



Class Ruling

Nova Eye Medical Limited – return of capital

❶ Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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What this Ruling is about

1. This Ruling sets out the tax consequences for shareholders who received the return of share capital (return of capital) from Nova Eye Medical Limited (NEML) on 29 July 2020 (Payment Date).
2. Full details of the return of capital are set out in paragraphs 11 to 29 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you were a holder of ordinary shares in NEML who:
 - was listed on the NEML share register on 22 July 2020 (Record Date), being the date for determining entitlements to receive the return of capital
 - is a ‘resident of Australia’ as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), and
 - held your shares on capital account (that is, you neither held your NEML shares as ‘revenue assets’ nor as ‘trading stock’ (as defined in section 977-50 and subsection 995-1(1) respectively).

A holder of ordinary shares in NEML, as described in paragraph 4 of this Ruling, is referred to as an ‘NEML shareholder’.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 11 to 29 of this Ruling.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2020 to 30 June 2021.

Ruling

Sections 45A, 45B and 45C do not apply

7. The Commissioner will not make a determination under sections 45A or 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to any part of the return of capital NEML paid to you on the Payment Date.

CGT events G1 or C2 happen

8. CGT event G1 (section 104-135) happened to you when NEML paid you the return of capital in respect of the NEML shares you owned at the Record Date and continued to own at the Payment Date.

9. CGT event C2 (section 104-25) happened to you when NEML paid you the return of capital in respect of the NEML shares you owned at the Record Date and ceased to own at the Payment Date.

CGT discount

10. You can treat a capital gain made when CGT event G1 or CGT event C2 happened as a discount capital gain under Subdivision 115-A provided you acquired your NEML shares at least 12 months before the Payment Date (subsection 115-25(1)) and the other conditions in that Subdivision are satisfied.

Scheme

11. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Background

12. NEML is an Australian resident public holding company that has been listed on the Australian Securities Exchange since 1987.

13. NEML specialises in the development, manufacture and sale of ophthalmic lasers and has three distinct businesses, namely iTrack, 2RT and the Lasers and Ultrasound business. These businesses operate globally through NEML's subsidiaries in Germany, France, Japan and the US, and the subsidiaries form part of the NEML Group.

14. NEML is the head company of a tax consolidated group, which includes Adele Ellex SPV Pty Ltd (Ellex SPV).

15. NEML has grown the Lasers and Ultrasound, iTrack and 2RT businesses over many years, including through acquisitions of some business assets. To this end, NEML has undertaken numerous capital raisings including while it was a private company and since it has been listed.

16. The NEML Group's profits in some years were reinvested in its businesses.

17. Since 2002 NEML has not paid any dividends. NEML has not previously issued bonus shares or made any returns of capital.

18. As at 31 December 2019, the tax consolidated group had a franking account balance of \$3,797,472.

Sale of Ellex SPV

19. On 24 December 2019, NEML entered into a Sale and Purchase Agreement with Lumibird Group SA to sell 100% of its shares in Ellex SPV.

20. Ellex SPV is the special-purpose vehicle established by NEML to facilitate the restructure and sale of the relevant NEML subsidiaries that comprise the Lasers and Ultrasound business (Sale Business) for a total cash price of \$100 million.

21. After the sale of the Sale Business, NEML retained the iTrack and 2RT businesses and intends to continue to invest in and grow these businesses.

22. NEML received \$97.4 million, after closing adjustments, from the sale of the Sale Business (sale proceeds) and made an estimated profit of \$39 million on the sale.

23. NEML distributed \$61 million of the sale proceeds to NEML shareholders by way of return of capital of \$41.6 million and a fully franked dividend of \$19.4 million.

Return of capital

24. At NEML's extraordinary general meeting on 24 April 2020, NEML shareholders approved a return of capital of 29c per NEML share amounting to \$41.6 million.

25. NEML paid the return of capital of 29c per NEML share on the Payment Date to the shareholders listed on the NEML's share register on the Record Date. On the Payment Date NEML also paid the fully franked dividend of \$19.4 million to NEML shareholders.

26. NEML debited the entire amount of the return of capital of \$41.6 million against the company's share capital account. There was no change in either the number of NEML shares on issue or the proportionate interest of each shareholder in NEML.

Other matters

27. As at the Record Date, NEML had:

- 143.6 million ordinary shares on issue
- a paid-up share capital of \$78.311 million, and
- an estimated consolidated profit of \$30.954 million.

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28. NEML has only one class of shareholders in NEML, being ordinary shareholders, and all shares have equivalent rights.

29. The share capital account of NEML is not tainted within the meaning of Division 197.

Commissioner of Taxation

12 August 2020

Appendix – Explanation

❶ *This Explanation 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.*

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Sections 45A, 45B and 45C do not apply

30. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies. The effect of such a determination is that all or part of the distribution of capital received under the return of capital is treated as an unfranked dividend.

31. Section 45A of the ITAA 1936 applies where capital benefits are streamed to some shareholders who would derive a greater benefit from the receipt of capital than other shareholders who receive, or are likely to receive, dividends. Paragraph 45A(3)(b) of the ITAA 1936 provides that capital benefits include the distribution of share capital.

32. Although a 'capital benefit' was provided to NEML shareholders, the circumstances of the return of capital indicate that there was no streaming of capital benefits to some NEML shareholders and dividends to other NEML shareholders.

33. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the return of capital.

34. Section 45B of the ITAA 1936 applies where certain capital payments are made to shareholders in substitution for dividends. In broad terms, section 45B of the ITAA 1936 applies where:

- there is a scheme under which a person is provided with a capital benefit by a company
- under the scheme, a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit, 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 a taxpayer to obtain a tax benefit.

35. The return of capital satisfies the first two conditions listed in paragraph 34 of this Ruling. However, having regard to the relevant circumstances of the scheme, it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling NEML shareholders to obtain a tax benefit.

36. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or a part, of the payment of the return of capital.

CGT events G1 or C2 happen

37. CGT event G1 happens if a company makes a payment to a shareholder in respect of a share they own in the company, some or all of the payment is not a dividend or an amount that is taken to be a dividend under section 47 of the ITAA 1936, and the payment is not included in the shareholder's assessable income (section 104-135).

38. CGT event G1 happened to an NEML shareholder when NEML made the return of capital to them in respect of NEML shares they owned at the Record Date and continued to own at the Payment Date (section 104-135).

39. An NEML shareholder will make a capital gain from CGT event G1 happening if the amount of the return of capital of 29c per NEML share is more than the cost base of the shareholder's NEML share. If so, the capital gain is equal to the amount of the excess and the cost base and reduced cost base of the NEML share is reduced to nil (subsection 104-135(3)). No capital loss can be made from CGT event G1 (Note 1 to subsection 104-135(3)).

40. If the amount of the return of capital of 29c per NEML share is not more than the cost base of the shareholder's NEML share, the cost base and reduced cost base of the NEML share is reduced by the amount of the return of capital (subsection 104-135(4)).

41. If, after the Record Date but before the Payment Date, an NEML shareholder ceased to own an NEML share in respect of which the return of capital was payable, the right to receive the return of capital in respect of that share is retained by the NEML shareholder and is a separate CGT asset.

42. CGT event C2 happened when the return of capital was made. The right to receive the return of capital (being an intangible asset) was ended by the right being discharged or satisfied when the return of capital was made (section 104-25).

43. An NEML shareholder will make a capital gain under CGT event C2 if the capital proceeds from the ending of the right were more than the cost base of the right. The capital gain is equal to the amount of the excess. An NEML shareholder will make a capital loss if the capital proceeds from the ending of the right were less than the reduced cost base of the right. The capital loss is equal to the amount of the difference (subsection 104-25(3)).

44. In working out the capital gain or capital loss when CGT event C2 happens, the capital proceeds are equal to the amount of the return of capital (that is, 29c per NEML share) (subsection 116-20(1)).

45. The cost base of the NEML shareholder's right to receive each return of capital is worked out under Division 110 (modified by Division 112). The cost base of the right does not include the cost base or reduced cost base of the share previously owned by an NEML shareholder to the extent that it was applied in working out a capital gain or capital loss made when a CGT event happened to the share, for example, when the NEML shareholder disposed of the share after the Record Date and before the Payment Date. Therefore, if the cost base or reduced cost base of the share previously owned by an NEML shareholder has been fully applied in working out a capital gain or capital loss on the share, the right to receive the return of capital will have a nil cost base. As a result, an NEML shareholder will, in those circumstances, make a capital gain equal to the capital proceeds, being 29c per NEML share owned at the Record Date.

References*Previous draft:*

Not previously issued as a draft

- ITAA 1997 104-25(3)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 230
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(3)
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1997 104-25

ATO references

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 end of a CGT asset
 Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events G1 to G3 –
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