

Are Fixed Rate Preference Shares “Ordinary Share Capital” for Entrepreneurs’ Relief – More or Less Certainty?

Tax Talks on **May 7, 2019**

There has been another development on the tricky but important subject of whether the rights attaching to preference shares mean that they are or are not ordinary shares for entrepreneurs’ relief (and other tax) purposes.

Recent cases have shown that share with no right to a dividend are ordinary shares. HMRC has published its view that cumulative fixed rate share are not ordinary shares but that non-cumulative fixed rate shares are.

In *Warsaw v HMRC*, the First-Tier Tribunal (**FTT**) has now held that cumulative fixed rate preference shares under which the fixed rate was also applied to the unpaid dividend (so the fixed rate dividend compounded) were ordinary share capital for entrepreneurs’ relief purposes (so the taxpayer was entitled to entrepreneurs’ relief).

The taxpayer held shares in a company that carried the right to a fixed rate of interest (10%) calculated on a compound basis (on the sum of the subscription price and the aggregate of any unpaid dividends from previous years). Therefore, if profits were not available in a certain year, the fixed rate of 10% would be calculated on an increased amount in subsequent years.

The definition of “ordinary share capital” in section 989 ITA 2007 provides that, broadly, all of a company’s issued share capital constitutes ordinary share capital except for those shares which give a right to “a dividend at a fixed rate” with “no other right to share in the company’s profits”.

In this case, HMRC, in line with its published view, argued that the shares were not ordinary share capital as the rate of the dividend remained fixed. However, the FTT accepted the taxpayer's argument that the fixed rate looked at not only the rate but also the amount that it applied to (here an indeterminate amount depending on whether dividends were or were not paid in a particular year).

The decision can be taken to align with HMRC's published view if HMRC's position on cumulative fixed rate dividends is read to apply only to non-compounding cumulative shares. This and other decisions means that only such non-compounding cumulative fixed rate shares would not be ordinary share capital.

The decision does, however, highlight the very different (and very important) outcome that can result from seemingly minor differences in the terms of fixed rate dividend shares. Taxpayers expecting to rely on the terms of their shares to give particular tax results should check the position given this new decision.

The full transcript can be found [here](#).

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- **Stephen Pevsner**
Partner