

CR 2006/86 - Income tax: Australian Stock Exchange Limited - proposed return of capital

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Class Ruling

Income tax: Australian Stock Exchange Limited – proposed return of capital

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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, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are 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.

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) 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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997;
- section 136-10 of the ITAA 1997; and

- section 136-25 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the holders of ordinary shares in Australian Stock Exchange Limited (ASX) and who are registered on the ASX share register on the Record Date, being the date for determining entitlements to participate in the proposed return of capital described in paragraphs 13 to 28 of this Ruling. In this Ruling, those entities are referred to as 'ASX shareholders'. This Ruling does not apply to ASX shareholders that hold their shares on revenue account.

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 13 to 28 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 6 September 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or

- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

12. This Class Ruling is withdrawn and ceases to have effect after 30 June 2007. However, the Ruling continues to apply after its withdrawal in respect of the taxation provisions ruled upon, to all entities within the specified class who enter into the specified scheme during the term of the Ruling subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

13. The scheme that is the subject of this Ruling is described below. The description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- the Class Ruling application, accompanying financial statements and other information from Ernst & Young (E&Y) dated 3 July 2006; and
- correspondence providing further particulars dated 21 July 2006, 4 August 2006 and 8 August 2006 from E&Y.

Note: Certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

14. ASX was formed in 1987 through the amalgamation of six independent stock exchanges that formerly operated in the State capital cities. The company was demutualised on 13 October 1998 and quoted on the official list of the Australian stock exchange on 14 October 1998.

15. The Board of Directors (ASX Board) and management of ASX regularly review the capital requirements of ASX. This review is undertaken from a working capital perspective, as well as from the perspective of ensuring that ASX is able to meet its prudential obligations and its corporate strategic initiatives. Where a significant event occurs which affects the capital structure and funding requirements of the business, the Board assesses whether the level of share capital employed in the business is appropriate. In the year 2000, ASX made a distribution of share capital to ASX shareholders.

16. Two significant events have occurred in recent times which has led the ASX Board to review the level of share capital employed in the business and, consequent upon this review, the ASX Board determined that ASX had share capital in excess of its current requirements.

17. The first significant event was the disposal by ASX of a non-core business investment, in August 2005. The acquisition of this investment was sourced with funds from the share capital account. The disposal released capital of approximately \$50 million.

18. The second significant event was the announcement, on 27 March 2006, of an agreed proposal to merge the businesses of ASX and SFE Corporation Limited (SFE). Shareholders of SFE subsequently voted in favour of the merger proposal at a meeting on 5 July 2006 and the merger was implemented with effect from 11 July 2006.

19. The merger with SFE required ASX to issue new share capital in excess of \$2.2 billion. As a result of this share issue, shareholders' equity as at 11 July 2006 was approximately \$2.55 billion of which approximately \$2.3 billion represented share capital.

20. After reviewing the impact of these two significant events with particular emphasis on the level of share capital employed in the ASX business, ASX Board has determined that there is surplus share capital of approximately \$100 million. The excess share capital is attributable to capital released from the two significant events described above.

21. The proposed return of capital is considered an integral part of an appropriate capital management strategy and is to be funded from the surplus cash reserves of the merged group.

22. ASX shareholders are to vote on the proposed return of capital at a General Meeting scheduled for 9 October 2006.

23. Subject to ASX shareholder approval:
- the amount of the return of capital will be \$0.585 cents for each ASX share held by ASX shareholders on the register at 5pm on the 17 October 2006 (the Record Date);
 - payment of the return of capital to ASX shareholders is to be effected on the 24 October 2006 (the Payment Date); and
 - ASX shares will trade ex-entitlement to the return of capital from the second day after the day on which the General Meeting is to be held (that is, 11 October 2006).
24. No shares will be cancelled as a result of the proposed return of capital, nor will there be any dilution to the shareholdings in ASX.
25. ASX will debit the return of capital against its share capital account.
26. ASX confirms that its share capital account, as defined in section 975-300 of the ITAA 1997, is untainted.
27. ASX currently has, and intends to maintain in the future, a dividend payout ratio of 90% of normal net profit after tax. The proposed return of capital will be made in addition to the payment of the declared final dividend in respect of the year ended 30 June 2006.
28. ASX has advised that the proposed return of capital will not impact on its ability to pay dividends in subsequent financial years.

Ruling

Distribution is not a dividend for income tax purposes

29. As the proposed return of capital will be debited to ASX's share capital account it will not be a dividend, as defined in subsection 6(1) of the ITAA 1936.

Sections 45A, 45B and 45C

30. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the proposed return of capital. Accordingly, no part of the proposed return of capital will be taken to be a dividend for income tax purposes.

Capital gains tax (CGT)

31. CGT event G1, in section 104-135 of the ITAA 1997, will happen when ASX pays the proposed return of capital of \$0.585 cents per share to ASX shareholders.

32. Under subsections 104-135(3) and (4) of the ITAA 1997, the cost base and reduced cost base of each ASX share will be reduced (but not below nil) by the amount of the proposed return of capital of \$0.585 cents per share. An ASX shareholder will make a capital gain from CGT event G1 happening to each share to the extent (if any) that the payment exceeds the share's cost base in accordance with subsection 104-135(3) of the ITAA 1997.

33. CGT event C2, in section 104-25 of the ITAA 1997, will happen when ASX makes the proposed return of capital to an ASX shareholder in respect of an ASX share they owned at the Record Date but which was disposed of before the Payment Date.

34. If CGT event C2 happens in respect of an ASX shareholder's right to the payment of the proposed return of capital amount, the ASX shareholder will make a capital gain to the extent the payment exceeds the cost base of the right. An ASX shareholder will make a capital loss to the extent the payment is less than the right's reduced cost base. Subsection 104-25(3) of the ITAA 1997 applies to both the capital gain and capital loss.

35. A non-resident ASX shareholder that receives the proposed return of capital will only make a capital gain if their share has the necessary connection with Australia (section 136-10 of the ITAA 1997). An ASX share will have the necessary connection with Australia if, at any time during the 5 years before the payment of the proposed return of capital, the non-resident ASX shareholder, together with their associates, owned 10% or more by value of the issued shares in ASX (section 136-25 of the ITAA 1997).

Appendix 1 – Explanation

❶ *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 for income tax purposes

36. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income a dividend, as defined by subsection 6(1) of the ITAA 1936, which is paid to the shareholder out of company profits.

37. As the proposed return of capital will be debited against an amount standing to the credit of ASX's confirmed untainted share capital account, it does not constitute a dividend because of the exclusion in paragraph (d) in the definition of a 'dividend' in subsection 6(1) of the ITAA 1936. That paragraph excludes a distribution from the meaning of 'dividend' if the amount of a distribution is debited against an amount standing to the credit of the company's share capital account.

38. Share capital account is relevantly defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created after 1 July 1998 where the first amount credited to the account was an amount of share capital.

39. Section 975-300 of the ITAA 1997 states that an account is not a share capital account if it is tainted as per subsections 197-50(1) and (2) of the ITAA 1997.

Sections 45A and 45B

40. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfrankable dividend that is paid by a company out of profits to a shareholder.

Section 45A – streaming of dividends and capital benefits

41. Section 45A of the ITAA 1936 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.

42. Although ASX will be providing its shareholders with a 'capital benefit', as defined in paragraph 45A(3)(b) of the ITAA 1936, the capital benefit is to be provided to all of the shareholders of ASX. The circumstances of the scheme do not indicate that there is a 'streaming' of capital benefits to 'advantaged' shareholders and of dividends to 'disadvantaged' shareholders. Accordingly, section 45A of the ITAA 1936 does not apply to the proposed return of capital and the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the proposed return of capital.

Section 45B – schemes to provide capital benefits in substitution for dividends

43. Section 45B of the ITAA 1936 applies where payments are made to shareholders in substitution for dividends. Subsection 45B(2) of the ITAA 1936 sets out the conditions under which the Commissioner will make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies. These conditions are that:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- 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) of the ITAA 1936); 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) of the ITAA 1936).

Each of the conditions is considered below.

44. The proposed return of capital will be a 'scheme' for the purposes of section 45B of the ITAA 1936.

45. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936. Relevantly, it includes a distribution to a person of share capital. As ASX proposes to debit the proposed return of capital against its untainted share capital account, its shareholders will be provided with a capital benefit.

46. A shareholder 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B of the ITAA 1936:

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend.

47. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises. A capital gain may not arise at all for certain non-resident shareholders: see paragraph 69 of this Ruling. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or in the case of a non-resident, be subject to dividend withholding tax. Therefore, as the ASX shareholders are to receive a return of capital they will generally obtain a tax benefit from the proposed return of capital.

Relevant circumstances

48. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the circumstances set out under subsection 45B(8) of the ITAA 1936 to determine whether any part of the arrangement would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit.

49. 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. The purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

50. The relevant circumstances under subsection 45B(8) of the ITAA 1936 cover both the circumstances of the company and the shareholders. In this instance, as the proposed return of capital is made to all ASX shareholders regardless of individual circumstances, paragraphs 45B(8)(c) to (h) of the ITAA 1936 do not incline for, or against, a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and (j) of the ITAA 1936, pertaining to the provision of ownership interests and demerger, are not relevant. In this case, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k) of the ITAA 1936.

51. Paragraph 45B(8)(a) of the ITAA 1936 refers to the extent to which the capital benefit is attributable to capital and profits (realised and unrealised) of the company or an associate (within the meaning of section 318 of the ITAA 1936) of the company. In this case, ASX has decided to return to ASX shareholders contributed share capital that was realised upon the sale of a significant investment and new share capital issued to effect the merger with SFE. The purpose of the proposed return of capital is to return capital that is excess to ASX's capital requirements. ASX has demonstrated, based on their dividend policy and profit position, that the distribution is attributable to share capital and not to profits.

52. Paragraph 45B(8)(b) of the ITAA 1936 refers to the pattern of distributions made by a company or an associate (within the meaning of section 318 of the ITAA 1936) of the company. Since listing, ASX has maintained a policy of paying dividends each year and intends to maintain its current dividend policy of 90% of normal net profit after tax. In the year 2000, ASX made a distribution of share capital to ASX shareholders.

53. The proposed return of capital will be made in addition to the payment of the declared final dividend in respect of the year ended 30 June 2006. Accordingly, the company's pattern of distributions does not suggest that the proposed return of capital will be made in substitution for a dividend.

54. Paragraph 45B(8)(k) of the ITAA 1936 refers to the matters in subparagraphs 177D(b)(i) to (viii) of the ITAA 1936. These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, its form and substance, and its financial and other implications for the persons involved. In this case, the practical implications of the scheme for ASX and ASX shareholders are consistent with it being, in form and substance, a distribution of share capital.

55. Therefore, having regard to the relevant circumstances of the scheme to return capital to the shareholders, as discussed in paragraphs 51 to 54 of this Ruling, it would not be concluded that the persons who enter into, or carry out, the scheme do so for a more than incidental purpose of enabling the shareholders to obtain a tax benefit. 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 proposed return of capital.

Section 45C – deeming dividends to be paid where determinations under section 45A or 45B are made

56. As the Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) of the ITAA 1936 in relation to the scheme, as described, section 45C will not deem any part of the proposed return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or of the ITAA 1997.

CGT event G1 – section 104-135

57. CGT event G1, in section 104-135 of the ITAA 1997, will happen when ASX pays the proposed return of capital amount in respect of a share a shareholder owned at the Record Date and continues to own at the Payment Date, and some or all of the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997.

58. ASX proposes to make a payment to ASX shareholders out of its untainted share capital account. This payment will not be a dividend as defined in subsection 995-1(1) of the ITAA 1997. If the proposed return of capital amount of \$0.585 cents per share is not more than the cost base of the ASX share, the cost base and reduced cost base of the share are reduced by the amount of the proposed return of capital (subsection 104-135(4) of the ITAA 1997).

59. An ASX shareholder will make a capital gain if the proposed return of capital amount is more than the cost base of their ASX share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

60. If an ASX shareholder makes a capital gain, the cost base and reduced cost base of the share are reduced to nil (subsection 104-135(3) of the ITAA 1997).

61. An ASX shareholder cannot make a capital loss under CGT event G1.

62. If the ASX share to which the payment relates was originally acquired by an ASX shareholder at least 12 months before the payment of the proposed return of capital amount, a capital gain from CGT event G1 may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

CGT event C2 – section 104-25

63. If, after the Record Date but before the Payment Date, an ASX shareholder ceases to own some, or all, of their ASX shares in respect of which the proposed return of capital is payable, the right to receive the payment in respect of each of the shares disposed of is considered to be a separate CGT asset. That right is one of the rights inherent in the share at the Record Date and is retained by the shareholder when the share is sold.

64. An ASX shareholder's right to receive the payment will be discharged or satisfied when the payment is made under the scheme, causing CGT event C2 to happen (section 104-25 of the ITAA 1997).

65. In working out the capital gain or capital loss made from CGT event C2 happening, the capital proceeds from the event will be the proposed return of capital amount (section 116-20 of the ITAA 1997).

66. The cost base of the ASX shareholder's right to receive a payment under the scheme is worked out in accordance with Division 110 of the ITAA 1997. However, the cost base of the right will be nil if the full cost base (or reduced cost base) of the share previously held by the ASX shareholder has been applied in working out a capital gain or loss when a CGT event happened to the share – for example, when the ASX shareholder disposed of the share. In these cases, the ASX shareholder will generally make a capital gain equal to the amount paid under the scheme (the proposed return of capital amount).

67. Because the right to a payment, such as the proposed return of capital, was inherent in the ASX share during the time it was owned, the right is considered to have been acquired at the time when the share was acquired (section 109-5 of the ITAA 1997).

68. Consequently, if the ASX share to which the payment relates was originally acquired by an ASX shareholder at least 12 months before the payment of the proposed return of capital amount, a capital gain from CGT event C2 happening to the right may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

Non-resident shareholders

69. A non-resident ASX shareholder will make a capital gain from the proposed return of capital only if their ASX share has the necessary connection with Australia (section 136-10 of the ITAA 1997). Under category 5 of the table in section 136-25 of the ITAA 1997, an ASX share will have the necessary connection with Australia if, at any time during the 5 years before the payment of the proposed return of capital, the ASX shareholder, together with their associates, owned 10% or more by value of the ASX shares.

Appendix 2 – Detailed contents list

70. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital benefit
- capital reductions
- dividend substitutions
- return of capital
- share capital

Legislative references:

- ITAA 1936 6(1)
 - ITAA 1936 44(1)
 - ITAA 1936 45A
 - ITAA 1936 45A(2)
 - ITAA 1936 45A(3)(b)
 - ITAA 1936 45B
 - ITAA 1936 45B(2)
 - ITAA 1936 45B(2)(a)
 - ITAA 1936 45B(2)(b)
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 - ITAA 1936 45B(3)
 - ITAA 1936 45B(5)
 - ITAA 1936 45B(8)
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 - ITAA 1936 177D(b)(i)
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 - ITAA 1936 177D(b)(viii)
 - ITAA 1936 318
 - ITAA 1997 104-25
 - ITAA 1997 104-25(3)
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 - ITAA 1997 104-135(3)
 - ITAA 1997 104-135(4)
 - ITAA 1997 109-5
 - ITAA 1997 Div 110
 - ITAA 1997 Subdiv 115-A
 - ITAA 1997 115-25(1)
 - ITAA 1997 116-20
 - ITAA 1997 136-10
 - ITAA 1997 136-25
 - ITAA 1997 197-50(1)
 - ITAA 1997 197-50(2)
 - ITAA 1997 975-300
 - ITAA 1997 995-1(1)
 - TAA 1953 Sch 1 357-75(1)
 - Copyright Act 1968
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ATO references

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