



Taxation of Chargeable Gains Act 1992

1992 CHAPTER 12

PART IV

SHARES, SECURITIES, OPTIONS ETC.

CHAPTER II

REORGANISATION OF SHARE CAPITAL, CONVERSION OF SECURITIES ETC.

^{F1} Company reconstructions ...

[^{F1}138A Use of earn-out rights for exchange of securities.

- (1) For the purposes of this section an earn-out right is so much of any right conferred on any person (“the seller”) as—
 - (a) constitutes the whole or any part of the consideration for the transfer by him of shares in or debentures of a company (“the old securities”);
 - (b) consists in a right to be issued with shares in or debentures of another company (“the new company”);
 - (c) is such that the value or quantity of the shares or debentures to be issued in pursuance of the right (“the new securities”) is unascertainable at the time when the right is conferred; and
 - (d) is not capable of being discharged in accordance with its terms otherwise than by the issue of the new securities.
- (2) Where—
 - (a) there is an earn-out right, [^{F2}and]
 - (b) the exchange of the old securities for the earn-out right is an exchange to which section 135 would apply, in a manner unaffected by section 137, if the earn-out right were an ascertainable amount of shares in or debentures of the new company, ^{F3}...

^{F3}(c)

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this Act shall have effect, in the case of the seller and every other person who from time to time has the earn-out right, in accordance with the assumptions specified in subsection (3) below.

[Subsection (2) above does not have effect if the seller elects under this section for the ^{F4}(2A) earn-out right not to be treated as a security of the new company.]

(3) Those assumptions are—

- (a) that the earn-out right is a security within the definition in section 132;
- (b) that the security consisting in the earn-out right is a security of the new company and is incapable of being a qualifying corporate bond for the purposes of this Act;
- (c) that references in this Act (including those in this section) to a debenture include references to a right that is assumed to be a security in accordance with paragraph (a) above; and
- (d) that the issue of shares or debentures in pursuance of such a right constitutes the conversion of the right, in so far as it is discharged by the issue, into the shares or debentures that are issued.

(4) For the purposes of this section where—

- (a) any right which is assumed, in accordance with this section, to be a security of a company (“the old right”) is extinguished,
- (b) the whole of the consideration for the extinguishment of the old right consists in another right (“the new right”) to be issued with shares in or debentures of that company,
- (c) the new right is such that the value or quantity of the shares or debentures to be issued in pursuance of the right (“the replacement securities”) is unascertainable at the time when the old right is extinguished, [^{F5}and]
- (d) the new right is not capable of being discharged in accordance with its terms otherwise than by the issue of the replacement securities, ^{F6}...

^{F6}(e)

the assumptions specified in subsection (3) above shall have effect in relation to the new right, in the case of [^{F7}the person on whom the new right is conferred] and every other person who from time to time has the new right, as they had effect in relation to the old right.

[Subsection (4) above does not have effect if the person on whom the new right is ^{F8}(4A) conferred elects under this section for it not to be treated as a security of the new company.]

(5) An election under this section in respect of any right must be made, by a notice given to an officer of the Board—

- (a) in the case of an election by a company within the charge to corporation tax, within the period of two years from the end of the accounting period in which the right is conferred; and
- (b) in any other case, on or before the first anniversary of the 31st January next following the year of assessment in which that right is conferred.

(6) An election under this section shall be irrevocable.

(7) Subject to subsections (8) to (10) below, where any right to be issued with shares in or debentures of a company is conferred on any person, the value or quantity of the shares

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or debentures to be issued in pursuance of that right shall be taken for the purposes of this section to be unascertainable at a particular time if, and only if—

- (a) it is made referable to matters relating to any business or assets of one or more relevant companies; and
 - (b) those matters are uncertain at that time on account of future business or future assets being included in the business or assets to which they relate.
- (8) Where a right to be issued with shares or debentures is conferred wholly or partly in consideration for the transfer of other shares or debentures or the extinguishment of any right, the value and quantity of the shares or debentures to be issued shall not be taken for the purposes of this section to be unascertainable in any case where, if—
- (a) the transfer or extinguishment were a disposal, and
 - (b) a gain on that disposal fell to be computed in accordance with this Act,
- the shares or debentures to be issued would, in pursuance of section 48, be themselves regarded as, or as included in, the consideration for the disposal.
- (9) Where any right to be issued with shares in or debentures of a company comprises an option to choose between shares in that company and debentures of that company, the existence of that option shall not, by itself, be taken for the purposes of this section either—
- (a) to make unascertainable the value or quantity of the shares or debentures to be issued; or
 - (b) to prevent the requirements of subsection (1)(b) and (d) or (4)(b) and (d) above from being satisfied in relation to that right.
- (10) For the purposes of this section the value or quantity of shares or debentures shall not be taken to be unascertainable by reason only that it has not been fixed if it will be fixed by reference to the other and the other is ascertainable.
- (11) In subsection (7) above “relevant company”, in relation to any right to be issued with shares in or debentures of a company, means—
- (a) that company or any company which is in the same group of companies as that company; or
 - (b) the company for whose shares or debentures that right was or was part of the consideration, or any company in the same group of companies as that company;
- and in this subsection the reference to a group of companies shall be construed in accordance with section 170(2) to (14).]

Textual Amendments

- F1** S. 138A inserted (retrospectively) by [Finance Act 1997 \(c. 16\)](#), [s. 89\(1\)\(2\)](#) (with [s. 89\(3\)-\(8\)](#))
- F2** Word in s. 138A(2)(a) inserted (with effect in accordance with s. 161(6) of the amending Act) by [Finance Act 2003 \(c. 14\)](#), [s. 161\(2\)\(a\)](#)
- F3** S. 138A(2)(c) and preceding word repealed (with effect in accordance with s. 161(6) of the amending Act) by [Finance Act 2003 \(c. 14\)](#), [s. 161\(2\)\(b\)](#), [Sch. 43 Pt. 3\(8\)](#)
- F4** S. 138A(2A) inserted (with effect in accordance with s. 161(6) of the amending Act) by [Finance Act 2003 \(c. 14\)](#), [s. 161\(3\)](#)
- F5** Word in s. 138A(4)(c) inserted (with effect in accordance with s. 161(6) of the amending Act) by [Finance Act 2003 \(c. 14\)](#), [s. 161\(4\)\(a\)](#)
- F6** S. 138A(4)(e) and preceding word repealed (with effect in accordance with s. 161(6) of the amending Act) by [Finance Act 2003 \(c. 14\)](#), [s. 161\(4\)\(b\)](#), [Sch. 43 Pt. 3\(8\)](#)

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- F7** Words in s. 138A(4) substituted (with effect in accordance with s. 161(6) of the amending Act) by [Finance Act 2003 \(c. 14\), s. 161\(4\)\(c\)](#)
- F8** S. 138A(4A) inserted (with effect in accordance with s. 161(6) of the amending Act) by [Finance Act 2003 \(c. 14\), s. 161\(5\)](#)

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Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

- Act applied by [1997 c. 16 Sch. 12 para. 12\(7\)](#)[1314](#)
- Act applied by [2002 c. 23 Sch. 16 para. 48\(1\)\(2\)](#)
- Act construed as one with reg. 37 by [S.I. 2006/575 reg. 37\(2\)](#)
- Act construed as one with reg. 38 by [S.I. 2006/575 reg. 38\(3\)](#)

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 4(10)(11) inserted by [2016 c. 11 s. 15\(4\)](#)
- s. 4(10) words inserted by [2016 c. 24 s. 83\(11\)](#)
- s. 35(3)(d)(xviii) added by [2008 c. 17 Sch. 7 para. 9](#)
- s. 35(3)(d)(xviii) inserted by [2008 c. 18 Sch. 13 para. 46](#)
- s. 35(3)(d)(xviii) repealed by [S.I. 2008/3002 Sch. 1 para. 42](#)[Sch. 3](#) (This amendment comes into force on the day 2008 c. 4, s. 5 comes into force, see art. 1(2). That provision was brought into force on 1.12.2008 by [S.I. 2008/3068](#), art. 2(1)(b))
- s. 104(4)(b)(i) words substituted by [S.I. 1989/469](#), reg. 27(2) (as amended) by [S.I. 1997/1716 reg. 13\(1\)\(b\)](#)
- s. 107(11) words substituted by [S.I. 1989/469](#), reg. 27(2A) (as amended) by [S.I. 1997/1716 reg. 13\(2\)\(b\)](#)
- s. 169S(4A) inserted by [2015 c. 11 s. 43\(2\)](#)
- s. 587B inserted by [2000 c. 17 s. 43\(1\)](#)
- Sch. 5C para. 3(1) modified by [S.I. 2004/2199 reg. 7\(1\)](#)
- Sch. 5C para. 3(6) modified by [S.I. 2004/2199 reg. 7\(2\)](#)
- Sch. 5C para. 5(1) modified by [S.I. 2004/2199 reg. 7\(3\)](#)
- Sch. 5C para. 3 words inserted by [S.I. 2005/3229 reg. 128](#)
- Sch. 5C para. 5 words inserted by [S.I. 2005/3229 reg. 128](#)
- Sch. 5C para. 6 words inserted by [S.I. 2005/3229 reg. 128](#)
- Sch. 5C para. 3(1)(f) words substituted by [2007 c. 3 Sch. 1 para. 347](#)