Rules relating to recovery of capital and replacement loans

Part 08-02-01a

This document should be read in conjunction with section 247 and section 249 of the Taxes Consolidation Act 1997

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Contents

1. Introduction

This manual provides an overview of the recovery of capital rules contained in section 249 Taxes Consolidation Act 1997 (TCA), which operate to prevent abuse of sections 247 TCA 1997.

Subject to meeting certain requirements, section 247 provides relief in the form of a charge on income for interest on money borrowed by a company which is used to acquire shares in and, in some cases lend to, a trading company, a property rental company, a holding company that directly holds shares in such companies or a holding company that indirectly holds shares in a trading company through one or more intermediate holding companies. Refer to Tax and Duty Manual (TDM) Part 08-02-01 for details of what constitutes a qualifying loan for the purposes of section 247 and the relevant conditions for relief.

Section 249 prevents abuse of section 247 by disallowing or restricting interest relief available to a borrower company where the borrower company has, or is deemed to have, recovered capital from the company in which the borrowings are invested or a connected company without using the capital recovered to reduce the loan in respect of which relief is claimed under section 247. The section provides that the borrower will lose relief on the interest referable to the amount of the loan that corresponds to the capital recovered or deemed to be recovered. The section not only addresses a recovery of capital by the borrower company after the proceeds of a loan are applied for a qualifying purpose under section 247, but also a recovery of capital in the two-year period before the application of the loan proceeds (refer to paragraph 2.4 below).

Where a recovery of capital takes place, or is deemed to take place, in accordance with section 249 and only part of a loan qualifies for interest relief under section 247, the deduction to be made on account of the capital recovered is to be made wholly out of interest on that part of the loan which qualifies for relief under section 247.

2. Charges on Income and Recovery of Capital

2.1 Key terms

In this manual the company which borrows funds to invest in another company and claims tax relief for the interest under section 247 is referred to as the "**investing company**" and the company in which the investing company invests is referred to as the "**concerned company".** A **"connected company"** refers to a company connected with the company concerned and is a company that would be regarded as connected with it by virtue of the provisions of section 10 TCA 1997.

2.2 Application of section 249 to interest treated as a "charge on income"

Section 243 TCA 1997 provides for the deduction of charges on income paid by a company against its total profits. Section 243(7) contains a general prohibition on interest being treated as a "charge on income". However, by virtue of section 243(8), this prohibition does not apply to any interest paid on a loan the interest on which qualifies for relief in accordance with section 247. Section 243(9) applies the provisions of section 249 where an investing company recovers an amount of capital without using it to repay the loan to which section 247 applies. The effect of this is to restrict the amount of interest the investing company may claim as a charge on income in circumstances where it is treated as having recovered an amount of capital.

2.3 Recovery of capital – section 247(3)

Section 247(3) sets out certain conditions that must be met in order for a loan to constitute a qualifying loan for the purposes of section 247. One of the conditions is that during the period taken as a whole, from the application of the loan proceeds to the time when the interest was paid, the investing company must not have recovered any capital from the company concerned or from a connected company, apart from any amount taken into account under section 249.

2.4 Recovery of capital before the application of loan proceeds

The recovery of capital rules apply where an investing company recovers capital from the company concerned in the 2-year period (referred to as the "relevant period") before it applies the proceeds of a loan to which section 247 applies. Where the investing company recovers capital from the **company concerned** at any time during the relevant period, the investing company will immediately after the application of the 'section 247 loan' be treated as if it had repaid out of the loan an amount equal to the capital recovered. Therefore, the investing company will not be entitled to relief in respect of so much of the interest otherwise eligible for relief as relates to the capital recovered. This restriction will not apply where the capital recovered is—

(a) a repayment of a "specified loan", being a loan taken out before 6 February 2003 or an ordinary trading loan or loan for the purposes of a rental business, by the company concerned to the investing company;

(b) used by the investing company to repay some other loan which qualifies for interest relief under section 247 (this recognises the fact that there should not be a restriction on future relief where capital recovered is used to repay an outstanding loan which qualifies for tax relief); or

(c) used by the investing company for a qualifying purpose within the meaning of section 247(2)(a) or (b), i.e. to acquire shares in, or lend to, a trading company, a rental company or a holding company (this recognises that in certain circumstances a company may not be able for contractual reasons to pay off its borrowings but may be able to use the funds recovered for purposes which, had the funds been borrowed, would qualify for relief).

The circumstances in which an investing company will be regarded as having recovered capital from the company concerned during the relevant period are the same as those which apply for determining whether the investing company has recovered capital from the company concerned after the application of the loan proceeds (see paragraph 2.5.1 below). Where an amount of capital recovered during the relevant period has already been treated in full as a repayment of a loan in accordance with section 249, resulting in a restriction in the amount of relief otherwise available under section 247 in respect of the loan, it will not be taken into account in relation to another loan.

2.5 Recovery of capital after the application of loan proceeds

Where, after the application of loan proceeds, the investing company recovers an amount of capital from the **company concerned or** from a **connected company**, or is deemed to recover an amount of capital from the company concerned, without using it to reduce the loan to which section 247 applies, the investing company is treated as having repaid the loan to the extent of the amount of capital recovered. This means the investing company loses relief in respect of the interest on that part of the loan which corresponds to the capital recovered or deemed to be recovered.

Section 24 of Finance Act 2017 amended section 247 to allow relief for interest on a loan used to acquire, or in certain circumstances lend to, a holding company that indirectly holds shares in a trading company through one or more intermediate holding companies. This applies for loans made on or after 19 October 2017 and reflects an administrative practice that was previously operated by Revenue. As a consequence of the extension of relief in section 247, section 249 was amended by Finance Act 2017 to provide that, in respect of a loan made on or after 19 October 2017, an investing company will be deemed to recover capital from the company concerned in circumstances where an intermediate holding company recovers an amount of capital from another company (see section 4 below).

Recovery of Capital by the investing company

The investing company is treated as having recovered an amount of capital from the company concerned or from a connected company, as the case may be, if:

(a) it receives consideration of that amount or value for the sale of any part of the ordinary share capital of the company concerned or of a connected company, or any consideration of that amount or value by means of repayment of any part of that ordinary share capital;

(b) the company concerned or a connected company repays that amount of a loan or advance from the investing company; or

(c) the investing company receives consideration of that amount or value for assigning any debt due to the investing company from the company concerned or from a connected company.

2.5.2. Deemed recovery of capital by the investing company

The recovery of capital rules also restricts interest relief where there is a deemed recovery of capital by the investing company. The investing company may be deemed to have recovered capital from the company concerned where, in certain circumstances:

(a) the company concerned is a holding company that directly holds shares in a trading or rental company, or indirectly holds shares in a trading company through one or more intermediate holding companies, and the company concerned recovers capital from another company in which it directly holds more than 50% of the ordinary share capital; or

(b) the company concerned is a holding company that indirectly holds shares in a trading company through one or more intermediate holding companies and an intermediate holding company, in which the company concerned directly or indirectly holds more than 50% of the ordinary share capital (or both companies are under common control), recovers capital from a company in which it directly holds more than 50% of the ordinary share capital (or that company and the intermediate holding company are under common control).

Details of the deemed recovery of capital rules for (a) and (b) above are set out below in section 3 and section 4 respectively.

3. Deemed recovery of capital where the company concerned recovers capital

Overview

Under the deemed recovery of capital provisions contained in section 249(2)(aa), an investing company will be regarded as recovering from the company concerned so much of any capital which that company recovers from one of its subsidiaries (being a company in which it directly holds more than 50% of its ordinary share capital), to the extent that the capital recovered is not used by the company concerned to –

(a) repay a loan made to it by the investing company (this in turn will trigger a recovery of capital by the investing company thereby requiring it to use the capital recovered to repay the loan for which it is getting tax relief or else suffer a restriction of the relief, with the amount restricted equalling the amount of capital recovered);

(b) redeem, repay or purchase any of its ordinary share capital acquired by the investing company (again, this would trigger a recovery of capital by the investing company with the same consequences as set out above);

(c) to acquire ordinary shares in, or lend to, a trading company, a rental company, or holding company that directly or indirectly holds shares in a trading company or a holding company that directly holds shares in a rental company (this recognises that, in certain circumstances, a company may not be able to repay a loan or redeem its shares and allows a company to avoid a recovery of capital where it re-invests the funds recovered for a qualifying purpose), or

(d) repay some other loan which qualifies for tax relief in respect of interest paid under section 247 (this recognises that there should not be a restriction of relief where capital recovered is used to repay other borrowed funds which qualified for tax relief).

The company concerned will be regarded as recovering capital from its directly held subsidiary where:

(i) it receives consideration of that amount or value for the sale of any part of the ordinary share capital of the subsidiary company, or any consideration of that amount or value by means of repayment of any part of that ordinary share capital;

(ii) the subsidiary company repays that amount of a loan or advance from the holding company, other than a repayment of a specified loan (being a loan taken out before 6 February 2003 or an ordinary trading loan or loan for the purposes of a rental business); or

(iii) it receives consideration of that amount or value for assigning any debt due to it from the subsidiary company.

The circumstances in which the company concerned is regarded as recovering capital from a subsidiary company are similar to those which apply in relation to an investing company recovering capital from the company concerned (see paragraph 2.5.1 above). However, there is one difference. The company concerned will not be regarded as recovering capital from a directly held subsidiary in circumstances where that subsidiary repays a “specified loan” to the company concerned. It follows, that such a repayment will also not constitute a deemed recovery of capital by the investing company from the company concerned.

Example 3.1 – Deemed recovery of capital where company concerned recovers capital

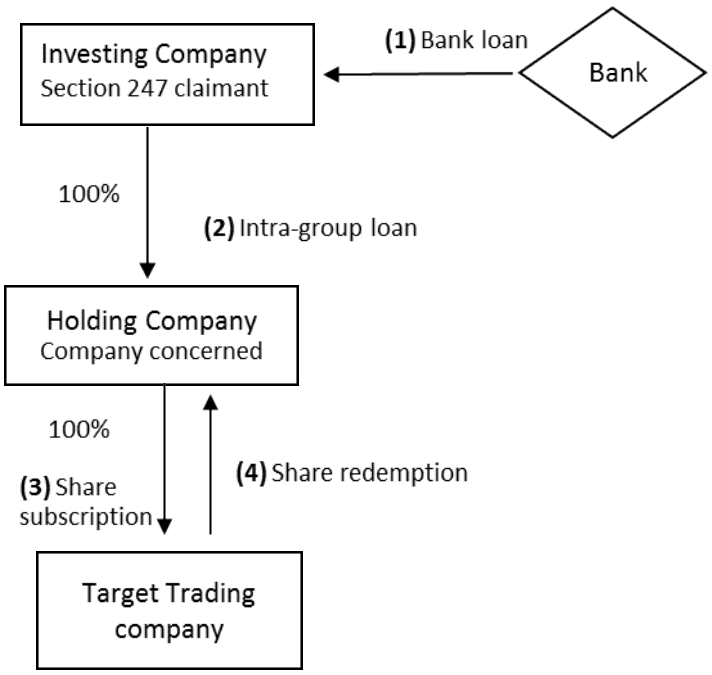

Diagram 3.1 – Deemed recovery of capital where company concerned recovers capital

In this example, Investing Company is deemed to have made a recovery of capital unless Holding Company (the company concerned) uses the proceeds from the repayment of shares to repay the loan made to it by Investing Company or invests the proceeds to acquire ordinary shares in, or lend to, a trading company, a rental company or a holding company (within the meaning of section 247(2)(a) or (b)).

3.2 Recovery of capital by two or more investing companies

Where two or more companies have borrowed to acquire shares in, or lend to, the company concerned (being a holding company to which section 247(2)(a) or (b) applies) and all the investing companies qualify for tax relief on interest paid in respect of the borrowings, the amount of capital deemed to be recovered from the company concerned in accordance with section 249(2)(aa) will be apportioned between the relevant investing companies:

(a) in proportion to the aggregate amount of money applied in acquiring share capital in, or any loan made to, the company concerned, or

(b) in such manner as may be agreed between the investing companies and the agreed apportionment basis is specified by all of them jointly in writing to Revenue.

3.3 Share for Share reorganisation – company concerned

The investing company may elect that the deemed recovery of capital provisions will not apply where the company concerned is issued shares in a company in exchange for shares in a subsidiary company and, in respect of the exchange, section 584 TCA is applied by section 586 TCA 1997 or would be but for the application of section 626B TCA 1997. The election may be made by an investing company where the exchange would otherwise give rise to a deemed recovery of capital. The election must be made by the investing company in its CT1 return for the accounting period in which the original shares are exchanged.

Where an election is made, the company that issues the new shares in exchange for the old shares is treated as if it were the company concerned for the purposes of the deemed recovery of capital rules in section 249(2)(aa) as regards any subsequent disposal of the old shares. The effect of this is illustrated in the example below.

Example 3.3 – Share for share exchange – company concerned

New Company issues shares to Holding Company in exchange for its shares in Trading Company. The reorganisation and the structure post-reorganisation are shown below.

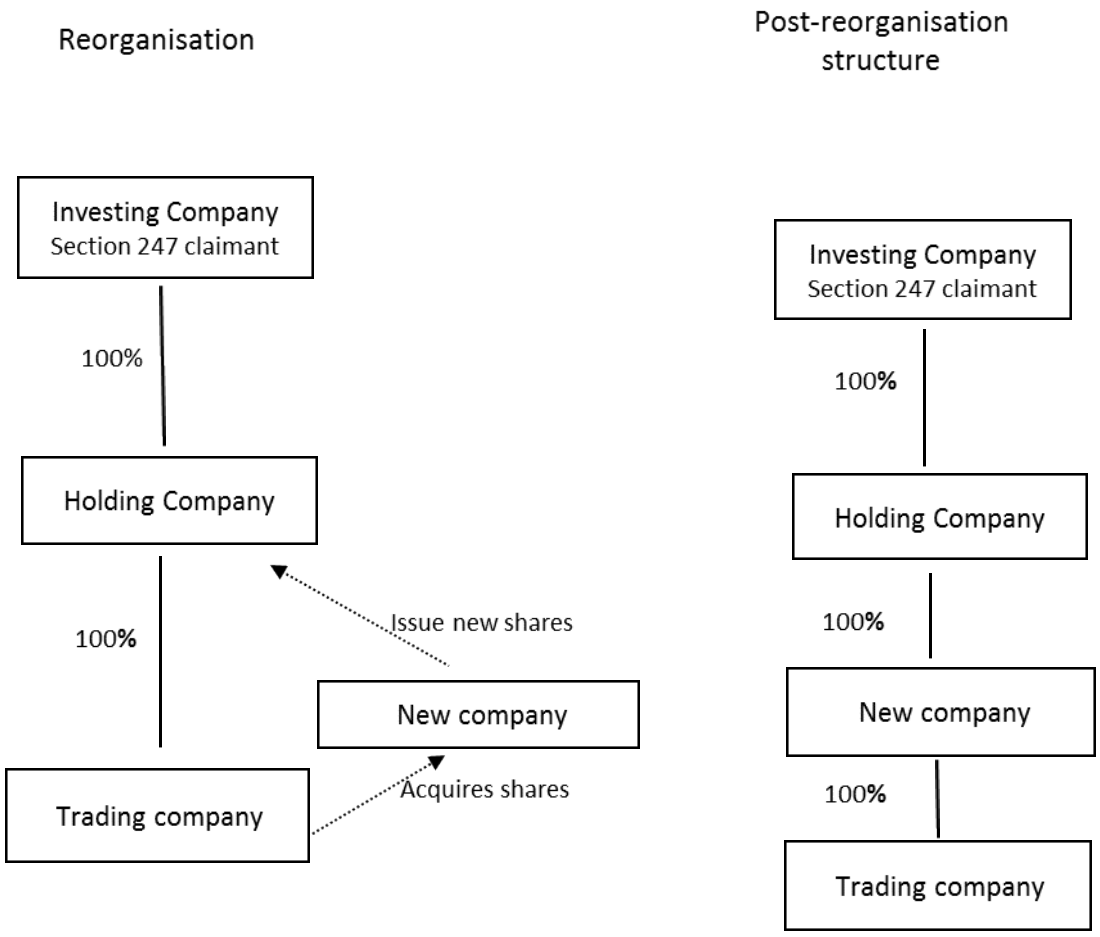

Diagram 3.3 – Share for share exchange – company concerned

Investing Company may elect that the deemed recovery of capital provisions will not apply in the event of Holding Company exchanging its shares in Trading Company for shares in New Company. If New Company recovers capital from Trading Company, such as on a sale of the shares in Trading Company, section 249(2)(aa)(ii) will deem the Investing Company to have recovered capital because New Company is treated as the company concerned for these purposes.

4. Deemed recovery of capital where an intermediate holding company recovers capital

Overview

An investing company will also be deemed, in accordance with provisions contained in section 249(2)(ac), to recover capital from the company concerned, being a holding company that indirectly holds shares in a trading company through one or more intermediate holding companies, in certain circumstances where an intermediate holding company recovers capital from another company. This will apply where the following relationship requirements are met in relation to the intermediate holding company and the other company:

(a) the company concerned owns directly or indirectly more than 50 per cent of the ordinary share capital of the intermediate holding company or both companies are under common control, and

(b) the intermediate holding company owns directly more than 50 per cent of the ordinary share capital of the other company from which it recovers capital or both companies are under common control.

An intermediate holding company is treated as recovering capital from another company in similar circumstances to those which apply for determining whether the company concerned has recovered capital from another company (see paragraph 3.1 above).

Example 4.1 – Deemed recovery of capital where an intermediate holding company recovers capital

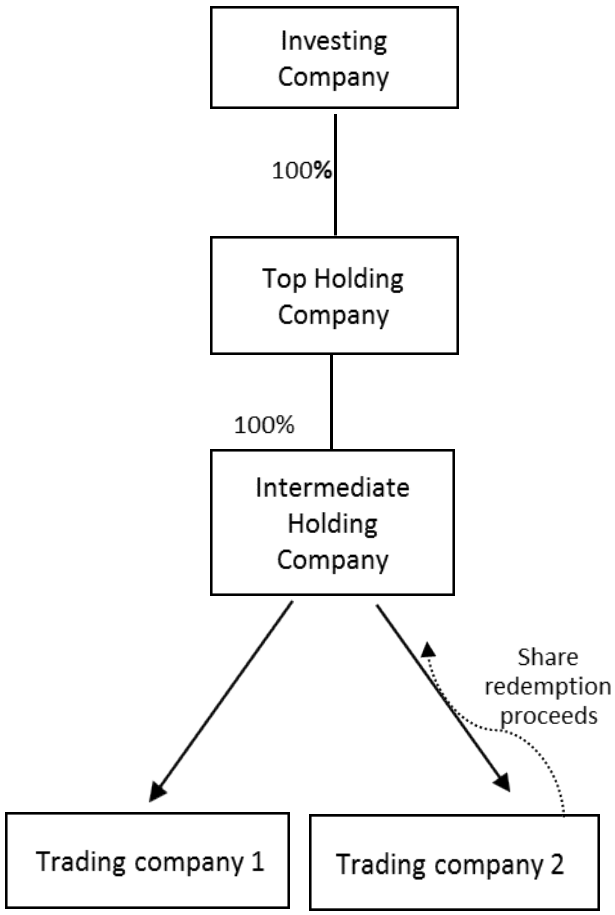

Diagram 4.1 – Deemed recovery of capital where an intermediate holding company recovers capital

Upon Intermediate Holding Company receiving share redemption proceeds from Trading Company 2, Investing Company will be deemed to have recovered capital equal to the amount of those proceeds from Top Holding Company (the company concerned), subject to the application of any exclusion referred to in paragraph 4.2 below.

4.2 Exclusions from the deemed recovery of capital provisions

An investing company will not be deemed to have recovered capital from the company concerned where an intermediate holding company recovers capital from another company where:

(a) The capital recovered by the intermediate holding company is used to repay a loan made to it by the company concerned (this will result in a deemed recovery of capital in accordance with section 249(2)(aa) (see section 3 above);

(b) The capital recovered by the intermediate holding company is used to acquire ordinary shares in, or lend to, a trading company, a property rental company, a direct holding company of a trading or rental company or a holding company that indirectly holds shares in a trading company indirectly through one or more intermediate holding companies;

(c) The capital recovered by the intermediate holding company is used to repay a loan qualifying for relief under section 247;

(d) The intermediate holding company, other than an excluded intermediate holding company*, transfers all its assets and liabilities to another intermediate holding company and:

  (i) the transfer is made in the course of the intermediate holding company being dissolved with or without going into liquidation,

  (ii) the company concerned, being a company that indirectly holds stock, shares or securities in a trading company through one or more intermediate holding companies, continues to hold indirectly the same beneficial percentage of shares in the trading company, and

  (iii) the transfer is for bona fide commercial reasons and is not part of a scheme or arrangement the purpose of which, or one of the purposes of which, is the avoidance of tax.

*An excluded intermediate holding company is a company to which section 247(2)(bb)(i) or (ii) applies. Section 247(2)(bb) affords relief for interest on borrowed funds where an investing company applies the monies to lend to a holding company that indirectly holds shares in a trading company through one or more intermediate holding companies and that holding company in turn on-lends the monies to a connected company and that connected company uses the monies for certain qualifying purposes.

If the connected company that uses the funds is an intermediate holding company, then the exclusion from the deemed recovery of capital provision where an intermediate holding company transfers its assets, in the circumstances set out above, cannot apply. This is because such an intermediate holding company is a key company in relation to the investing company being

able to claim relief under section 247 and the recovery of capital provisions should apply where it ceases to exist.[1]

Example 4.2 – Intermediate holding company transfers its assets to another intermediate holding company

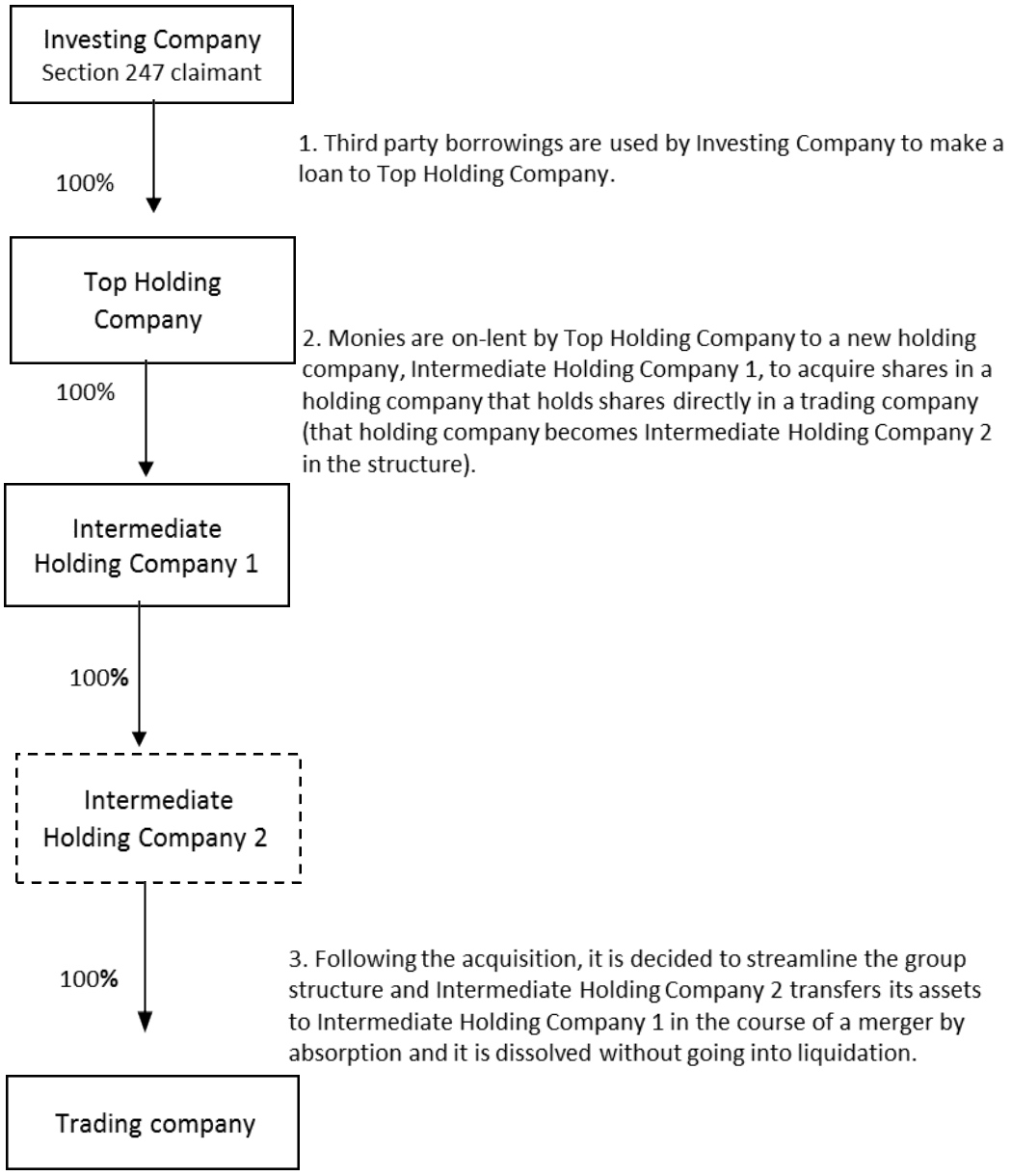

Diagram 4.2 – Intermediate holding company transfers its assets to another intermediate holding company

[1] If an intermediate company that is the connected company within the meaning of section 247(2)(bb) ceases to exist, it would also affect the ability of the investing company to meet the conditions for relief for interest contained in section 247(3). Refer to TDM Part 08-02-01.

In the above example, provided the transfer of assets by Intermediate Holding Company 2 to Intermediate Holding 1 is undertaken for bona fide commercial reasons and does not form part of a scheme or arrangement for the avoidance of tax, it will not result in a deemed recovery of capital for the Investing Company. The condition that the company concerned (Top Holding Company) continues to hold indirectly the same beneficial percentage of shares in a trading company is satisfied in this example.

Of note, it is Intermediate Holding Company 1 (and not Intermediate Holding Company 2) that is the 'connected company' that uses the borrowed monies (within the meaning of section 247(2)(bb)). Therefore, the exclusion from a deemed recovery of capital, in the event of an intermediate holding company transferring its assets to another intermediate holding company, is available on the facts of this example.

4.3 Share for share exchange – intermediate holding company

In the same way that an investing company may elect that the deemed recovery of capital provisions of section 249(2)(aa) will not apply where the company concerned is issued shares in another company in exchange for shares (see paragraph 3.3 above), an election may be made that the deemed recovery of capital provisions of section 249(2)(ac) will not apply where an intermediate holding company is issued shares in another company in exchange for shares. The exchange must occur as part of a share for share reorganisation to which section 584 applies by virtue of section 586, or which would apply but for section 626B.

Where an election is made, the company that issues the new shares in exchange for the old shares is treated as if it were the intermediate holding company for the purposes of the deemed recovery of capital rules in section 249(2)(ac) as regards any subsequent disposal of the old shares.

4.4 Multiple deemed recoveries of capital

In the absence of a relieving measure, related transactions and series of events could give rise to an amount or value of capital being taken into account in relation to more than one deemed recovery of capital event under section 249(2)(aa) and section 249(2)(ac). To ensure that this does not happen, provision is made to allow an investing company to exclude from capital deemed to have been recovered under section 249(2)(aa) or section 249(2)(ac) an amount or value which was, within a reasonable time previously and by reference to related transactions or events, included within an amount of capital it was deemed to have recovered under those provisions. This is referred to as 'capital previously recovered' in the legislation. Where an investing company wishes to exclude capital previously recovered from an amount of capital it is deemed to have recovered, it is required to give notice in writing to that effect to Revenue and is required to maintain and make available

such records as are reasonably required to show that it meets the requirements of the legislation.

What constitutes a ‘reasonable period of time’ for these purposes will depend on the facts of the case, but the expectation is that the related events will usually all occur within a period of 12 months. However, this may not be appropriate in all cases because, for example, a liquidation process could take longer than 12 months to complete. In some cases, based on the facts of the case, a shorter period than 12 months may be appropriate.

Example 4.4 – Multiple deemed recoveries of capital

In this example, Investing Company borrowed funds from a third-party bank and used the monies to lend to Top Holding Company and it in turn used the monies to acquire shares in an unrelated holding company (Intermediate Holding Company 1 in the structure below) that indirectly holds shares in trading companies. Shortly after acquisition, the following events/transactions occur with a view to streamlining the group structure and to ensure that the trading activities of the group are aligned with strategic objectives of the acquirer group (the numbering reflects the sequence in which they occur):

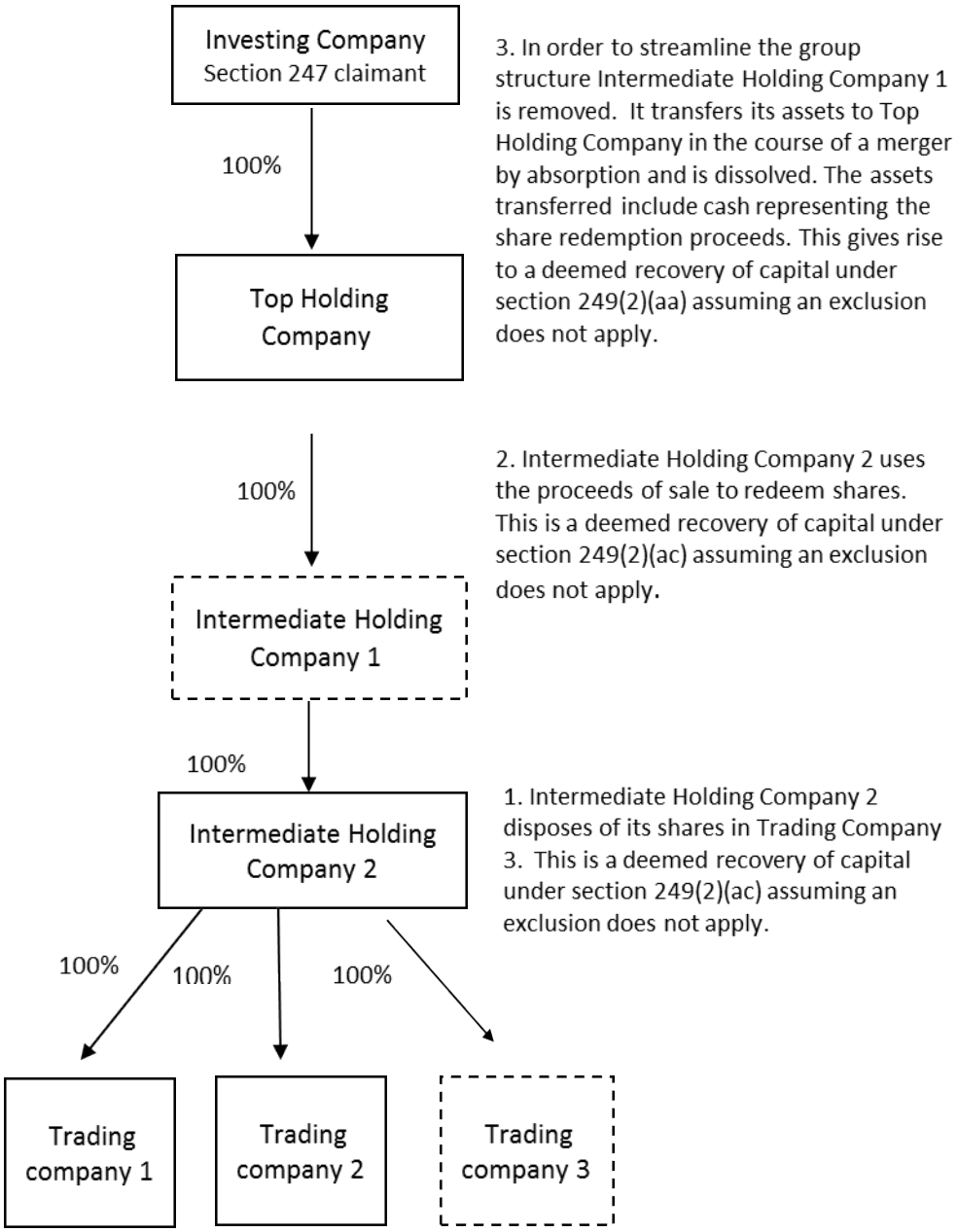

Diagram 4.4 – Multiple deemed recoveries of capital

In the above example, the value of the proceeds of sale of Trading Company 3 could, in the absence of a relieving provision, be reflected in the amount of capital deemed to have been recovered by the investing company in respect of three transactions or events which occur within a reasonably short period of time of each other. To ensure that this does not happen, Investing Company can, by giving notice in writing to Revenue, exclude from capital it is deemed to have recovered as a consequence of events 2 and 3 so much of any capital it is has previously been deemed to have recovered as a consequence of event 1. Investing Company is required to maintain and have available such records as may reasonably be required by Revenue to demonstrate that the amount of capital was in fact previously deemed to have been recovered in respect of a related event or transaction occurring within a reasonably short period of time.

4.5 Deemed recovery of capital by two or more investing companies

Where two or more companies have borrowed to acquire shares in, or lend to, a holding company that holds shares in a trading company indirectly through one or more intermediate holding companies, and all the investing companies qualify for tax relief on interest paid in respect of the borrowings, then the amount of capital deemed to be recovered from the company concerned in accordance with section 249(2)(ac), on account of capital recovered by an intermediate holding company, will be apportioned between the relevant investing companies:

(a) in proportion to the aggregate amount of money applied in acquiring share capital in, or any loan made to, the company concerned, or

(b) in such manner as may be agreed between the investing companies and the agreed apportionment basis is specified by all of them in writing to Revenue.

4.6 Application of deemed recovery of capital rules where the administrative practice applied

The deemed recovery of capital rules outlined in this part of the manual were introduced by Finance Act 2017 as a consequence of the extension of section 247 relief to interest on a loan used to acquire, or in certain circumstances lend to, a holding company that indirectly holds shares in a trading company through one or more intermediate holding companies. These provisions apply for loans made on or after 19 October 2017. Prior to the Finance Act 2017 amendments, Revenue operated an administrative practice allowing relief under section 247 in limited circumstances where an investing company invested in a holding company that indirectly held shares in a trading company.

Relying on the administrative practice, an investing company may have claimed/ may be claiming relief under section 247 in respect of a loan made prior to 19 October 2017 that was used to invest in a holding company that indirectly holds shares in a trading company. Where such a loan is replaced on or after 19 October 2017 with a new loan, as a consequence of a re-financing, relief may continue to be claimed under section 247, subject to the satisfaction of the requirements of the section. The replacement loan will be subject to the recovery of capital rules contained in section 249, including the deemed recovery of capital rules outlined in this part of the manual.

5. Sale of Shares or assignment of debt

In the case of a sale or assignment otherwise by way of a bargain made at arm's length, then for the purposes of the application of the recovery of capital rules in section 249, the sale or assignment will be deemed to be for consideration of an amount equal to the market value of what is disposed of.

6. Substitute Loans

Where, in accordance with section 247(2)(c), relief is claimed in respect of interest on a substituted loan, the recovery of capital provisions and the requirements of section 247(3) will apply to the substitute loan as if that loan and the original loan were one loan. This means that the requirements of section 247(3), which apply on an ongoing basis, regarding having a material interest and a common director and the rule about recovery of capital must be satisfied in relation to both the original loan and the replacement for so long as relief for interest is claimed in respect of the loans.