

The Acis Constitution: Dividend Access Shares

**We've
Got This.**

From 25 May, 2020 the Acis constitution, for private companies limited by shares, makes provision for the Company to issue shares that have no Rights attaching to them, unless the Directors of the Company declare otherwise.

The purpose of these provisions is to allow for the preservation of small business capital gains tax (CGT) concessions where dividend access shares are on issue.

I Class, J Class & K Class Shares – The Acis Constitution

The Acis Pty Ltd constitution provides mechanisms for the allotment and redemption of I Class, J Class & K Class shares (dividend access shares). Holders of these shares have no Rights, however, unless the Directors declare that the holders of one or more of those classes have Rights.

A Directors' declaration can only confer a Right to receive dividends and cannot confer on the holders of I Class, J Class & K Class shares the Right to vote or participate in the division of surplus assets or profits of the Company. The constitution also allows the Directors to resolve to pay a dividend to the holders of these shares after dividend Rights have been declared.

This restriction provides a mechanism to structure dividends in a year where a CGT event occurs to preserve the availability of small business CGT concessions, as highlighted below in the [Devuba case](#).

It is important to note, however, that the provisions of the Acis constitution only provide mechanisms for structuring companies where dividend shares are issued. Further steps may be required to achieve a desired or appropriate outcome when calculating small business participation percentages and considering the availability of small business CGT concessions. Taxation and legal advice should be obtained prior to:

- allotting and/or redeeming dividend access shares;
- declaring that any class of dividend access shares have dividend Rights;
- resolving to pay a dividend in relation to dividend access shares; and/or
- the occurrence of any CGT event with respect to company shares.

Note also that I Class, J Class & K Class shares are redeemable. Section 152.70(2) of the *Income Tax Assessment Act 1997* (Cth) ignores redeemable shares when calculating an entity's small business participation percentage. This allows for further structuring certainty.

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Capital Gains Tax Small Business Concessions

Division 152 of the *Income Tax Assessment Act 1997* (Cth) outlines the conditions that must be satisfied for a taxpayer to access small business CGT concessions. If the CGT asset is a share in a company, there are additional basic conditions regarding CGT concession stakeholders which must be satisfied just before the CGT event in order to access the concessions.

If the CGT asset is a share in a company or an interest in a trust (the object entity), one of these additional basic conditions must be satisfied.

Just before the CGT event, either:

- (a) you are a CGT concession stakeholder in the object entity; or*
- (b) CGT concession stakeholders in the object entity together have a small business participation percentage in you of at least 90%.*

s. 152.10(2)(d) Income Tax Assessment Act 1997 (Cth)

The Devuba Case

The Devuba case dealt with the application of Division 152 of the *Income Tax Assessment Act 1997* (Cth).

Devuba Pty. Limited ("Devuba", the taxpayer) sold shares that it held in another company, giving rise to a capital gain which it claimed could be reduced to nil by virtue of small business CGT concessions contained in Division 152. The Commissioner conversely claimed that the small business CGT concessions were not available to Devuba, largely because of the existence of a dividend access share.

At the relevant time, the shareholding in Devuba was as follows:

- one ordinary share held by John van der Vegt;
- one ordinary share held by the trustee of the Van der Vegt Family Trust;
- one dividend access share held by Sloane van der Vegt.

In the relevant year (2010), Devuba declared a dividend to the holders of ordinary shares. No dividend was paid to the holder of the dividend access share.

The Commissioner argued that the directors of Devuba had a discretion to pay a dividend on the dividend access share and could use their powers to pay a dividend on the dividend access share to the exclusion of the holders of the ordinary shares. This meant the holders of the ordinary shares might obtain a zero distribution.

The Commissioner's argument continued to say, if that were the case, the small business participation percentage/CGT concession stakeholder conditions would not be satisfied and Devuba would, therefore, not be entitled to relief under Division 152.

Resolution of Directors of Devuba - 1 May, 2007

The holders of "DIVV ACC"..... shall be entitled to receive in respect of such shares, such dividends, capital or other distribution (if any) other than on a winding up as in respect of each class the Directors may from time to time determine to pay...

Resolution of Directors of Devuba - 1 September, 2008

... the rights attached to dividend access shares are varied so that the holders of the dividend access shares have no right to payment of a dividend until such time as the directors of the Company resolve that the holders of the dividend access shares have a right to a payment of a dividend.

Administrative Appeals Tribunal – Devuba Pty Limited v Commissioner of Taxation [2015] AATA 255

The Administrative Appeals Tribunal of Australia found that, in accordance with Division 152, the rights of shareholders in Devuba, when determining CGT concession stakeholder status, were to be assessed *just before the CGT event*.

It was found that at that time, the only shares that carried any rights to dividends that may be paid in Devuba were the ordinary shares as the directors had not, at that time, passed a resolution giving the holder of the dividend access share a right to be paid a dividend.

The Tribunal held that the mere existence of the dividend access share at the relevant time did not cause the failure of a key condition for the availability of the small business CGT concessions, and allowed Devuba's objection to assessment in full.

At that time the dividend access share did not carry any rights to dividends because the directors had not passed any resolution to the effect that they should have such a right - Devuba Pty Limited v FC of T (2015) AAT Paragraph 68

If a dividend were to be declared at that time the dividend would not and could not have been paid in favour of anyone other than the ordinary shareholders - Devuba Pty Limited v FC of T (2015) AAT Paragraph 77

The Commissioner of Taxation appealed to the Federal Court.

Federal Court – Commissioner of Taxation v Devuba Pty Ltd [2015] FCAFC 168

The Federal Court of Australia dismissed the Commissioner's appeal, finding that Devuba's ability to pay a dividend to the holder of the dividend access share was dependant on a determination to do so being made by the directors – and so was restricted until the directors so declared. The result of this finding, and its impact on the calculation of small business participation percentages, was that the small business CGT concession stakeholder conditions were satisfied and that Devuba, the taxpayer, could access the small business CGT concessions as claimed.

The 2008 resolution expressly limited Devuba's ability to pay a dividend to the holder of the Dividend Access Share by excluding from the holder of the Dividend Access Share any right to a dividend "until such time as the directors of the company resolve[d] that the holders of the dividend access shares have a right to payment of a dividend". Devuba's ability "to pay" any dividend to the dividend access shareholder was made dependent upon the prior determination by the directors.

Commissioner of Taxation v Devuba Pty Ltd (2015) FCAFC, paragraph 10

Other Resources

Further information about the Acis constitution is available. You might want to check the following:

- [Summary of Changes](#)
- [Factsheet: Successor Directors](#)

Notes:

- Specific tax/legal advice should always be sought prior to issuing dividend access shares.
- Variations to the standard Acis constitution can be made [on request](#).
- A copy of the Acis constitution can be emailed [on request](#).
- The Acis team is [contactable](#) at any time to discuss the constitution.

Acis does not provide advice in relation to taxation, duty, the implications of issuing dividend access shares, the availability of small business capital gains tax concessions or any other matter. Legal and taxation advice should always be obtained prior to any dealing in company shares, and particularly in relation to the allotment of dividend access shares and the capital gains tax implications of dealing with company assets or shares.

Acis does not purport to give advice in relation to the Acis Pty Ltd company constitution nor should you construe anything in the constitution, any correspondence with us, or material provided by us, as advice of any kind.

If you would like further information or have any questions, please contact us toll-free on [1800 773 477](tel:1800773477) or email acis@acis.net.au.