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## *Practitioner's Perspective*

### **Corporate Aspects of Liquidating a Subsidiary in New Zealand**

Richard E. Weiner\*

This article deals with the procedures that must be followed by a foreign parent company wishing to liquidate a wholly-owned subsidiary in New Zealand. First, the article will set forth the basic requirements under New Zealand company law to liquidate a New Zealand company. Second, the tax consequences to the foreign parent company from the distribution of assets upon the liquidation of the New Zealand subsidiary will be discussed. Third, the notarial fees and other costs involved in the liquidation process will be outlined. Finally, this article will explain the filings which must be effected with the New Zealand tax authorities before dissolution of the New Zealand subsidiary will be granted.

#### I. BASIC COMPANY PROCEDURES

There are two procedures for the voluntary liquidation of a New Zealand company, both of which are found in New Zealand's Com-

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panies Act of 1955 (Companies Act).<sup>1</sup> One procedure provides for conventional liquidation under New Zealand law:

(1) No more than thirty days prior to the date of a resolution by the shareholders of a New Zealand company for its voluntary liquidation, the directors of the company must make a declaration, called a *Declaration of Solvency*, which affirms that the company is solvent. The *Declaration of Solvency* must set forth the company's assets and liabilities as of the latest practicable date and must be registered with the New Zealand Registrar of Companies (Registrar).<sup>2</sup>

(2) The company's shareholders must pass an Ordinary, Special<sup>3</sup> or Extraordinary<sup>4</sup> Resolution requiring that the company be liquidated.<sup>5</sup>

(3) Within fifteen days of the date of the resolution, the resolution must be published in the New Zealand National Gazette and in at least one newspaper circulating in the locale where the company is registered. A copy of the resolution must also be sent to the Registrar within thirty days of the date of the resolution.<sup>6</sup>

(4) The shareholders of the company must appoint a liquidator, who must give notice of his appointment to the Registrar within seven days.<sup>7</sup>

(5) The liquidator must then distribute the assets of the company to its creditors and shareholders according to their rights and interests.<sup>8</sup>

(6) The liquidator must prepare an accounting of the assets of the company, which must be approved at a general meeting of the shareholders and filed with the New Zealand Inland Revenue Department and the Registrar.<sup>9</sup> The minutes of the general meeting

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1. N.Z. Stat. 1955, No. 63, Companies Act §§ 268 *et seq.* & 335A [hereinafter Companies Act].

2. *Id.* § 274.

3. A Special Resolution is any resolution characterized as such by either statute or a New Zealand company's Articles of Association. In order to be passed, a Special Resolution must have the support of not less than 75% of the shareholders in the company actually voting on the resolution. The resolution must be passed at a meeting for which not less than 21 days notice has been given. *Id.* § 145(2).

4. An Extraordinary Resolution is one which would otherwise be an Ordinary Resolution (which would require the vote of only a simple majority), but which is passed at a meeting at which the shareholders of the company have been given less notice than is required under the Companies Act for a meeting at which an Ordinary Resolution is passed. To be valid, an Extraordinary Resolution must meet the same voting requirements as a Special Resolution. *Id.* § 145(1).

5. See Companies Act, *supra* note 1, § 268.

6. *Id.* § 269.

7. Companies Act, *supra* note 1, § 296 (as amended by § 24 of the Companies Amendment (1975)).

8. Companies Act, *supra* note 1, §§ 293, 299.

9. *Id.* § 281.

calling for dissolution must also be placed in the Registrar's records.

(7) Three months later, the company is officially dissolved.<sup>10</sup>

The second procedure for liquidation of a New Zealand company provides for a simpler and less expensive means of removing solvent corporations from the Register of Companies without the need for a formal dissolution or the appointment of a liquidator.<sup>11</sup> This method is most often employed in the context of the dissolution of defunct or non-trading solvent companies within the same corporate group. The expedited procedure is:<sup>12</sup>

(1) The company discharges all of its debts and liabilities.

(2) An officer or shareholder of the company publishes (in the New Zealand National Gazette and in two newspapers circulating in the area where the company maintains its principal place of business), a notice that such officer or shareholder proposes to apply to the Registrar to dissolve the company, and that unless written objection is made to the Registrar may so dissolve it.

(3) The officer or shareholder sends a copy of the notice to each director and shareholder of the company.

(4) The officer or shareholder makes an application to the Registrar for the dissolution of the company, in which he or she states that the company has ceased to operate, has discharged all of its debts and liabilities, and has sent out the required notice. The application must be accompanied by a copy of such notice and confirmation from the New Zealand Commissioner of Inland Revenue (Commissioner) that the Commissioner has no objection to the dissolution of the company.

(5) Provided that the Registrar does not receive any objection to the dissolution, the Registrar will notify the company that it may distribute its surplus assets among its shareholders, according to their respective rights and interests in the company.

(6) The company notifies the Registrar that it has distributed its surplus assets among its shareholders.

(7) Thirty days following the date of publication of the required notice, the Registrar may, by publication in the New Zealand National Gazette, declare the company dissolved.

## II. TAXATION ON THE DISTRIBUTION OF ASSETS

Whether the shareholder of a liquidating New Zealand company will be taxed on the receipt of a distribution from the company

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10. *Id.*

11. This procedure may be utilized if "a company has ceased to operate and has discharged all its debts and liabilities." *Id.* § 335A.

12. *Id.*

depends upon the shareholder's status and the extent to which the distribution constitutes a dividend. Distributions received by a foreign company from the liquidation of a New Zealand company are generally not treated as dividends, except to the extent that they exceed paid-in capital.<sup>13</sup> Furthermore, a return of capital is not ordinarily considered to be a dividend. The return of capital, however, may be treated as such if the company has made a "bonus issue" on or after April 1, 1982, or within ten years prior to the date of its liquidation.<sup>14</sup> Finally, for tax purposes, the return of a share premium to a shareholder will constitute a dividend.

If the shareholder receiving the dividend is a company resident in New Zealand, it will not be subject to any withholding tax.<sup>15</sup> If, on the other hand, the shareholder is a foreign company, then the receipt of a dividend will render it liable for New Zealand withholding tax at the statutory rate of thirty percent.<sup>16</sup> This tax lowers to a maximum rate of fifteen percent for American companies, pursuant to a tax treaty between New Zealand and the United States.<sup>17</sup>

The company being liquidated is not itself liable for the payment of income tax on its liquidating distributions. If the property distributed consists of "trading stock," however, (including any instrument representing an interest in land which, had the land been sold directly, would have yielded taxable income), it will be deemed to have been sold for its full market value at the time of the distribution.<sup>18</sup> The company will be liable for income tax on the difference between the book value of the trading stock and its deemed market value.<sup>19</sup> If

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13. See New Zealand Income Tax Act of 1976, § 4(1)(c).

14. *Id.* If a New Zealand company issues its own shares in the form of a dividend, it may be subject to a special "bonus issue" tax of 17.5%, unless the shares are issued on the basis of a share premium reserve, or represent the restoration of capital previously lost or the capitalization of profits arising from the realization or re-evaluation of a capital asset of the company. *Id.* §§ 3, 258-265; see also *Wix Corporation New Zealand Ltd. v. Commissioner of Inland Revenue*, 10 A.T.R. 358 (1979).

15. See New Zealand Income Tax Act of 1976, § 63.

16. This withholding tax operates as a final tax so that no income tax may be assessed. *Id.* §§ 310, 311, 317.

17. See Convention for the Avoidance of Double Taxation, July 23, 1982, United States-New Zealand, art. 10, T.I.A.S. No. 10772, at 19.

18. *Id.*

19. See New Zealand Income Tax Act of 1976, §§ 67, 129, 197. The distribution of an instrument representing an interest in land will trigger income tax on the deemed profit from the distribution if:

- (1) the land was acquired for the purpose or intention of sale, or for purposes or intentions which include the purpose or intention of sale;
- (2) the land was acquired by the company with the intent to deal in land, develop or subdivide the land or erect buildings thereon. If the land is not acquired for any

the assets distributed during the company's liquidation include any for which depreciation allowances have previously been taken, these allowances will be recaptured.<sup>20</sup>

### III. NOTARIAL FEES AND OTHER EXPENSES

In a conventional liquidation, the New Zealand company being liquidated must pay the cost of publishing in two newspapers (1) the resolution announcing its liquidation; and (2) notification of the time, place and purpose of the shareholders' meeting at which the liquidator's accounting will be approved.<sup>21</sup> The company must also pay the liquidator's fee for winding up its affairs, the amount of which will depend upon the complexity of the actual dissolution.<sup>22</sup> In an expedited liquidation which does not require a formal dissolution or the appointment of a liquidator, the company must pay the cost of (1) publishing in the New Zealand National Gazette and in two newspapers a notice that an officer or shareholder of the company proposes to apply to the Registrar for dissolution of the company; and (2) mailing such notice to all of the directors and shareholders of the company.

### IV. FILINGS

In the case of a conventional liquidation, the liquidator is required to file a tax return as of the commencement date of the liquidation, and is required to pay any tax due as a result of a distribution of the company's assets.<sup>23</sup> If any further income is received by the

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of these purposes, then the deemed profit from the distribution is only taxable if an interest in the land is distributed within ten years from the date of its acquisition (or within ten years after the date of completion of improvements on the land if such improvements account for at least 20% of the deemed profit); or

(3) a scheme or undertaking involving the development or subdivision of the land was commenced within ten years of its acquisition or included significant financial expenditures.

Finally, if under any circumstances (not limited to those stated above), a company takes deductions with respect to interest payable on money borrowed for the purpose of acquiring or improving land and makes a distribution of an instrument representing an interest in the land within ten years of its acquisition, the interest deductions taken by the company will be recaptured.

20. See *Shaw, Saville & Albion Co. Ltd. v. Commissioner of Inland Revenue*, 1956 N.Z.L.R. 211 (1956).

21. See N.Z. Stat. 1955, No. 63, Companies Act §§ 269, 281.

22. See *Willis C. Raymond Ltd.*, 1928 N.Z.L.R. 115 (1928).

23. It should be noted that some general commentary regarding liquidation has been published by various governmental agencies. See New Zealand Inland Revenue Department's Technical Rulings Manual Ch. 5, pt. I, Ch. 7; see also New Zealand Revenue Department Pub. Info. Bull., Nos. 120 (Mar. 1983), 136 at pt. III (Feb. 1986).

company during the course of the liquidation, an additional tax return must be filed. The liquidator must describe the company's tax position in a Statement of Affairs, which must be filed with the Registrar before the company can ultimately be dissolved. In the case of an expedited liquidation without a formal dissolution or the appointment of a liquidator, the Commissioner must provide the Registrar with written notice that the Commissioner has no objection to the liquidation.

Finally, New Zealand's relaxation of exchange control regulations provides for the remittance of currency abroad without governmental controls. The Reserve Bank of New Zealand, however, continues to monitor such activities for statistical purposes. Therefore, the Reserve Bank of New Zealand must be notified of any transfer of funds relating directly to the liquidation of a New Zealand company before any such transfer may take place.

#### CONCLUSION

The Companies Act provides for two methods of liquidating a company in New Zealand. The simpler method may be used by solvent companies that are no longer actively engaged in a trade or business. The more complex (and time-consuming) method may be applicable to solvent and insolvent companies alike. The liquidation may be characterized under New Zealand legal principles as a taxable event, which will normally render the foreign parent company liable to taxation upon the distribution of the assets of its subsidiary. The subsidiary itself, however, will not usually be subject to tax on the assets which it distributes in the course of the liquidation, unless the property distributed consists of "trading stock."

Both methods of liquidating a New Zealand company require the payment of certain fees, including the cost of publishing notices about the proposed liquidation in two regional newspapers and the New Zealand National Gazette in order to provide constructive notice to all of the company's officers, shareholders and creditors that it is seeking its own dissolution. Thereafter, the company is required to make certain governmental filings regarding the distribution of its assets and income. If the company desires to remit any of this income to its foreign parent company overseas, the company must notify the Reserve Bank of New Zealand.