



Finance Act 1997

1997 CHAPTER 16

PART V

INCOME TAX, CORPORATION TAX AND CAPITAL GAINS TAX

Chargeable gains

89 Earn-out rights

- (1) After section 138 of the Taxation of Chargeable Gains Act 1992 there shall be inserted the following section—

“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,
 - (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, and

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- (c) the seller elects under this section for the earn-out right to be treated as a security of the new company,

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.

- (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,
- (d) the new right is not capable of being discharged in accordance with its terms otherwise than by the issue of the replacement securities, and
- (e) the person on whom the new right is conferred elects under this section for it to be treated as a security of that company,

the assumptions specified in subsection (3) above shall have effect in relation to the new right, in the case of that person and every other person who from time to time has the new right, as they had effect in relation to the old right.

- (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 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—

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- (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).”
- (2) Subject to subsections (3) to (8) below—
 - (a) the section 138A inserted by subsection (1) above shall be deemed always to have been a section of the Taxation of Chargeable Gains Act 1992; and
 - (b) the enactments applying to chargeable periods beginning before 6th April 1992 shall be deemed always to have included a corresponding section.
- (3) Subject to subsections (4) to (6) below, an election under section 138A of the Taxation of Chargeable Gains Act 1992 in respect of a right conferred on any person before 26th November 1996 may be made at any time before the end of the period for the making of such an election in respect of a right conferred on that person on that date.
- (4) An election in respect of a right conferred on any person shall not be made by virtue of subsection (3) above at any time after the final determination of his liability to

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corporation tax or capital gains tax for the chargeable period in which the right was in fact conferred on him.

- (5) A notice given to an officer of the Board before the day on which this Act is passed shall not have effect as an election under section 138A of the Taxation of Chargeable Gains Act 1992, or the corresponding provision applying to chargeable periods beginning before 6th April 1992, except in accordance with subsection (6) below.
- (6) Where—
- (a) any person has given a notification to an officer of the Board before the day on which this Act is passed, and
 - (b) that notification was given either—
 - (i) in anticipation of the right to make an election under section 138A of the Taxation of Chargeable Gains Act 1992, or
 - (ii) for the purposes of an extra-statutory concession available to be used by that person for purposes similar to those of that section,that notification shall, unless the Board otherwise direct, be treated as if it were a valid and irrevocable election made by that person for the purposes of that section or, as the case may be, the corresponding provision.
- (7) Where any notification given as mentioned in subsection (6)(b)(ii) above is treated as an election for the purposes of section 138A of the Taxation of Chargeable Gains Act 1992 or any corresponding provision, that section or, as the case may be, the corresponding provision shall be taken to have no effect by virtue of that election in relation to any disposal before 26th November 1996 of any asset which—
- (a) was issued to any person in pursuance of an earn-out right;
 - (b) was issued to any person in pursuance of any such right as is mentioned in subsection (4) of that section; or
 - (c) falls for the purposes of that Act to be treated as the same as an asset issued at any time to any person in pursuance of such a right as is mentioned in paragraph (a) or (b) above but is not an asset first held by that person before that time.
- (8) Subsection (7) above shall not prevent section 138A of the Taxation of Chargeable Gains Act 1992 from being taken, for the purposes of applying that Act to any disposal on or after 26th November 1996, to have had effect in relation to—
- (a) any disposal before that date on which, by virtue of any of the enactments specified in section 35(3)(d) of that Act, neither a gain nor a loss accrued,
 - (b) any deemed disposal before that date by reference to which a gain or loss falls to be calculated in accordance with section 116(10)(a) of that Act, or
 - (c) any transaction before that date that would have fallen to be treated as a disposal but for section 127 of that Act.