

CR 2007/120 - Income tax: proposed return of capital: Centennial Coal Company Limited

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Class Ruling

Income tax: proposed return of capital: Centennial Coal Company Limited

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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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided 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.

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. In this Ruling, the scheme is a proposed return of share capital (the Scheme) by Centennial Coal Company Limited (Centennial).

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; and
 - section 855-10 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders of Centennial who are registered on the Centennial share register on the Record Date, being the date for determining entitlements to the proposed return of capital described in paragraphs 13 to 23 of this Ruling. In this Ruling, those entities are referred to as 'Centennial shareholders'. This Ruling does not apply to Centennial shareholders who 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 23 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 2007 to 30 June 2008. However, the Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

9. 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.

10. If this 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)).

11. If this Ruling is inconsistent with an earlier private ruling the private ruling is taken not to have been made if, when the 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.

12. 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).

Scheme

13. The following description of the scheme is based on information provided by the applicant.

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. Centennial is an Australian resident public company which listed on the Australian Securities Exchange (ASX) in 1994. It is the head company of a consolidated group.

15. The Centennial group is primarily involved in the mining and marketing of coal.

16. During October 2007 Centennial sold its Anvil Hill mining assets and its shareholding in Austral Coal Limited. The proceeds from these sales totalled approximately \$932 million. The cost of acquiring the Anvil Hill mining assets and the Austral Coal Limited shares was approximately \$575 million. These acquisitions were funded by capital raised from Centennial's shareholders.

17. As a result of the sale of these two significant assets Centennial's management have come to the conclusion that a large portion of funds raised in recent years are no longer required. As such, and given that the company has no plans to undertake any new projects or acquisitions, Centennial's management considered it prudent that capital not otherwise utilised be returned to shareholders.

18. Centennial intends to apply the surplus capital from the asset sales to reduce bank debt and to return capital to its shareholders.

19. Centennial proposes to undertake a return of capital of \$1.88 per share. The proposed return of capital received shareholder approval at Centennial's Annual General Meeting (AGM) held on 30 November 2007.

20. The proposed return of capital is to be debited to the share capital account.

21. Centennial has confirmed that its share capital account is not tainted as governed under Division 197 of the ITAA 1997 and that there have been no transfers from other accounts to Centennial's share capital account.

22. Centennial has paid interim and final dividends in the past six years and intends to continue with its current dividend policy of paying semi-annual dividends following the payment of the proposed return of capital.

23. Centennial has advised that as at 31 August 2007 there were 305,589,725 fully paid ordinary shares held by 10,330 shareholders. Approximately 57% of the shares were held by resident shareholders and 43% held by non-resident shareholders.

Ruling

Distribution is not a dividend

24. The proposed return of share capital will not be a dividend as defined in subsection 6(1).

Sections 45A and 45B

25. The Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) that section 45C 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

26. Capital gains tax (CGT) event G1 (section 104-135 of the ITAA 1997) will happen to a Centennial shareholder who is registered as a Centennial shareholder on the Record Date and continues to own the share at the time when the proposed return of capital is paid.

27. CGT event C2 (section 104-25 of the ITAA 1997) will happen to a Centennial shareholder who is registered as a Centennial shareholder on the Record Date but who has ceased to own their Centennial share by the date when the proposed return of capital is paid.

Foreign resident shareholders

28. A foreign resident Centennial shareholder who is paid a return of capital disregards any capital gain from CGT event G1 happening if their shares in Centennial are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

29. A foreign resident Centennial shareholder who is paid a return of capital disregards any capital gain or loss from CGT event C2 happening as the right to the payment is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Commissioner of Taxation19 December 2007

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

30. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to a resident shareholder out of profits derived by the company from any source and paid to a non-resident shareholder from an Australian source.

31. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, this broad definition is limited by later paragraphs in the definition, which expressly excludes certain items from being a dividend for income tax purposes.

32. Relevantly, paragraph (d) of the definition within subsection 6(1) excludes any distribution which is debited against the share capital account of a company. As the return of capital is to be debited against Centennial's untainted share capital account then the return of capital would not be a dividend as defined in subsection 6(1).

33. Consideration has been given to subsection 6(4), which provides that paragraph (d) of the definition of dividend does not apply if the capital distribution forms part of an arrangement where the company raises share capital from certain shareholders and then makes a capital distribution to other shareholders. However, in the scheme described, Centennial has advised that it has no plans to undertake a corresponding share capital raising and, therefore, subsection 6(4) does not apply to the proposed return of capital.

Anti-avoidance provisions

34. 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 amount received by the shareholders as an unfranked dividend.

Section 45A – streaming of dividends and capital benefits

35. Section 45A applies in circumstances where the 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.

36. Centennial will provide all its ordinary shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b)), with the capital benefit being provided to all shareholders in direct proportion to their individual shareholding. As all shareholders will benefit equally from the return of capital there is no indication of 'streaming' of capital benefits to some shareholders and not to others.

37. Accordingly, section 45A does not apply to the proposed return of capital and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies.

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

38. Section 45B applies where certain amounts of a capital nature are provided to shareholders in substitution for dividends.

39. Subsection 45B(2) sets out the conditions under which the Commissioner may make a determination under subsection 45B(3) that section 45C 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));
- 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)).

Each of these conditions is considered below.

Scheme

40. The proposed return of capital is a 'scheme' within the broad meaning of that term.

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

Tax benefit

42. A shareholder 'obtains' a 'tax benefit', as defined in subsection 45B(9), where:

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

by the taxpayer would, apart from the operation of section 45B:

- 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.

43. 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 share there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only the extent (if any) to which the capital distribution exceeds the cost base of the share that a capital gain arises. A capital gain may not arise at all for certain foreign resident shareholders. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a non-resident, subject to dividend withholding tax under section 128B of the ITAA 1936. Therefore, Centennial shareholders will obtain tax benefits from the proposed return of capital.

Relevant circumstances

44. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) to determine whether any part of the scheme was entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

45. The test of purpose is an objective one. The question is whether 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 requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

46. The purpose which causes section 45B of the ITAA 1936 to apply may be the purpose of any party to the scheme. In this case, however, the Commissioner is concerned only with the purpose of Centennial. The Commissioner at this stage cannot ascertain the purposes of Centennial's numerous shareholders, all of whom were eligible to vote on the proposed return of capital under section 256C of the *Corporations Act 2001* and all of whom will participate in the proposed return of capital. Nevertheless, in a case such as this, an objective conclusion as to the purpose of the company should, generally speaking, not be inconsistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who voted in favour of the proposal.

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

48. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital or profits (realised and unrealised) of the company or associate (within the meaning of section 318) of the company. In this case, Centennial will be returning contributed share capital to its shareholders that was realised on the sale of a significant portion of its business undertaking, the Anvil Hill mining assets and the shareholding in Austral Coal Limited. Centennial states that following these divestments it is of the opinion that its cash holdings are in excess of its current and future capital requirements. The proposed return of capital to be provided to shareholders is wholly attributable to excess share capital arising from the sale of the Anvil Hill mining assets and the Austral Coal Limited shares. No part of the return is attributable to specific profits, realised or unrealised, of Centennial.

49. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company. Centennial has paid regular interim and final dividends in the past six years and intends to continue with its current dividend policy of paying semi-annual dividends following the payment of the proposed return of capital. Accordingly, the company's pattern of distributions does not suggest that the proposed return of capital will be made in substitution for a dividend.

50. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to (viii). 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, the timing of the scheme, its form and substance, and the financial and other implications for the parties involved.

51. Centennial has demonstrated that the scheme, being a proposed return of capital to its shareholders, seeks to legitimately return an amount of excess share capital raised. The return will release capital which Centennial has stated is excess to its current needs. In this case, the practical implications of the scheme are consistent with it being, in form and substance, a return of capital.

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

Application of section 45C

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

CGT event G1 – section 104-135

54. CGT event G1 (section 104-135 of the ITAA 1997) will happen when Centennial pays the return of capital in respect of each share that a Centennial shareholder owns at the time of the payment. This occurs because the payment will not be a dividend as defined in subsection 995-1(1) of the ITAA 1997, nor will it be considered a dividend under section 47 of the ITAA 1936.

55. If the return of capital of \$1.88 per share is not more than the cost base of the Centennial share at the time of the payment, the cost base and reduced cost base of the share are reduced (but not below nil) by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

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

57. Where a Centennial shareholder makes a capital gain as a result of the return of capital, the cost base and the reduced cost base of the Centennial share are reduced to nil (subsection 104-135(3) of the ITAA 1997). A Centennial shareholder cannot make a capital loss when CGT event G1 happens (subsection 104-135(3) of the ITAA 1997).

58. If the Centennial share was acquired by the shareholder at least 12 months before the time of payment of the return of capital, a capital gain from CGT event G1 will 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

59. The right to receive the return of capital is one of the rights inherent in the Centennial share at the Record Date. If, after the Record Date but before the payment date, a Centennial shareholder ceases to own some, or all, of their shares in Centennial, the right to receive the return of capital is retained by the shareholder and is considered to be a separate CGT asset.

60. CGT event C2 (section 104-25 of the ITAA 1997) happens when the return of capital is paid and the right to receive that payment ends.

61. A Centennial shareholder will make a capital gain if the capital proceeds from the ending of the right are more than the cost base of the right (subsection 104-25(3) of the ITAA 1997). The capital proceeds will be the amount of the return of capital (section 116-20 of the ITAA 1997).

62. The cost base of the Centennial shareholder's right to receive the return of capital is worked out in accordance with Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). The cost base of the right does not include the cost base (or reduced cost base) of the share they previously owned. As the Centennial shareholder will have paid nothing for the right, the cost base of the right will be nil. Therefore, the Centennial shareholder will make a capital gain equal to the amount of the return of capital.

63. As the right to receive the return of capital amount is inherent in the Centennial share during the time it is owned, the right is considered to have been acquired at the time when the share was acquired (section 109-5 of the ITAA 1997).

64. If the Centennial share to which the payment relates was originally acquired by the former Centennial shareholder at least 12 months before the payment of the return of capital, a capital gain from CGT event C2 happening to the right will 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).

Foreign resident shareholders

65. A foreign resident shareholder disregards any capital gain or capital loss made from a CGT event that happens in relation to a CGT asset that is not 'taxable Australian property' (section 855-10 of the ITAA 1997). The term 'taxable Australian property' is defined in the table in section 855-15 and covers five categories of CGT assets.

66. Broadly these categories are:

- (1) taxable Australian real property which is held directly;
- (2) indirect Australian real property interests which are not covered by item 5 of the table in section 855-15 of the ITAA 1997;
- (3) CGT assets used in carrying on a business through a permanent establishment in Australia, and which are not covered by item 1, 2 or 5 of the table in section 855-15 of the ITAA 1997;
- (4) options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table in section 855-15 of the ITAA 1997; and
- (5) CGT assets covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

67. A Centennial foreign resident shareholder who receives a payment of the return of capital and makes a capital gain from CGT event G1 happening to their Centennial share, disregards the capital gain if the Centennial shares are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

68. A Centennial foreign resident shareholder who has a right to the payment of the return of capital and makes a capital gain or capital loss from CGT event C2 happening to that right, disregards the capital gain or capital loss as the right is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital gains tax
- capital streaming
- dividend streaming arrangements
- dividends
- foreign residents
- return of capital on shares
- share capital

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 6(4)
- 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)
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- ITAA 1936 45B(9)
- ITAA 1936 45C
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- ITAA 1936 177D(b)(i)
- ITAA 1936 177D(b)(ii)
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- ITAA 1936 177D(b)(vii)
- ITAA 1936 177D(b)(viii)
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- ITAA 1997 104-25
- ITAA 1997 104-25(3)
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- ITAA 1997 104-165(3)
- ITAA 1997 109-5
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20
- ITAA 1997 Div 197
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 995-1(1)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Corporations Act 2001 256C
- Copyright Act 1968

ATO references

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 Income Tax ~~ Capital Gains Tax ~~ cost base and reduced cost base