

Updated HMRC guidance

(Lecture P1143 – 11.03 minutes)

Following the First-Tier Tribunal's decision in the *Warshaw* case that was published on 24 April 2019, HMRC have recently updated their guidance on the meaning of 'ordinary share capital'.

In the context of entrepreneurs' relief, this term has the meaning given to it by S989 ITA 2007 which states that the words cover all of a company's issued share capital (however described), other than capital the holders of which have a right to a dividend at a fixed rate but have no other right to share in the company's profits. There is an identical definition for corporation tax in S1119 CTA 2010.

On the authority of *Canada Safeway Ltd v CIR* (1972), it is the nominal value of the ordinary shares rather than the number of ordinary shares issued or the amount subscribed for those shares which must be taken into account for the purposes of S989 ITA 2007.

HMRC's CT Structure Team have technical responsibility for the interpretation of S989 ITA 2007 (and S1119 CTA 2010) and their official guidance on what constitutes 'ordinary share capital' can be found in Para CTM00514 of the Company Taxation Manual. In particular, the guidance now includes a table which sets out HMRC's view on whether a number of different types of share are likely to be classified as 'ordinary share capital'. However, HMRC emphasise that some of the classification issues are 'finely balanced'.

Notably, the tax officials express the opinion that fixed rate preference shares with rights in a liquidation (e.g. to a distribution of surplus assets) will not usually be regarded as 'ordinary share capital', but they do confirm that this is fact-dependent. In addition, the position of preference shares:

- where the coupon compounds over time; or
- where a rate of interest is added if a dividend is unpaid

is described as 'borderline' and fact-dependent. The decision in *Warshaw v HMRC* (2019) is referred to as being of 'persuasive' rather than 'precedent' authority. Does this imply that HMRC do not intend to take their defeat in the *Warshaw* case any further?

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