



Class Ruling

Income tax: return of capital: Guinness Peat Group PLC

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● This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- the definition of 'dividend' in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) (as it applied prior to the introduction of the *Taxation Laws Amendment (Company Law Review) Act 1998*);
- subsection 6(4) of the ITAA 1936 (as it applied prior to the introduction of the *Taxation Laws Amendment (Company Law Review) Act 1998*);
- subsection 44(1) of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936; and

- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997).

All legislative references in this Ruling are to the ITAA 1936 unless otherwise stated.

(Note: all references to former subsection 6(1) and former subsection 6(4) of the ITAA 1936 are a reference to those provisions of the ITAA 1936 before they were amended by the *Taxation Laws Amendment (Company Law Review) Act 1998*.)

Class of entities

3. The class of entities to which this Ruling applies are holders of ordinary shares in Guinness Peat Group PLC (GPG) and holders of Australian Securities Exchange (ASX) listed CHESS Depository Interests (CDIs) representing shares in GPG who:

- (a) are registered on the GPG share registers at the Scheme Record Time of 6:00pm London time on 1 July 2011, being the date for determining entitlements under the return of capital (Capital Return) as described in paragraphs 9 to 31 of this Ruling;
- (b) hold their GPG shares and/or CDIs on capital account;
- (c) are residents of Australia for the purposes of the Australian income tax legislation, including by virtue of the operation of any double tax agreement between Australia and any other country;
- (d) are not 'temporary residents' of Australia within the meaning of section 995-1 of the ITAA 1997; and
- (e) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their GPG shares.

(Note – Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

In this Ruling, holders of GPG shares and holders of CDIs are described as shareholders. Ordinary shares and CDIs are collectively referred to in this Ruling as GPG shares. GPG share registers and CDI Register are collectively referred to in this Ruling as GPG share registers.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 31 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- application for Class Ruling dated 12 April 2011 with attachments;
- Scheme Circular issued by GPG on 12 May 2011;
- GPG's Financial Report for the year ended 31 December 2010; and

- correspondence received in relation to the Class Ruling application.

10. The Capital Return was approved by the shareholders at the Annual General Meeting and a Court Convened meeting of shareholders on 8 June 2011. The High Court of Justice for England and Wales granted approval, in hearings held on 1 July and 4 July 2011, to a Scheme of Arrangement and Reduction of Capital pursuant to the *UK Companies Act 2006*.

11. Shareholders registered as at the Scheme Record Time, on the Operative Date of 5 July 2011, had one out of every eight of their GPG shares cancelled, subject to rounding, under the Scheme of Arrangement.

12. Shareholders received a Capital Return amount of £0.3507 for each cancelled GPG share. This amount reflects the volume weighted average price (converted to sterling pounds) of a GPG share on the New Zealand Exchange (the most liquid market for the GPG shares) for the five trading days up to and including 11 February 2011, the date on which the Capital Return was first announced.

13. The Capital Return proceeds were provided to the shareholders by 19 July 2011.

Background

14. GPG is an investment holding company incorporated in England and Wales and is a tax resident of the UK. GPG is a diversified holding company that holds interests in diverse industries and businesses in the UK, Australia and New Zealand. These businesses include property development, building services, food processing, fruit and produce distribution, financial services, and textiles and thread manufacture.

15. GPG is listed on the London Stock Exchange, the ASX (as represented by CDIs) and on the New Zealand Exchange. GPG's principal share register is in the UK and GPG maintains branch registers in Australia and New Zealand and a register of CDI holders in Australia.

16. On 11 February 2011, GPG announced its intention to discontinue new investments and to undertake an orderly realisation of its investment portfolio over time (GPG's strategy). Part of this strategy included consideration of capital management initiatives pursuant to which GPG announced its intention to undertake a Capital Return during 2011 of at least £75 million.

17. GPG advised that, in light of GPG's strategy, the Capital Return amount is surplus to GPG's on-going operating funding requirements.

Capital structure

18. There are approximately 31,000 shareholders in GPG. GPG advised that, as at 31 January 2011, approximately 16% of shareholders are listed on the share register in Australia.

19. No individual owns, nor do up to 20 individuals own between them, directly or indirectly, for their own benefit GPG shares carrying:

- fixed entitlements to at least 75% of GPG's income or at least 75% of GPG's capital; or
- at least 75% of the voting power in GPG.

20. As at 30 June 2011, GPG had 1,822,959,937 ordinary fully-paid GPG shares on issue. The GPG shares were issued with a par value of £0.05 and GPG has no other class of shares on issue.

Capital accounts

21. During 2002, GPG acquired GPG Holdings (UK) plc (the merger) and as a result of the merger, GPG recorded in its balance sheet a reserve called the 'Other Reserve'. The Other Reserve is a share premium account for Australian tax purposes, representing the premium received on the issue of GPG shares to former GPG (UK) Holdings plc shareholders pursuant to the merger. Apart from the merger, other transactions recorded in the Other Reserve include:

- crediting of the premium on GPG shares issued under the acquisition of Coats plc during 2004; and
- debiting of amounts pursuant to the issue of Capitalisation Shares to shareholders from 2003 – 2010.

22. During 2006, GPG raised approximately £46.6 million through the global placement of 51 million GPG shares. This was credited to a mixture of GPG's paid up capital and share premium accounts.

23. As at 31 December 2010 the balance of GPG's share capital account was approximately £90.93 million and the balance of GPG's share premium account was approximately £61.95 million.

24. As at 31 December 2010, the balance of GPG's Other Reserve account was approximately £161.06 million.

25. GPG had approximately £4 million in retained earnings as of 31 December 2010.

Creation of distributable reserves

26. Part of the Scheme of Arrangement involved the creation of distributable reserves by capitalising part of the Other Reserve account and then cancelling those new shares. Under the *UK Companies Act 2006* the Other Reserve cannot be directly distributed to shareholders. However, the Other Reserve can be used to pay up deferred shares in full at par. The deferred shares created can then be cancelled pursuant to a reduction of capital confirmed by the Court and the amount paid up on the deferred shares can be returned to shareholders.

27. Under the Scheme of Arrangement, GPG capitalised £161.06 million of its Other Reserve account on 4 July 2011 by issuing three newly created deferred shares:

- Class A Share of £36.64 million;
- Class B Share of £6.14 million; and
- Class C Share of £118.28 million.

28. All of the deferred shares were issued to Aqua Capital Limited, a company specifically incorporated for the purpose of holding the deferred shares, at the Effective Time of 4 July 2011. Following Court approval on 4 July 2011, these shares were cancelled on the Operative Date of 5 July 2011.

Payment of the capital return

29. Under the Scheme, an amount of £79.81 million was returned to shareholders. The Capital Return was accounted for by debiting the following accounts:

- Share Premium Account: £62.38 million;
- Share Capital Account: £11.39 million; and
- Class B Share capital account: £6.14 million.

Other matters

30. GPG has a dividend distribution policy that has not altered since 2000. Every year from 2000 to 2010, GPG has paid a cash dividend of £0.01 per GPG share (accompanied by a scrip dividend alternative) and has undertaken a 1 for 10 capitalisation issue. The capitalisation issue involved the issue of 1 new share (capitalisation share) for every 10 GPG shares held at the relevant time subject to rounding. GPG intends to pay a £0.0115 dividend in 2011.

31. GPG has confirmed it has no current intention to undertake a further return of capital to shareholders.

Ruling

Distribution is not a dividend

32. The Capital Return is not a dividend as defined in former subsection 6(1).

The application of sections 45A, 45B and 45C

33. The Commissioner will not make a determination under either subsection 45A(2) or subsection 45B(3) that section 45C applies to the Capital Return.

Capital gains tax

34. CGT event C2 happens to a GPG shareholder upon the cancellation of their GPG shares on 5 July 2011 (subsection 104-25(1) of the ITAA 1997).

Commissioner of Taxation

3 August 2011

Appendix 1 – Explanation

● *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Distribution is not a dividend

35. Amendments to the Corporations Act in 1997 abolished the concept of par value shares and associated concepts of share premium, share premium accounts and paid-up capital. As a result of these Corporations Act amendments, consequential amendments were made to the taxation laws by the *Taxation Laws Amendment (Company Law Review) Act 1998* (the Act). These amendments included repealing the definition of share premium account and amending the definition of dividend in subsection 6(1), and amending subsection 6(4). These provisions as enacted prior to the amendments contained in the Act will be referred to hereafter as the 'former provisions'.

36. However, the amendments mentioned in paragraph 35 of this Ruling only have effect from 1 July 1998 for companies that do not have on issue par value shares. For those companies that continue to have par value shares on issue, the former provisions continue to apply.¹

37. Since GPG is a company incorporated under UK Company Law, GPG shares have a par value. Accordingly, the former provisions apply.

38. In the present circumstances, subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in former subsection 6(1), paid to the shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

¹ See paragraph 1.57 of the Explanatory Memorandum that accompanied the introduction of the *Taxation Laws Amendment (Company Law Review) Act 1998*.

39. The term 'dividend' in former subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' in former subsection 6(1) provides that money paid by a company to a shareholder which is debited against an amount standing to the credit of a share premium account is excluded from the definition of 'dividend' in former subsection 6(1), subject to former subsection 6(4). In the present circumstances, former subsection 6(4) does not apply as the amount of the Capital Return debited to the Share Premium Account of GPG is not made under an 'agreement' or 'arrangement' whereby GPG has issued shares at a premium and then has subsequently distributed that premium to another person as part of the arrangement. Accordingly, that part of the Capital Return debited against the Share Premium Account of GPG is not a dividend as defined in former subsection 6(1) (that is, £61.95 million).

40. As mentioned in paragraph 39 of this Ruling, the term 'dividend' in former subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (e) of the definition of 'dividend' in former subsection 6(1) provides that a repayment by a company of moneys paid up on a share is excluded from the definition of 'dividend' in former subsection 6(1), subject to certain exceptions. The exception at subparagraph (e)(i) within the definition of 'dividend' at former subsection 6(1), which applies when a share is cancelled, does not apply in this case as the repayment does not exceed the amount paid up immediately before the cancellation takes place (that is, £0.05 per GPG share).

41. As the amount debited against GPG's Share Capital Account represents the paid-up par value on GPG shares, the part of the Capital Return debited against the Share Capital Account of GPG is not a dividend for the purposes of former subsection 6(1) (that is, £11.37 million).

42. Further, as the amount debited against the Class B Share Account represents the paid-up par value on the Class B Share pursuant to the capitalisation and deferred share issue, that part of the Capital Return debited against the Class B Share Account is not a dividend for the purposes of former subsection 6(1) (that is, £6.14 million).

43. Accordingly, the Capital Return is not a dividend as defined in former subsection 6(1).

Anti-avoidance provisions

44. Sections 45A and 45B are two anti-avoidance provisions, which, if they apply, allow the Commissioner to make a determination that section 45C applies to treat all or part of the return of capital received by the shareholders as an unfranked dividend paid by GPG out of profits to shareholders.

Section 45A – streaming of dividends and capital benefits

45. Section 45A applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

46. GPG will provide shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b)) and the capital benefit will be provided to all shareholders in direct proportion to their individual share holding. As all shareholders benefit equally from the return of capital there is no 'streaming' of capital benefits to some shareholders and not to others.

47. Accordingly, section 45A will not apply to the return of capital and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the return of capital to the shareholders.

Section 45B – schemes to provide capital benefits

48. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- under the scheme, a taxpayer (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

49. In the circumstances of the Capital Return, the conditions of paragraphs 45B(2)(a) and (b) are satisfied. The distributions under the Capital Return provides shareholders with a capital benefit (as defined in subsection 45B(5)) and the shareholders would generally pay less tax on the payments received under the Capital Return than they would on an equivalent amount of dividend (a 'tax benefit' as defined in subsection 45B(9)).

50. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the circumstances set out under subsection 45B(8) to determine whether any part of the Capital Return would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit.

51. The test of purpose is an objective one. The question is whether, objectively, it would be concluded that a person who entered into or carried out the scheme, did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. The purpose does not have to be the most influential or prevailing purpose, but it must be more than an incidental purpose.

52. Having regard to the relevant circumstances of the scheme as listed under subsection 45B(8), it cannot be concluded that either GPG or GPG shareholders entered into or carried out the scheme for the purpose of enabling the GPG shareholders to obtain a tax benefit. The Capital Return was funded from the cash reserves of GPG which are considered excess to GPG's ongoing operating funding requirements in light of GPG's strategy. GPG's current dividend policy is expected to continue into the future and will not be impacted by the Capital Return. Further, the Capital Return is partly attributable to the capital raised through the global placement in 2006.

53. Further, it cannot be said that the return of capital is attributable to the profits of GPG, nor does GPG's pattern of distributions indicate that the return of capital is being made in substitution of dividends. Similarly, the manner in which the scheme is to be carried out, and the form and substance of the scheme, do not indicate that the Capital Return was made in substitution for dividends.

54. Accordingly, the Commissioner will not make a determination pursuant to subsection 45B(3) that section 45C applies to the distributions made under the Capital Return.

55. As the Commissioner will not make a determination pursuant to subsection 45B(3) in relation to the arrangement as described, section 45C will not deem the distributions made under the Capital Return to be an unfranked dividend for income tax purposes.

Capital gains tax

CGT event C2 – section 104-25 of the ITAA 1997

56. CGT event C2 happens when a taxpayer's ownership of an intangible CGT asset ends by the asset being redeemed or cancelled (paragraph 104-25(1)(a) of the ITAA 1997).

57. Accordingly, CGT event C2 happens in relation to each GPG shareholder when their GPG shares are cancelled under the Capital Return (paragraph 104-25(1)(a) of the ITAA 1997).

Time of the CGT event

58. The time of CGT event C2 is when you enter into the contract that results in the asset ending or if there is no contract, when the asset ends (subsection 104-25(2) of the ITAA 1997).

59. In this case the cancellation of the GPG shares under the Capital Return will not happen under a contract. Accordingly, CGT event C2 happens on 5 July 2011 (the Operative Date).

Capital proceeds

60. Subsection 116-20(1) of the ITAA 1997 provides that the capital proceeds from a CGT event are the total of the money received or entitled to be received, and the market value (worked out as at the time of the event) of any other property received or entitled to be received, in respect of the CGT event happening. The capital proceeds from the cancellation is £0.3507 per GPG share.

61. Section 116-30 of the ITAA 1997 provides that in certain circumstances, the capital proceeds from a CGT event are to be replaced with the market value (worked out as at the time of the event) of the CGT asset that is the subject of the event. Under subparagraph 116-30(2)(b)(ii) of the ITAA 1997, the market value substitution rule applies if the capital proceeds from the CGT event are more or less than the market value of the asset and the CGT event is CGT event C2. As CGT event C2 applies in this case, the market value would be worked out as if the CGT event had not occurred and was never proposed to occur (subsection 116-30(3A) of the ITAA 1997).

62. The market value substitution rule in subparagraph 116-30(2)(b)(ii) of the ITAA 1997 will have no application to the Capital Return because of subsection 116-30(2B) of the ITAA 1997. This is because:

- the CGT event is CGT event C2; and
- the CGT asset that is the subject of the event is a share in a company that has at least 300 members; and
- GPG is not a company that is covered by section 116-35 of the ITAA 1997 because no individual owns, nor do up to 20 individuals own between them, directly or indirectly, for their own benefit shares in GPG carrying:
 - fixed entitlements to at least 75% of the GPG's income or at least 75% of GPG's capital; or
 - at least 75% of the voting power in GPG.

63. Accordingly, the capital proceeds from the cancellation of a GPG share will be the money received or entitled to be received by the shareholders, being £0.3507 per GPG share.

Capital gain or capital loss

64. A shareholder will make a capital gain if the capital proceeds from the cancellation of their GPG shares are more than the cost base of the GPG shares. A shareholder will make a capital loss if the capital proceeds from the cancellation are less than the reduced cost base of the GPG shares (subsection 104-25(3) of the ITAA 1997).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)
- ITAA 1936 45B(8)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1997
- ITAA 1997 104-25
- ITAA 1997 104-25(1)(a)
- ITAA 1997 104-25(2)
- ITAA 1997 104-25 (3)
- ITAA 1997 116-20(1)
- ITAA 1997 116-30
- ITAA 1997 116-30(2)(b)(ii)
- ITAA 1997 116-30(2B)
- ITAA 1997 116-30(3A)
- ITAA 1997 116-35
- ITAA 1997 Division 230
- ITAA 1997 995-1
- TAA 1953
- Copyright Act 1968
- Taxation Laws Amendment (Company Law Review) Act 1998
- UK Companies Act 2006

Related Rulings/Determinations:
CR 2004/7W
TR 2006/10

Subject references:

Capital benefit
Capital gains tax
Capital reductions
CGT events C1 – C3 end of a
CGT asset
Deemed dividends
Return of capital on shares
Share capital

Legislative references:

- Former ITAA 1936 6(1)
- Former ITAA 1936 6(1)(e)
- Former ITAA 1936 6(1)(e)(i)
- Former ITAA 1936 6(4)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)

ATO references

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