


CR 2012/91 - Income tax: return of capital Multiplex Acumen Vale Syndicate Limited

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Class Ruling

Income tax: return of capital Multiplex Acumen Vale Syndicate 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, 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 provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provisions

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 6(4) of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 855-10 of the ITAA 1997;
- section 855-15 of the ITAA 1997; and
- section 995-1 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Multiplex Acumen Vale Syndicate Limited (MAVSL) who:

- (a) were ordinary shareholders of MAVSL on the record date and who continued to hold all the ordinary shares at the date the return of capital payment was made (MAVSL shareholder);
- (b) participated in the scheme under which MAVSL made the return of capital payment to its ordinary shareholders;
- (c) held their MAVSL shares neither as 'revenue assets' (as defined in section 977-50 of the ITAA 1997) nor as 'trading stock' (as defined in subsection 995-1(1) of the ITAA 1997) – that is, broadly on capital account; and
- (d) were not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their MAVSL shares.

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

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 26 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 2012 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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 a number of documents provided to the Commissioner. These documents or relevant parts of them, as the case may be, form part of and are to be read with this description. The documents include:

- the request for a Class Ruling from MAVSL dated 3 August 2012;
- MAVSL's prospectus (the Prospectus) dated 16 August 2005;
- MAVSL's Audited June 2012 consolidated accounts; and
- further correspondence provided by MAVSL.

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

10. MAVSL is an Australian incorporated unlisted company.

11. MAVSL is the head company of a tax consolidated group which also consists of Brookfield Multiplex Vale Landowner Pty Limited (BMVL), formally Multiplex Acumen Vale Landowner Pty Limited. MAVSL provides finance to BMVL.

12. The main activities of BMVL are the sub-division, development and sale of a parcel of land (the Project). The Project commenced in January 2004 and, it is now estimated that the Project will complete sale of its land lots in December 2012.

13. In its prospectus dated 16 August 2005, MAVSL outlined its intention to progressively pay franked dividends and returns of capital to shareholders following the completion of various stages of the Project.

Return of capital

14. Under the Prospectus, the discretion for MAVSL to return capital to MAVSL shareholders is held by the Directors of MAVSL, but is subject to the approval of an ordinary resolution by shareholders. At the Annual General Meeting held on 25 November 2011, a resolution was passed by the shareholders which gave the Directors a discretion up until 31 December 2012 to approve the balance of the return of capital.

15. The Record Date for a shareholder to be eligible for the return of capital was 24 September 2012. The Payment Date was 28 September 2012.

16. MAVSL made a capital distribution of 17.00 cents per share (totalling \$5,100,017) to its shareholders.

17. As a result of the return of capital, there will be no change in either the number of MAVSL shares on issue held by each MAVSL shareholder or the proportionate interest of each shareholder in MAVSL.

18. The return of capital was funded using MAVSL's excess cash reserves and was debited against MAVSL's share capital account.

19. The source of the funds that enabled MAVSL to make the capital return are loan funds repaid by BMVL to MAVSL out of monies received from the sale of underlying properties by BMVL.

Other matters

20. MAVSL has previously made dividend distributions and capital distributions to shareholders.

21. The Board of Directors will consider the payment of further dividends (if any) in the light of the results for the period and the likely performance of the companies for the remainder of the financial year to 30 June 2013.

22. Under the Prospectus, MAVSL will be wound up following the completion of the Project. Once the remaining land lots are sold profits (if any) will be distributed to all shareholders and the capital returned to shareholders. This is currently expected to occur prior to 31 December 2012.

23. As at 30 June 2012, there were 30,000,100 MAVSL shares on issue. The only entries to its share capital account are in respect of the subscriptions for shares (as reduced for capital raising costs and the previous returns of capital payments). No other amounts have been credited or transferred to the share capital account.

24. As at 30 June 2012, the balance of MAVSL's share capital account was \$10,233,512.

25. As at 30 June 2012, a total of 394 separate investors, including a small percentage that are foreign residents, held ordinary shares in MAVSL.

26. MAVSL has confirmed that its share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (within the meaning of Division 197 of the ITAA 1997).

Ruling

Distribution is not a dividend

27. The return of capital is not a dividend, as defined in subsection 6(1).

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

28. The Commissioner will not make a determination under section 45A that section 45C applies to the whole or any part of the return of capital.

29. The Commissioner will not make a determination under section 45B that section 45C applies to the whole or any part of the return of capital.

Capital gains tax

30. CGT event G1 (section 104-135 of the ITAA 1997) happens when MAVSL pays the return of capital to a shareholder in respect of a MAVSL share they owned at the Record Date and continued to own at the Payment Date.

Foreign resident shareholder

31. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event G1 happened disregards (under subsection 855-10(1) of the ITAA 1997) any capital gain from CGT event G1 happening if their shares in MAVSL are not 'taxable Australian property', as defined in section 855-15 of the ITAA 1997.

Commissioner of Taxation

17 October 2012

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

32. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholder 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).

33. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (d) specifically excludes a distribution from the definition of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the share capital account of the company.

34. 'Share capital account' is 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.

35. Subsection 975-300(3) of the ITAA 1997 states that an account is generally taken not to be a share capital account if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies is transferred to the account and the account is not already tainted.

36. The return of capital was wholly debited against MAVSL's share capital account. There have been no transfers into MAVSL's 'share capital account', as defined in section 975-300 of the ITAA 1997, which would cause MAVSL's share capital account to be tainted (in terms of section 197-50 of the ITAA 1997) or prevent MAVSL's share capital account from being treated as a share capital account.

37. Therefore, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies and the return of capital is not a dividend.

Anti-avoidance provisions

38. Sections 45A and 45B are two anti-avoidance provisions which, if either 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

39. 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.

40. MAVSL will provide its shareholders with a 'capital benefit', as defined in paragraph 45A(3)(b), and the capital benefit is to be provided to all MAVSL shareholders in the same proportion as 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.

41. 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 to the whole or any part of the return of capital amount.

Section 45B – schemes to provide capital benefits

42. Section 45B applies where certain capital payments, including a return of capital, 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, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

Each of these conditions is considered in paragraphs 43 to 58 of this Ruling.

Scheme

43. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal.

44. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). It states that a person is provided with a capital benefit if:

- an ownership interest in a company is issued to the person;
- there is a distribution to the person of share capital; or
- the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.

45. As the return of capital is to be debited to MAVSL's share capital account, it will provide shareholders with a capital benefit under paragraph 45B(5)(b).

Tax benefit

46. A relevant taxpayer 'obtains a tax benefit', as defined in subsection 45B(9), 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, 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 instead had been a dividend.

47. The distribution to MAVSL's ordinary shareholders is a return of capital and, therefore, constitutes a capital benefit. In the event that the relevant distribution were a dividend rather than a capital benefit, it is likely that the amount of tax payable by MAVSL's shareholders would be greater than is payable in respect of the return of capital payment (that payment being the capital benefit). Consequently, the receipt of the capital benefit is a 'tax benefit'.

48. 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 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 foreign resident be subject to dividend withholding tax under section 128B. Therefore, MAVSL shareholders will obtain a tax benefit from the return of capital.

Relevant circumstances

49. Paragraph 45B(2)(c) requires the Commissioner to consider the 'relevant circumstances' of the scheme as set out in subsection 45B(8). Considering these circumstances determines whether any part of the scheme is entered into for a purpose, other than an incidental purpose, of enabling the relevant taxpayer (that is an ordinary shareholder in MAVSL) to obtain a tax benefit.

50. The test of purpose is an objective one. The question is whether it would be concluded that a person who enters into or carries out the scheme does so for the purpose of obtaining a tax benefit for the relevant taxpayer. This requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

51. The purpose which causes section 45B 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 MAVSL. The Commissioner cannot ascertain the purposes of MAVSL's numerous shareholders, all of whom are eligible to vote on the return of capital under section 256C of the *Corporations Act 2001*, and all of whom will participate in the 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 will vote in favour of the payment.

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

53. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital and profits (realised or unrealised) of the company or an associate (within the meaning of section 318) of the company.

54. The return of capital is not attributable to the profits of MAVSL as most of the profits have been, and will continue to be, returned to MAVSL shareholders as dividends; this is supported by MAVSL's total dividend payments since the commencement of the Project and the near completion of the Project as at 30 June 2012. Accordingly, the return of capital is attributable to capital only and not to any realised or unrealised profits of MAVSL.

55. 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. MAVSL has paid dividends between January 2007 and February 2011 which were paid out of profits following the receipt of dividends from BMVL. MAVSL has outlined in the Prospectus an intention to progressively pay franked dividends and to return capital to shareholders following the completion of various stages of the Project. Overall, the pattern of distributions made by MAVSL does not suggest that the return of capital is to be made in substitution for dividends.

56. 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.

57. In this case, in light of MAVSL's business model, it is considered that the capital distributed under the return of capital is in excess of MAVSL's ongoing operating requirements. Furthermore, as the return of capital was applied to all the ordinary shareholders of MAVSL, the form and substance of MAVSL's return of capital does not lead to a conclusion that the requisite purpose exists that the scheme is to be carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

58. It cannot be concluded that MAVSL or participating MAVSL shareholders entered into, or carried out, the scheme for the purpose of enabling the shareholders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole or any part of the return of capital.

Section 45C

59. 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

60. CGT event G1 (section 104-135 of the ITAA 1997) will happen when MAVSL pays the return of capital to a MAVSL shareholder in respect of an ordinary share they own at the Record Date and continue to own at the Payment Date.

61. Where the return of capital payment of 17.00 cents per share is less than or equal to the cost base of the MAVSL share at the time of the payment, the cost base and reduced cost base of the share are reduced by the amount of the return of capital payment (subsection 104-135(4) of the ITAA 1997).

62. A MAVSL shareholder makes a capital gain if the return of capital payment of 17.00 cents per share is more than the cost base of the MAVSL share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

63. If a MAVSL shareholder makes a capital gain, the cost base and reduced cost base of the share are subsequently reduced to nil (subsection 104-135(3) of the ITAA 1997). A MAVSL shareholder cannot make a capital loss when CGT event G1 happens.

64. If the MAVSL share to which the payment relates was acquired by a MAVSL shareholder at least 12 months before the payment of the return of capital, a capital gain made when CGT event G1 happens 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 shareholder

65. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'. As stated in paragraph 63 of this Ruling, a MAVSL shareholder cannot make a capital loss when CGT event G1 happens.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; CR 2008/17;
CR 2010/69; CR 2011/107

Subject references:

- capital gains tax
- dividends
- return of capital on shares

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)(a)
- ITAA 1936 45B(2)(b)
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- ITAA 1936 45B(5)
- ITAA 1936 45B(5)(b)
- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(a)
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- ITAA 1936 45B(8)(k)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 128B
- ITAA 1936 177A(1)
- ITAA 1936 177D(b)(i)
- ITAA 1936 177D(b)(ii)
- ITAA 1936 177D(b)(iii)
- ITAA 1936 177D(b)(iv)
- ITAA 1936 177D(b)(v)
- ITAA 1936 177D(b)(vi)
- ITAA 1936 177D(b)(vii)
- ITAA 1936 177D(b)(viii)
- ITAA 1936 318
- ITAA 1997
- 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(1)
- ITAA 1997 Div 197
- ITAA 1997 197-50
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 975-300
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001 256C

ATO references

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