FIJI REVENUE AND CUSTOMS SERVICE

STANDARD INTERPRETATION GUIDELINE 2024-13

INCOME TAX ACT 2015 – DISPOSAL OF SHARES

This Standard Interpretation Guideline ("SIG") sets out Fiji Revenue and Customs Service's ("FRCS") policy and operational practice in relation to tax implication arising upon disposal of shares.

It is issued with the authority of the Chief Executive Officer (CEO) of FRCS.

Legislative references in this SIG are the Income Tax Act 2015, unless otherwise stated.

This SIG which replaces SIG 2021-07 is in effect from 1 July 2023 and may need to be reviewed in the event of any relevant legislative amendments.

CONTENTS

PURPOSE

1. The purpose of this SIG is to provide practical guidance on the CEO's interpretation of the disposal of shares.
2. It includes 2023-2024 National Budget amendments that have been effected through Act No. 5 of 2023, Income Tax (Budget Amendment) Act 2023.

INTRODUCTION

3. Following the 2023/2024 Budget Amendment the disposal of shares will no longer be exempt from Capital Gains Tax effective 1st August 2023.

4. Shareholding represents the ownership proportion by shareholders in the share capital of a company.

5. A person who owns shares is a 'shareholder' or 'member'; capital amount injected in a company against which the shareholder is allotted shares is the 'share capital' of a company.

6. Shares may be of different types such as equity shares, preference shares, convertible or non-convertible shares, listed or unlisted shares, etc.

7. A person may dispose of shares for several reasons (commercial, personal, contractual, event based etc.) on which tax implication such as imposition, exemption or deferring, as applicable, may arise.

8. Tax implication on disposal of shares may vary depending on the reason and factors leading to disposal of shares. For instance, under general circumstances, CGT applies on disposal of shares however when the disposal is on account of transmission (due to death of a shareholder) to an executor or beneficiary, CGT may be deferred.

9. This SIG analyses the legislative provisions relating to capital gains tax and income tax upon disposal of shares.

10. The examples used throughout this SIG are merely illustrative. They do not cover the infinite number of factual scenarios that may arise. The relevant legislative provisions must be considered and applied to each case on its particular facts. That is, conclusions should not be drawn by determining whether the facts of a particulars case may be analogous with particular examples, but rather on the basis of applying the correct tests established by the law.

11. The full text of the legislative provisions is contained in the Appendix.

LEGISLATIVE ANALYIS

Capital Gains Tax

12. Capital gains are the increased worth of an investment that makes its current value higher than when it was originally bought by the owner.

13. Capital Gains Tax (CGT) is charged at the rate of 10% on capital gains made on disposal of a capital asset.[1]

    In order to understand CGT implication on shares, this section will briefly discuss –
    a) whether shares can be termed as a capital asset;
    b) when does disposal of shares occur; and
    c) how to assess gains on disposal of shares.

Shares - a Capital Asset

14. Section 2 of ITA defines *capital asset* to mean – 'a membership interest in a company, security or other financial asset;'

    Membership interest in a company in regard to a member commonly means:

    a. that member's status as member;
    b. member's right to receive distributions from the company;
    c. all rights and benefits enjoyed by the member including the right to vote; and
    d. all obligations, duties and liabilities imposed on a member including the right to make capital contributions.

    Ownership of shares entitles a person to membership interest in a company, therefore it can be concluded that shares are a capital asset.

Disposal

15. The most common example of disposal of shares is 'sale of shares'. Section 84 of ITA provides detailed understanding of the term 'disposal' by laying down rules to assist in determining when a 'disposal' occurs.

16. Disposal of shares occurs when a person gives away ownership of shares. Ordinarily, a change in ownership of an asset will result in both the disposal and acquisition of the asset. In sale of shares, the seller disposes the shares, and the buyer acquires the shares.

    Section 84 defines disposal to mean '*a person ceasing to have a legal title to the shares as well as when the shares are:*
    - *sold;*
    - *exchanged (such as a barter transaction);*
    - *transferred (such as by way of gift);*
    - *distributed (such as by way of an in-kind dividend paid by a company);*
    - *cancelled;*
    - *redeemed;*
    - *relinquished,*
    - *surrendered, or*
    - *the asset otherwise expires (such as the expiration of a contractual right).'*

[1] Income Tax (Rates of Tax and Levies) Regulations 2016

17. Special rules exist for situations when shares are transmitted[2] or when the person disposing the shares is a trustee-in-bankruptcy, liquidator, or receiver[3]. This will be discussed later in this SIG.

Computation of Capital Gains on disposal

18. The essential components in determining capital gains made on sale of a capital asset are consideration received upon disposal of asset and cost of the asset.

19. Capital gain made by a person on disposal of a capital asset is computed as below-

Joint Ownership

For income tax purposes, any gain or loss derived from the disposal of an asset that is jointly owned by 2 or more persons must be apportioned according to their respective interests in the asset[4].

Furthermore, where the ownership interests of a jointly owned asset cannot be ascertained, the owners are treated as having equal interests in the asset[5].

Consideration on Disposal

20. **Consideration** for disposal of any asset is *the total amount received or receivable for the asset, including the fair market value of any consideration in kind determined at the time of the disposal.*[6]

21. This means that capital gains is calculated on the sum that has been received or will be received when disposing of shares.

Consideration in Kind

22. At times, the disposal of shares may not be a straightforward transaction especially when shares are disposed of for non-cash elements. Here, the nature of transaction requires careful assessment where consideration and cost of shares needs to be ascertained correctly.

23. Consideration for disposal of shares is the total amount to be received against the sale of shares. In determining the consideration for shares, the cash as well as the non-cash component needs to be included.

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[2] Section 84(4) of ITA
[3] Section 84(6) of ITA
[4] Section 82(1) of ITA 2015.
[5] Section 82(2) of ITA 2015.
[6] Section 86(2) of ITA

The non-cash component should be computed at fair market value[7] (e.g. if shares are exchanged against land, consideration for sale of shares will be the fair market value of the land at the time of disposal).

Example 1: X sells 100 shares in ABC Ltd. to Z in exchange of land and buildings. Fair market value of the land and buildings at the time of disposal is $125,000. What will be the consideration for the sale of shares?

CEO's position: When consideration for disposal of shares is received in kind (non-cash), the fair market value of the non-cash component will be consideration for sale of shares. Therefore, the fair market value (usually the ordinary open market value) of land and buildings will be the consideration. In this case, the fair market value of land and buildings amounting to $125,000 will be the consideration for sale of 100 shares by X to Z.

Consideration – when shares are issued for Debt Settlement

24. Another common scenario in computing consideration is where debt owed to the creditor is adjusted by issuing shares by the borrower.

    For instance, A Ltd. borrows $1,000 from B Ltd. to be repaid in a period 1 year. A Ltd. proposes to B Ltd. that instead of repaying in cash, it will issue shares to B Ltd. of an amount equivalent to the debt. Here, the consideration for issue of shares will be the debt amount adjusted i.e. $1,000.

    Alternatively, if both parties decide that the debt will be settled by A Ltd. by paying $200 in cash and issuing shares for the balance amount of $800, consideration received for issue of shares will be $800 only, not the full amount of debt.

25. When adjusting debt by issue/sale of shares, it is important that borrower of debt and the person disposing the shares are the same.

    For instance, a debt due by the subsidiary of the parent company cannot be used by the parent company to reduce consideration when issuing shares.

    Example 2: XCo is a parent company, and YCo. is its subsidiary entity. XCo. raises capital by issuing 10,000 shares of $1 each to Harry. YCo. (subsidiary company) owes $2,000 to Harry for certain services. Harry and XCo. want to adjust the debt amount of $2,000 owed to YCo. in such a way that consideration for issue of 10,000 shares to be recorded at $8000 ($10,000 - $2,000).

    XCo. seeks CEO's opinion to confirm the consideration amount towards 10,000 shares issued to Harry?

    CEO's position: The consideration for disposal of shares shall be the total amount received or receivable for the asset. XCo and YCo are two separate entities. Debt of subsidiary company, YCo. cannot be used to offset consideration amount due by Harry to XCo. The amount owed to Harry by YCo. is an independent transaction to be settled separately between Harry and YCo.

[7] Fair Market Value is the ordinary open market value of an asset. Detailed explanation is available under section 5 of ITA

Alternatively, if that debt was due by XCo. to Harry, the adjustment of debt would have been allowed where the consideration in cash would have been $8,000 and in kind $2,000 (debt settlement).

Consideration – when shares are issued in a non-arm's length transaction

26. When shares are disposed on a non-arm's length basis (in a related party transaction), the fair market value of the shares prevalent at the time of disposal of shares shall be the consideration for disposal of shares for the seller/issuer and the corresponding amount shall be the cost for the buyer.[8]

Example 3: X sells 100 shares in ABC Ltd. to Y (his wife) at $15 per share for the total amount of $1500. As per the latest valuation report, the value of per share of ABC Ltd. is $35. What should be the consideration of shares for income tax purposes?

CEO's position: When disposal of shares occurs between related parties or associates on a non-arm's length basis, the fair market value of shares will be taken as the consideration of shares, regardless of what the seller received as consideration. Therefore, the fair market value of shares amounting to $3500 (100 shares x $35 per share) will be the consideration for disposal.

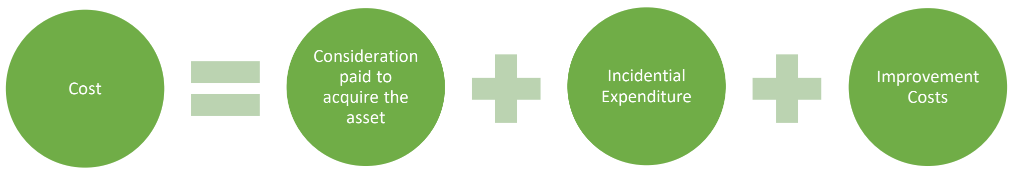
Consideration of shares of a company under liquidation

When a company goes under liquidation, the liquidation value of shares is determined, which is arrived at by deducting the amount that would be received if the company sold all its assets (for market value) and paid all its liabilities. The balance amount, if any, is the liquidation value which is distributed to shareholders, that represents the company's liquidation value per share.

The shares of a company under liquidation are eventually cancelled and such cancellation of shares is disposal of shares under section 84 of ITA. The liquidation value received by the shareholders is the consideration on disposal of shares.

Cost

27. **Cost** of a tangible asset is the sum total of the following amounts-



[8] Section 89 of ITA

28. The cost of issuing shares would include:
    a. the consideration paid by the buyer to acquire the shares. If the buyer is acquiring shares against non-cash items, fair market value of such non-cash items (e.g. land) will form part of the consideration;
    b. any incidental expenditure in acquiring or disposing the asset e.g. brokerage fees, commission etc.;
    c. any improvement costs. Since the asset involved is a shares, the improvement costs generally applicable to land, building etc. may not apply to shares.

Acquisition

29. For the purpose of understanding 'cost of acquisition', the term acquisition requires some discussion.

30. A person acquires shares when the person begins to *own* the shares, including the legal title to the shares. A share certificate issued by the company evidences the legal ownership of a shareholder. Members list maintained by Registrar of Company is also a reliable indication regarding membership status of a person as the filings with the Registrar are done by the Company.

    If, however, a company has not complied with the requirement of issuing share certificate, or updating records with the Registrar of Companies, the status of membership interest of a shareholder may be deduced from other factors such as, a person exercising membership rights and duties in the company e.g. receives dividends, participates, or votes in general meeting, makes payment on calls on shares etc. Each such circumstance may involve unique facts and information and need to be decided on a case-by-case basis.

31. If an asset is a right (e.g. right to use an asset on lease) or option, a person acquires the asset when the person is *granted* the right or option.

    In case where the asset is 'shares', having a right or option usually refers to employees' right or option to acquire shares under Employee Share Schemes (section 16 of ITA.) It requires to be noted that rights or option under Employee Share Schemes is subject to income tax instead of capital gains tax. This is discussed in detail in the later part of this SIG.

32. When shares are disposed of on a non-arm's length basis (related party transaction), the cost of shares for the buyer shall be equal to the consideration received by the seller which is the fair market value of the shares prevalent at the time of disposal of shares.[9] This has been discussed above under the heading '*Issue of Shares in a non-arm's length transaction'.*

Example 4 – Computation of capital gains and applying CGT on sale on shares.

X bought 500 shares of a company at $1,000 in the year 2015. The current value of the shares is $2,500. X disposes the shares at $2,500 in 2020, where he paid brokerage fee of $50. What will the CGT on the gains made?

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[9] Section 89 of ITA

CEO's position:

Capital Gains = Consideration – Cost of Asset (including incidental expenditure i.e. brokerage)

= $2,500 – [$1,000+$50]

= $2,500 - $1,050

= $1,450

Capital Gains Tax = $1,450 x 10%

= $ 145.

X will be required to pay CGT of $145.

Notes:

a. It needs to be noted that capital gains tax only applies if the shares are being sold, not upon notional increase in shares value.
b. If the share price decreases over a period of time resulting in capital loss, there will be no CGT implication nor can it be adjusted against any other capital gains.

Example 5 – Capital Gains made on sale of shares pursuant to splitting of business

Harry and Sally are shareholders of a company having 60/40 ownership in the share capital of the company where Harry owns 60,000 shares and Sally owns 40,000 shares. The company has 4 properties forming part of its business assets. Sally wishes to exit the business and as part of the Deed of Settlement, the following facts are to be noted:

a. Sally will sell her 40% stake (40,000 shares) in the company to Harry;
b. Harry will become 100% owner of the company;
c. Incidental expenses for transfer of 40,000 shares will be $2,000;
d. The 4 business properties will be split between the 2 shareholders where Sally will become owner of 2 properties and 2 properties will be retained in the business.
e. Fair market value of each business property is $100,000.
f. Cost of acquisition is $25,000 for property 1 and $30,000 for property 2.

Harry and Sally want to know whether CGT implication pursuant to splitting of business.

CEO's position: As per the Deed of Settlement, Sally will be transferring 40,000 shares to Harry, making Harry 100% shareholder of the company. As part of splitting the business, Sally will receive 2 business assets. This means that against the transfer of 40,000 shares, Sally will be receiving consideration in kind, that is 2 business assets. In order to determine consideration for sale of shares, reference is made to section 86(2) of ITA, it provides-

> *The consideration for the disposal of an asset is the total amount received or receivable for the asset, including the fair market value of any consideration in kind determined at the time of the disposal.*

It can be ascertained from section 86(2) that the consideration for sale of 40,000 shares will be the fair market value of the 2 business assets which is $200,000.

Since business split is taking place between the 2 shareholders using business assets but in effect both shareholders are benefiting in their individual capacity (i.e. Harry becomes owner of 40,000 additional shares and Sally becomes owner of 2 assets), the 2 business assets must first be transferred from the company to Harry who should then transfer the assets to Sally to acquire 40,000 shares. This transfer will be a separate CGT event, as computed below:

Splitting of business has resulted in sale of shares, thus capital gains tax will apply on the gains made on sale of shares, as computed below:

<u>CGT computation for transfer of 40,000 shares from Sally to Harry:</u>

Capital Gain = $200,000(consideration) – $42,000 (cost-$40,000 + incidental expenses $2,000)

= $158,000.

Capital Gains Tax = $15,800 [10% on $158,000]

CGT payable by Sally for transfer of 40,000 shares = $15,800.

<u>CGT computation for transfer of 2 business properties from company to Harry:</u>

Property 1

Capital Gain = $100,000 (consideration) - $25,000 (cost of asset)

= $75,000

Capital Gains Tax = $7,500 [10% on $75,000]

Property 2

Capital Gain = $100,000 (consideration) - $30,000 (cost of asset)

= $70,000

Capital Gains Tax = $7,000 [10% on $70,000]

Total CGT payable by the company = $7,500 + $7,000 = $14,500

Capital Gains Tax and Residency

33. If a person is a resident of Fiji, capital gains tax shall apply to all assets anywhere in the world.

    For instance, if a Fiji resident disposes of shares outside Fiji, gains made on such a disposal shall be subject to capital gains tax. The Fiji resident shall be allowed foreign tax credit to the extent of foreign income tax paid in the country where the asset was disposed.

34. If a person is a non-resident of Fiji, capital gains tax shall apply only if the asset being disposed is a Fiji asset[10]. If the person is a non-resident of a country with which Fiji has entered into a Double Taxation Agreement (DTA), the DTA rules shall prevail.

For instance, if a resident of New Zealand disposes of shares in a company registered in Fiji (a Fiji Asset), the gains made on disposal of shares shall be subject to CGT. However, DTA with New Zealand must be considered to assess additional rules concerning taxing rights available to New Zealand or Fiji.

Residency of person	**CGT liability**	**Notes**
Resident of Fiji	On gains made on worldwide assets	Foreign Tax Credit may be allowed
Non-Resident of Fiji	On gains made on Fiji Assets only	DTA rules may apply

Capital Gains and Capital Loss

35. A capital gain arising on disposal of a capital asset is not reduced by any capital loss on disposal of another capital asset[11]. This means that gains or loss is assessed independently in relation to each capital asset disposal without adjusting with loss or gain made on another capital asset.

36. For instance, in February 2021, A sells shares of Company A in which she makes a gain of say \$10,000 and in the same month she sells shares of Company B in which she makes loss of \$2,000. CGT will be assessed on the gains of \$10,000 in Company A. Loss of \$2,000 cannot be adjusted to reduce the gains made on another capital asset. Capital loss of \$2,000 shall not be subject to CGT.

Exempt Capital Gains

37. An exempt capital gain is excluded from capital gains tax under section 67(1). The different scenarios of exempt capital gains tax are discussed below.

Disposal of capital gains not exceeding \$30,000 – Section 67(1)(a)

38. If the capital gains made on disposal of a capital asset does not exceed \$30,000, such a gain is an exempt capital gain. Until the National Budget of 2020-2021, the threshold was \$16,000 that was increased to \$30,000 effective August 1, 2020.

39. This exemption is available to individuals who are Fiji resident or Fiji citizen. This means that if a non-resident or non-citizen makes capital gain of any amount (even less than \$30,000), the gain shall be subject to CGT.

40. The exemption is also extended to those having dual citizenship, for instance if a person is citizen of USA and Fiji, the person shall qualify for exemption under this section as the requirement of Fiji citizen is met.

[10] Section 2 of ITA defines Fiji asset.
[11] Section 66 of ITA

Summary of CGT liability under this heading:

Residency status of individual	**If capital gain is below $30,000**	**Notes**
Resident of Fiji	Exempt from CGT	-
Citizen of Fiji	Exempt from CGT	-
Non-resident of Fiji	Exemption not available	CGT applies on gains from $1 onwards
Non-citizen of Fiji	Exemption not available	CGT applies on gains from $1 onwards

Example 6 – Capital gains on disposal of shares below $30,000

A (citizen and resident of USA) owns shares in an unlisted company registered in Fiji. He sells 10,000 shares at the rate of $2 per share to B for a consideration of $20,000. He had originally acquired the shares for $15,000. Will CGT apply on the gains made of $5,000?

CEO's position: Shares in a company registered in Fiji is a Fiji Asset. A makes a capital gain of $5,000 by disposing a Fiji Asset. The exemption under section 67(1)(a) is only available to a Fiji resident or Fiji citizen, therefore A will be required to pay CGT on the capital gains even though the gain amount is below $30,000.

If, however, the shares disposed are listed on the South Pacific Stock Exchange, CGT exemption shall be available regardless of the amount of gains made or the residency status of the shareholder. This is pursuant to section 67(1)(c) according to which any gains made on disposal of listed shares by a person (regardless of residency or citizenship) shall be exempt from CGT. This is discussed in detail in the later part of this SIG.

Splitting of Disposal of Shares – anti-avoidance – Section 67(2)

41. This section discusses situations when a capital asset is disposed of in 2 or more parts or tranches with the motive of taking advantage of CGT exemption based on threshold, i.e. each disposal is devised in a manner that the gains from disposal does not exceed $30,000.

42. In such a case, if the CEO is satisfied that the disposal of capital asset was carried out in tranches, in order to benefit from the exemption limit of $30,000, the capital gain exemption will be allowed only if total gain from the disposal of all parts does not exceed $30,000.

Example 7:

Mr. X plans to sell his business to Mr. Y. Pursuant to the Sale and Purchase Agreement entered on 1st January 2021, X is required to sell 45,000 shares at a consideration of $45,000 (45,000 shares x $1) on or before the settlement date of March 15, 2021.

X sells 20,000 shares on January 31, 2021, for $20,000 and the balance 25,000 shares for $25,000 on March 1, 2021. Assuming the cost of acquisition of all shares was $10,000, and there is a gain made on disposal of shares, what will be the capital gains tax implication on the exemption be allowed on this disposal?

CEO's position: Here, X disposes $45,000 in two tranches as below:

a. 20,000 shares x $1 = $20,000

b. 25,000 shares x $1 - $25,000

If 45,000 shares were disposed in totality, there would have been a capital gain of $35,000 [Consideration ($45,000) – Cost ($10,000)], and CGT would have been applicable.

The CEO may not allow exemption under section 67(1)(a) of ITA [exemption on CGT where the gains do not exceed $30,000], if he/she is satisfied that the disposal was carried out by Mr. X in two tranches to avoid paying CGT by maintaining the gains under each disposal below $30,000. The CEO shall make decisions under section 67(2) after considering all surrounding factors including but not limited to reasons for split sale of shares.

Disposal of shares listed on the South Pacific Stock Exchange – Section 67(1)(c)

43. A number of shares are traded on a daily basis on The South Pacific Stock Exchange (SPSE) of Fiji. A company listed on the stock exchange is termed as a listed entity whose securities are listed and is available for trading to the security holder.

44. Any capital gains earned by a person on the disposal of shares shall be exempt provided the shares are listed on the South Pacific Stock Exchange.

45. This exemption was brought in to encourage companies to consider listing on SPSE as it provides impetus to the economy, helps unlock company's share valuation, and provides an alternative investment avenue to security holders.

46. This exemption is available to any person, resident or non-resident, citizen or non-citizen, who makes such a gain.

Disposal of shares to solely derive dividends – Section 67(1)(d)

47. A capital gain made on disposal of an asset that is used solely to derive exempt income is an exempt capital gain. This ensures that there is consistent treatment of both an asset and the income that the asset produces.

48. Prior to 1st August 2017, dividend income was taxable income, which meant that shares (being an asset used to derive dividend) were subject to CGT upon disposal.

49. With the passing of Income Tax (Budget Amendment) Act 2017, effective 1st August 2017, dividend income was to be treated as exempt income, the resultant effect of which was that shares (being an asset used to derive dividend, an exempt income now) was not subject to CGT upon disposal.

50. In the National Budget 2019-2020, there was an amendment made to section 67(1)(d), whereby the words 'excluding the disposal of shares' was added as below:

    *"a capital gain made on disposal of an asset that is used solely to derive exempt income **excluding the disposal of shares**"*

51. Consequent to the amendment, disposal of shares was excluded from the exemption list, making it subject to capital gains tax.

This meant that even though dividend income is an exempt income that made shares an asset used to derive exempt income, the CGT exemption shall not apply to disposal of shares.

The below table depicts changes in CGT implication upon disposal of shares due to change in legislative provisions:

Period	CGT on disposal of shares	Notes (if any)
From 1st January 2016 (with enactment of ITA 2015) to 31st July 2017	Taxable	With the passing of Income Tax Act, dividend income was taxable until 31st July, 2017 making gains on disposal of shares subject to CGT
1st August 2017 to 31st July 2019	Exempt	Dividend income became exempt income due to which disposal of shares became exempt from CGT
1st August 2019 till date	Taxable	Removal of words 'excluding the disposal of shares' in National Budget 2019-2020 made disposal of shares subject to CGT.

Reorganisation, Restructure, Amalgamation for listing on the SPSE – Section 67(1)(g)

52. With a view to encourage listing on the SPSE, CGT exemption will be available to resident companies undertaking restructuring exercise prior to listing with SPSE.

53. If a business involves several group entities with different businesses, there might arise a need to reorganize the business assets based on the company's core activity with an objective of maintaining an organized group company structure.

54. Any capital gains made on sale of assets, including sale of shares, by a resident company (private or public) by undertaking reorganisation, restructure, amalgamation shall be exempt from CGT, provided that:

    a. the reorganisation, restructure, amalgamation is for the purpose of listing or part of listing process on the SPSE;
    b. the private company gets listed with SPSE within 24 months from the date of commencement of reorganisation, restructure, amalgamation;

    If the private company does not list with SPSE within 24 months from the date of commencement of reorganisation, restructure, amalgamation, gains made on sale of capital asset, including shares, shall be subject to CGT.

Repeal of Section 67(1)(i) - Exemption for disposal of shares held prior to 1 May 2011 and section 67(5) replaced

55. With the passing of Income Tax (Amendment) (No. 5) Act 2023, effective 1 July 2023, the exemption provision for disposal of shares that were held by a person before 1 May 2011 has been repealed.

56. This means that the disposal of shares held by a person before the introduction of CGT (i.e. prior to May 1, 2011) is no longer exempt.

57. Section 67 (5) has also been amended. Under the previous provision, any person who had made a gain on disposal of shares held prior to 1st May 2011 and who had not yet paid the CGT was no longer required to pay it and FRCS would suspend recovery action.

58. The new section 67 (5) provides that any person who has not paid the CGT on the disposal of shares held prior to 1st May 2011, is now liable to pay it, as if the former section 67(5) had not been enacted.

Example 8:

Sally had incorporated ABC Limited on 1st September 2010 and had been holding 100% shares since that day. Sally sold the shares on 1st June 2021; CGT payable was $4,000 but remained unpaid. Sally was not required to pay it when section 67 (5) introduced in August 2021. Sally wants to know the CGT implications on her unpaid tax due to the new section 67 (5).

CEO's position: Tax that should have been paid during the period when such sale of shares was taxable remains payable. Sally will be required to pay the $4000 now that the previous section -67(5), which suspended payment and FRCS recovery action, has been withdrawn.

Deferral of Capital Gains

59. Under certain circumstances, special rules apply where payment of capital gains tax is deferred. It requires emphasis that the onus of tax liability is not exempted but only deferred as long as certain conditions are fulfilled.

60. Deferral of tax means that liability to pay tax is deferred for the current transaction but upon change of situation or conditions pursuant to which the deferral was granted, tax may apply. Simply put, deferral of tax means that the liability to pay tax is postponed for a temporary period.

61. Tax exemption is not the same as deferral. Tax exemption means that there is no liability of tax arising out of the transaction as that particular transaction or action is specifically excluded from taxation. Here, the liability to pay tax does not exist in the present or in future.

Deferral of recognition of gain or loss – disposal between spouses (section 87(1)(a))

62. As per section 87(1)(a), when an asset is disposed between spouses[12] as part of a divorce settlement or under a separation agreement, no loss or gain shall be taken to effectuate on such a disposal.

63. In such a scenario, if transfer of shares takes place between the spouses, such a transfer is definitely a "disposal" as defined in section 84 (since there has been a change in ownership

[12] Spouse includes a de facto spouse to mean two persons (not of the same sex) living together on a genuine domestic basis, although not legally married to each other.

of the asset from one spouse to the other), but the disposal is effectively ignored for the purposes of the Act having no CGT implication.

64. In case of such a disposal, the assets retain its same character as in the hands of the transferor. Also, the cost incurred in acquiring the shares by the transferor shall be the cost of assets for the transferee.

    Example 9: As part of Jack and Sally's divorce settlement, Jack is required to transfer 10,000 shares of a company that was acquired at $20,000 (10,000 shares x $2) in 2015. Jack transfers the shares to Sally, what will be the CGT implication on this disposal.

    CEO's position: Since the transfer of shares from Jack to Sally takes place as part of a divorce settlement, no gain or loss will be considered to have arisen from the disposal. As such, CGT liability on this disposal shall be deferred as it will be considered at no gain or loss. The cost of the assets for Sally (transferee) will be $20,000, being the same cost as that incurred by Jack (transferor) to acquire the asset.

Deferral of recognition of gain or loss – transmission of asset (section 87(1)(b))

65. As per section 87(1)(b) of ITA, when due to death of a person, an asset is disposed to an executor or beneficiary, no loss or gain will be recognized on the transmission of asset and CGT will not be applicable.

66. Share transmission involves transfer of ownership of shares from the deceased person to the executor or beneficiary of shares. Since CGT is payable by the transferor of shares, which in this case would be the deceased shareholder, the CGT event is ignored and consequently deferred.

67. In case of such a disposal, the assets retain its same character as in the hands of the transferor. Also, the cost incurred in acquiring the shares by the transferor shall be the cost of assets for the transferee.

68. However, if subsequent transfer takes place from the executor or beneficiary of the shares, CGT may apply under section 67(1)(h). This scenario is explained in the example below.

    Example 9: In 2018, X dies due to a prolonged illness. As per X's Will, all his assets are to be bequeathed to Mrs. X, his wife.

    X's assets included investment of 5,000 shares in ABC Ltd. X had bought the shares in 2010 for $1 per share. Currently, the value of shares has appreciated to $2.5 per share. Mrs. X wants to know the CGT implication on acquisition of shares.

    CEO's position: Since the transfer of shares take place due to death of the shareholder, the CGT event will be ignored, i.e. there will not be any CGT liability. The appreciated value of shares will not have any significance on the transfer as the consideration is not accounted for in such a transfer. The cost of shares for Mrs. X will be taken as $5,000, same as that incurred by Mr. X in acquiring the assets.

If Mrs. X disposes the shares further, the subsequent disposal may be taxable or exempt depending on the character of shares and on the period within which the disposal was made [Section 67(1)(h)). Thus, if Mrs. X, the beneficiary, makes a further transfer of shares –

a. CGT may apply if the shares were of an unlisted company as that disposal would have been taxable in the hands of X (the deceased shareholder); OR
b. CGT may be exempt if the shares were of a listed company as that disposal would have been exempted in the hands of the deceased shareholder. The exemption will not be allowed if Mrs. X disposes the shares after 2 years from the death of Mr. X[13].

Deferral of recognition of gain or loss – by reason of love and affection (section 87(1)(c))

69. As per section 87(1)(c), no loss or gain is recognised on disposal of shares in a company, when the disposal is made due to love and affection –
    a. between spouses;
    b. between siblings;
    c. parents to children and vice versa, and
    d. grandchildren to grandparents and vice versa.

70. Capital gains tax shall not apply on the above disposal even though there will be change in ownership as a result of the disposal.

71. Upon such a disposal, the shares shall retain its same character as in the hands of the transferor. Also, the cost incurred in acquiring the shares by the transferor shall be the cost of asset for the transferee.

Example 11: In 2020 Mr. X (grandfather of Mr. Y) sells one of his strata title in an apartment to his grandson, Mr.Y for $100,000 out of natural love and affection. X had bought the property for $60,000 in 1990. Will the gains made on sale of property be subject to CGT?

CEO's position: As the transfer of shares was made by Mr.X (grandfather) to Mr.Y, out of natural love and affection, no gain or loss will be considered to have arisen from the disposal. As such, CGT liability on this disposal shall be deferred. The cost of asset for Mr. Y (transferee) will be $60,000, being the same cost as that incurred by X (transferor) to acquire the asset.

Deferral of CGT upon disposal of shares under reorganisation (section 88)

72. Disposal of shares under a reorganisation arrangement specified under section 88 shall qualify for deferral in the following circumstances –

    a. Transfer of shares from a resident individual to a resident company provided the individual transferor of shares is the sole owner of the transferee company and the consideration for transfer of shares does not exceed the cost of the asset (written down value in case of depreciable asset);

[13] Section 67(1)(h) of ITA

b. Transfer of shares from a resident company to another resident company provided the transferor and transferee are group companies under section 88(3) and the consideration for transfer of shares does not exceed the cost of the asset (written down value in case of depreciable asset).

73. For detailed information on disposal of shares under reorganisation, please refer to Standard Interpretation Guideline 2020-26 titled Income Tax Act 2015 – Section 88 - Re-Organisation available at https://www.frcs.org.fj/wp-content/uploads/2020/08/SIG-2020-32-Re-organisation-Section-88-of-ITA-2015.pdf

Income Tax Implication
Trading in Shares

74. If a person is in the business of trading in shares of an unlisted company, the net gains made from the trading shall be subject to income tax. Here, the shares will be treated as trading stock, not as a capital asset.

75. If a Fiji resident engages in the business of trading in shares of a listed company, the net gain derived during the tax year from the trading of shares in a company listed with the South Pacific Stock Exchange will be regarded as exempt income.[14]

76. If a non-resident engages in the business of trading in shares of a listed or unlisted company, the net gain may be subject to income tax.[15] DTA rules may apply and prevail over income tax rules if the non-resident belongs to a country with whom Fiji has entered into a DTA.

77. A quick overview of income tax liability based on different scenarios is as below:

Taxpayer	Business of trading in shares of a -	Income Tax on net gains
Any Person	Unlisted company	Applicable
Fiji resident	Listed company	Not applicable (exempt income)
Non resident	Listed company	Applicable

Employee Share Scheme – Section 16

78. "Employee share scheme" means any agreement or arrangement under which a company issues shares in the company to an employee of the company or to an employee of an associated company.

79. Under an employee share scheme, there are two events before realization of benefit by the employee –
    a. When the employee is granted the right or option to acquire shares;
    b. When the employee exercises the right i.e. when shares are allotted to the employee.

[14] Para 9 of Part 9 – Economic Development Exemptions of Schedule to Income Tax (Exempt Income) Regulations 2016

80. At the stage when employee is granted the right or option, the value of right or option is not included in gross income. This is despite the fact that it relates to employment. Also, it is not treated as fringe benefit even though it is a benefit in kind provided by the employer.

81. Example 12 - On 1 July 2018, Y is granted an option to acquire 10,000 shares under an employee share scheme. The exercise price is $10 per share, which is the market value of the shares at the time the option is granted. Y pays $50 to reserve the option.

    On 30 June 2020, Y exercises the option, paying $100,000 (10,000 shares x $10) for the shares. At the time the option is exercised, the market value of the shares is $12 per share.

    How to compute the value of benefit to the employee?

    CEO's position: X has received an employee share scheme benefit which is computed as below:

    $120,000 (10,000 shares x $12 fair market value per share)
    - $100,000 [$100,000 (10,000 shares x $10 exercise price per share being the cost of shares)
    - $50 (consideration for the option)

    $19,950

    Here, $19,950 shall be included in the gross income, the same shall be subject to income tax.

    If, instead of exercising the option, Y sells the option on 30 June 2020 for $1,000, the gain of $950 ($1,000 - $50) will be included in the gross income. In this case, $950 shall be subject to income tax.

82. For information or clarifications in regard to this SIG, please email us at tipu@frcs.org.fj

Appendix One: Legislation

INCOME TAX ACT 2015

[Section 16] Employee Share Scheme Benefits

(1) The value of a right or option to acquire shares granted to an employee under an employee share scheme is not included in gross income.

(2) Subject to subsection (3), if an employee is allotted shares under an employee share scheme, including shares allotted as a result of the exercise of an option or right to acquire the shares, the fair market value of the shares at the date of allotment reduced by the employee's contribution for the shares is income included in the gross income of the employee for the tax year in which the benefit is derived as determined under subsection (6).

(3) If shares allotted to an employee under an employee share scheme are subject to a restriction on the transfer of the shares—

a) income is included in the gross income of the employee under subsection (2) on the earlier of—

i. the time the employee is able to freely transfer the shares; or

ii. the time the employee disposes of the shares; and

b) the amount of income included in gross income is the fair market value of the shares at the time the employee is able to freely transfer the shares or disposes of the shares, as the case may be, reduced by the employee's contribution for the shares.

(4) For the purposes of this Act, if subsection (2) or (3) applies, the cost of the shares to the employee is the sum of the employee's contribution for the shares and the amount included in gross income under this section.

(5) A gain derived on the disposal by an employee of a right or option to acquire shares under an employee share scheme is income included in the gross income of the employee for the tax year in which the disposal occurs.

(6) Income under this section is derived by an employee—

a) in the case of an amount under subsection (2), at the time the shares are allotted to the employee in accordance with the rules governing the employee share scheme;

b) in the case of an amount under subsection (3), at the time determined under subsection (3)(a); or

c) in the case of an amount under subsection (5), at the time of disposal of the right or option by the employee.

(7) In this section—

employee share scheme means an agreement or arrangement under which a company that is an employer may allot shares in the company to—

a) an employee of the company or an employee of a company that is an associate of the first mentioned company; or

b) the trustee of a trust and under the trust deed the trustee may transfer the shares to an employee of the company or an employee of a company that is an associate of the first mentioned company; and

employee's contribution in relation to shares allotted to an employee under an employee share scheme, means the sum of the consideration, if any, given by the employee—

a) for the shares; and

b) for the grant of any right or option to acquire the shares.

[Section 65] Imposition of Capital Gains Tax

(1) Subject to this Act, a tax to be known as "Capital Gains Tax" is imposed at the rate prescribed by Regulations made under this Act on a person who has made a capital gain, other than an exempt capital gain, on the disposal of a capital asset.

(2) The Capital Gains Tax payable by a person on the disposal of a capital asset is computed by applying the rate prescribed by Regulations made under this Act to the amount of the capital gain arising on the disposal.

(3) If the person who has made a capital gain is a non-resident person, subsection (1) applies only if the capital asset is a Fiji asset.

[Section 66] Capital Gain

(1) The capital gain made by a person on the disposal of a capital asset is the consideration for the disposal reduced by the cost of the asset at the time of the disposal.

(2) A capital gain made by a person on disposal of a capital asset is not reduced by any capital loss on the disposal of another capital asset.

(3) A capital gain made by a person on the disposal of a capital asset is reduced by any part of the gain that is included in the gross income of the person or that is exempt income.

[Section 67] Exempt Capital Gains

(1) The following capital gains are exempt capital gains—

a) a capital gain made by a resident individual or Fijian citizen that does not exceed $30,000;

b) a capital gain made by a resident individual or a Fijian Citizen on the first disposal of either the individual's first residential property or principal place of residence;

c) a capital gain made by a person on the disposal of shares listed on the South Pacific Stock Exchange;

d) a capital gain made on disposal of an asset that is used solely to derive exempt income excluding the disposal of shares;

e) any gain made by a person on the disposal of an interest in a company within section 2(c) of the definition "company";

f) a capital gain made by a resident individual or a Fiji citizen on disposal of his or her interest in a family home, provided however that the disposal of the interest is by way of transfer to an existing joint tenant or tenant in common;

g) any gain made by a resident person from a capital asset, including from the sale of shares where a private or public company goes through re-organisation, restructure or amalgamation for the purposes of listing or as part of a listing process on the South Pacific Stock Exchange, provided that—

i. the private company is listed on the South Pacific Stock Exchange within 24 months from the date of commencement of re-organisation, restructure or amalgamation; and

ii. where the private company is not listed with the South Pacific Stock Exchange in accordance with subparagraph (i), the gain from the re-organisation, restructure or amalgamation of the private company shall be taxable under this Act;

(2) If the CEO is satisfied that a capital asset has been disposed of in 2 or more parts for the purpose of taking advantage of subsection (1)(a), any capital gain arising from the disposals is exempt under subsection (1)(a) only if the total gain from the disposal of all parts does not exceed $30,000.

(3) In the case of the disposal of a capital asset that is jointly owned, subsection (1)(a) applies only if the total capital gain made by all owners of the asset on disposal of the asset does not exceed $30,000.

(4)…

(5) For the avoidance of doubt, any person who was liable for Capital Gains Tax on the disposal of shares before the commencement of section 3 of the Income Tax (Amendment) (No. 2) Act 2021 and had not paid Capital Gains Tax is liable to pay it as if the former subsection (5) of section 67 had not been enacted.

(6) For the avoidance of doubt, if a person paid Capital Gains Tax before the commencement of section 3 of the Income Tax (Amendment) (No. 2) Act 2021 on the disposal of shares held by the person before 1 May 2011, the payment of the Capital Gains Tax is not refundable to the person.

[Section 82] Joint Owners

(1) For the purposes of this Act, if an asset is jointly owned by 2 or more persons, any gain or loss made on disposal of the asset must be apportioned among the owners according to their respective interests in the asset.

(2) If the interests of the owners of a jointly owned asset cannot be ascertained, the owners of the asset are treated as having an equal interest in the asset.

[Section 87] Deferral of Recognition of Gain or Loss

(1) For the purposes of this Act and subject to subsection (2), no gain or loss is taken to arise on the disposal of any of the following—

a) an asset between spouses as part of a divorce settlement or under an agreement to live apart;

b) an asset by reason of the transmission of the asset on the death of a person to an executor or beneficiary;

c) a principal place of residence, first residential property, an interest in a capital asset, or shares in a company, by reason of love and affection between spouses, siblings, parents to children and vice versa, and grandchildren to grandparents and vice versa; or

d) an asset by reason of the loss, destruction or compulsory acquisition of the asset (referred to as the "replaced asset") if the consideration for the disposal is reinvested by the recipient in an asset of a like kind (referred to as a "replacement asset") within one year of the disposal or within such further period as the CEO allows.

(2) If the person acquiring an asset referred to in subsection (1)(a), (b), or (c) is a non-resident person at the time of the acquisition, subsection (1) applies only if—

a) a subsequent disposal of the asset by the non-resident will give rise to an amount included in the gross income of, or allowed as a deduction to, the non-resident person; or

b) the asset is a Fiji asset.

(3) If subsection (1)(a), (b), or (c) applies, the person acquiring the asset is treated as acquiring—

a) subject to subsection (4), an asset of the same character as the person disposing of the asset; and

b) the asset for an amount equal to—

i. for an asset that was the principal place of residence or first residential property of the person disposing of the asset immediately before the disposal, the fair market value of the residence at the time of the disposal; or

ii. for any other asset, the cost of the asset for the person disposing of the asset at the time of the disposal.

(4) If the asset to which subsection (3) applies is the principal place of residence or first residential property of the person disposing of the asset immediately before the disposal, the asset retains that character only if the person acquiring the asset uses the asset as their principal place of residence.

(5) If subsection (1)(d) applies and the consideration given by the person for the replacement asset is equal to or exceeds the consideration received or receivable for the replaced asset, the cost of the replacement asset is the cost of the replaced asset at the time of disposal increased by the amount of the excess, if any.

(6) If subsection (1)(d) applies and the consideration received or receivable for the replaced asset exceeds the consideration given for the replacement asset, the cost of the replacement asset is the cost of the replaced asset at the time of disposal reduced by the amount of the excess.

(7) Section 34(3) and not subsection (1)(d) applies if the asset is a depreciable asset.

(8) In this section, "first residential property" and "principal place of residence" have the meanings in section 67(4).

[Section 88] Re-Organisations

1) If—

a) a resident individual (referred to as the "transferor") disposes of an asset, with or without liability not in excess of the cost of the asset or, in the case of a depreciable asset, written down value, to a resident company (referred to as the "transferee") and the transferee is wholly owned by the transferor; or

b) a resident company (referred to as the "transferor company"), disposes of an asset, with or without any liability not in excess of the cost of the asset or written down value in the case of a depreciable asset, to another resident company (referred to as the "transferee company") and the transferor company is a group company in relation to the transferee company,

then—

i. no gain or loss is taken to arise on disposal of the asset;

ii. the transferee or transferee company is treated as acquiring an asset of the same character as the asset disposed of by the transferor or transferor company; and

iii. the transferee or transferee company's cost on acquisition of the asset is equal to the transferor or transferor company's cost of the asset or, in the case of a depreciable asset, written down value at the time of disposal.

(2) Subsection (1) does not apply if the income of the transferee and transferee company is exempt income.

(2A) A transferee is wholly owned by the transferor if the transferor owns directly or through one or more interposed persons, 100% of the issued shares in the transferee.

(2B) For the purposes of subsections (1)(a) and (2A), where an asset under disposal is jointly owned by 2 or more tranferors, the percentage of ownership in the asset or the depreciable asset should be the same as their percentage of beneficial ownership of the issued shares in the transferee.

(2C) Notwithstanding section 87, the deferral granted under subsection (1)(a) will cease to apply and any taxes applicable at the time of disposal shall immediately become payable if there is a change in beneficial ownership of the transferee within 2 years from the date of disposal.

(3) A company is a group company in relation to another company if—

a) one company owns, directly or through one or more interposed persons, 100% of the issued shares in the other company; or

b) another company owns, directly or through one or more interposed persons, 100% of the issued shares in both companies.

(4) In this section, "company" means an incorporated body.

[Section 89] Non-Arm's Length Transaction

Subject to section 63, if an asset is disposed of by a person in a transaction that is not an arm's length transaction—

a) the person disposing of the asset is treated as having received consideration equal to the fair market value of the asset determined at the time the asset is disposed of; and

b) the person acquiring the asset is treated as having a cost equal to the amount determined under paragraph (a).