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HMRC's treatment of fixed rate non-cumulative shares as ordinary share capital

Proactive submission by the Chartered Institute of Taxation

1. Executive Summary

1.1. The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 20,000 members, and extensive volunteer network, in providing our response.

1.2. The purpose of our proactive submission is to seek clarification as to HMRC's position on non-cumulative shares and whether such shares with a fixed rate of dividend would still be regarded as ordinary share capital (OSC) for the purposes of s.989 Income Tax Act 2007.

2. Cumulative v non-cumulative shares as OSC

2.1. According to guidance CTM00514, in the table confirmed whether various types of shares are deemed to be OSC for the purposes of s.989, the fourth description down reads '*Fixed rate of 10% cumulative/un-cumulative*'; as to whether this constitutes ordinary share capital, the table reads '*no – but see comment*'; the comment reads '*The rate of dividend is a fixed percentage on a fixed amount. See HMRC v Stephen Warshaw [2020][1]. This is not affected by whether the dividend is cumulative or un -cumulative*'

2.2. Previously, this guidance had stated that fixed rate, non-cumulative shares would be regarded as OSC for the purposes of s.989. Indeed, our understanding had been that a cumulative dividend right was deemed to be a fixed rate. This new guidance would appear to contradict that – stating that fixed rate shares would NOT be OSC, regardless of whether it is cumulative or not.

2.3. The citing of the *Warshaw* case is presumably the driving force behind the change. Within that case, as part of the decision, the Upper Tier Tribunal stated: '*In our opinion, it is clear that a fixed rate dividend right does not cease to be fixed rate merely because it is cumulative. The right remains a right to a dividend at a fixed rate'*[2].

[1] UKUT 0366
[2] Para 20

The decision of that case was that a fixed rate cumulative preference share was held to represent OSC on the basis that both the rate and the amount to which the rate applied needed to be fixed – in this particular case however, the latter was variable. Section 989, according to the Tribunal, was merely a 'bright dividing line' between those shares which broadly qualify as OSC and those which do not.

2.4. The last-but-one table entry on CTM00514 states that share with a *'Fixed rate of 10% cumulative but dividend only paid on regulator authorisation / fixed rate of 10% non-cumulative but dividend can only be paid if regulator authorises'* only has an underlying fixed rate if it is cumulative. The middle entry in the table says: '*Depends on whether cumulative or non-cumulative'.* This would seem to contradict the early entry that cumulative/non-cumulative status makes no difference to a fixed rate share's not representing OSC.

2.5. We therefore ask HMRC to provide confirmation as to whether:

- This change in the guidance in CTM00514 based upon the decision in *Warshaw* (in particular the sentence quoted at paragraph 20) when applying s.989?
- HMRC be taking the view going forward that all non-cumulative fixed rate shares will no longer qualify as OSC, as indicated by the new guidance?
- In light of this change, HMRC still regard shares whose dividend payment rights are cumulative as being of fixed rate for the purposes of s.989? Or has the cumulative/non-cumulative distinction now been removed altogether?
- Why does the payment authorisation of a regulator make a difference as to whether a non-cumulative share represents OSC or not?
- If this new guidance does represent HMRC's stance with respect to fixed rate shares (and the *Warshaw* case was instrumental in this change), does the fact that *Warshaw* concerned <u>preference</u> rather than ordinary shares allow for any possibility of fixed rate non-cumulative <u>ordinary shares'</u> being considered OSC? Where it says in the guidance table '*no-but see comment*' with respect to *Warshaw,* this seemingly alludes to the possibility of some flexibility in approach given the different circumstances in that case.

3. Acknowledgement of submission

3.1. We would be grateful if you could acknowledge safe receipt of this submission.

The Chartered Institute of Taxation

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The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.

Our members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.