamated company, forthwith after the amalgamation is effective, issue to any person entitled to a share or shares under the amalgamation proposal, the share or shares to which that person is entitled.

A30. Section 42 permits a company to issue further shares:

42 Issue of other shares

Subject to this Act and the constitution of the company, the board of a company may issue shares at any time, to any person, and in any number it thinks fit.

A31. Section 44 provides that, despite s 42, the board of a registered company may issue shares in contravention of the constitution:

44 Shareholder approval for issue of shares

- (1) Notwithstanding section 42, if shares cannot be issued by reason of any limitation or restriction in the company's constitution, the board may

issue shares if the board obtains the approval for the issue in the same manner as approval is required for an alteration to the constitution that would permit such an issue.

- (2) Subject to the terms of the approval, the shares may be issued at any time, to any person, and in any number the board thinks fit.
- (3) Within 10 working days of approval being given under subsection (1), the board must ensure that notice of that approval in the prescribed form is delivered to the Registrar for registration.
- (4) Nothing in this section affects the need to obtain the approval of an interest group in accordance with section 117 (which relates to the alteration of shareholders' rights) if the issue of shares affects the rights of that interest group.
- (5) A failure to comply with this section does not affect the validity of an issue of shares.
- (6) If the board of a company fails to comply with subsection (3), every director of the company commits an offence and is liable on conviction to the penalty set out in section 374(2).

A32. Section 51 states:

51 Time of issue of shares

A share is issued when the name of the holder is entered on the share register.

A33. Section 84 states:

84 Transfer of shares

- (1) Subject to the constitution of the company, shares in a company may be transferred by entry of the name of the transferee on the share register.....

A34. Section 89 states:

89 Share register as evidence of legal title

- (1) Subject to section 91 of this Act, the entry of the name of a person in the share register as holder of a share is prima facie evidence that legal title to the share vests in that person.
- (2) A company may treat the registered holder of a share as the only person entitled to—
 - (a) exercise the right to vote attaching to the share; and
 - (b) receive notices; and
 - (c) receive a distribution in respect of the share; and
 - (d) exercise the other rights and powers attaching to the share.

A35. Section 96 defines "shareholder" as:

96 Meaning of shareholder

In this Act, the term shareholder, in relation to a company, means—

- (a) a person whose name is entered in the share register as the holder for the time being of 1 or more shares in the company....