


# ***CR 2014/41 - Income tax: Aviva Corporation Limited: return of capital***

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## Class Ruling

### Income tax: Aviva Corporation Limited: return of capital

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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

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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)
  - 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
  - section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997)
  - section 104-135 of ITAA 1997
  - Division 115 of the ITAA 1997, and
  - section 855-10 of the ITAA 1997.

All subsequent 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 are the holders of ordinary shares in Aviva Corporation Limited (Aviva) who:

- were listed on the share register of Aviva on 24 March 2014 (record date)
- held their ordinary shares in Aviva (Aviva shares) on capital account, and
- were not subject to taxation of financial arrangement rules in Division 230 of the ITAA 1997 in relation to gains and losses on their Aviva 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, a person belonging to this class of entities is referred to as an Aviva shareholder.

## **Qualifications**

4. 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 7 to 26 of this Ruling.

5. 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.

## **Date of effect**

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6. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

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7. 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 Freedom of Information legislation.

8. Aviva is an Australian resident company and has been listed on the Australian Securities Exchange (ASX) since 21 April 1994.

9. On 20 January 2014 Aviva announced to the ASX that it had entered into a share purchase agreement to acquire all the shares in Decimal Group Pty Ltd (Decimal). The acquisition of Decimal was completed on 11 April 2014. After the acquisition, Aviva changed its name to Decimal Software Limited and changed the nature and scale of its activities to become a technology provider to the financial services industry.

10. During the course of the financial year ended 30 June 2013, Aviva sold its mineral exploration and development projects in Kenya and Australia. Subsequently, Aviva sold its coal project in Botswana (Mmamantswe Coal Project). Following this, Aviva did not have any active projects.

### Sale of business

11. In October 2012 Aviva disposed all its Kenyan gold and base metal assets (Kenya Project) through sale of its subsidiary Aviva Mining Kenya Pty Ltd to an unrelated entity in exchange for a cash payment of \$20.1 million. The accounting profit recognised on sale was \$11,765,368.

12. As part of the agreement a further \$10 million is due to Aviva if a compliant indicated resource of 3 million ounces or more is declared over the project areas. Aviva confirmed this is unlikely to occur.

13. In February 2013 Aviva sold its wholly owned subsidiary Coolimba Power Pty Ltd (Coolimba Power) to an unrelated entity for a nominal amount of \$1. Aviva made an accounting loss of \$10,499,999. Under the sale agreement, Aviva may receive a payment of \$1 million if the purchaser is able to achieve financial close to construct a coal or gas project under Coolimba Power project approvals. Aviva confirmed this is unlikely to occur.

14. On 29 April 2013 Aviva announced that it had entered into an agreement for the sale of the Mmamantswe Coal Project to an unrelated entity, for a cash consideration of \$3.5 million. Shareholder approval was obtained at a general meeting on 9 July 2013 and the sale was completed on 12 July 2013. Aviva made an accounting loss on disposal of \$7,719,000.

15. The Kenya Project, Coolimba Power project and Mmamantswe Coal Project, were solely funded through capital raisings. The total funds raised through capital placements since 2004 was \$40.7 million.

## **Return of capital**

16. At a general meeting on 14 March 2014, a resolution was passed approving a reduction in Aviva's share capital by way of a pro rata distribution to shareholders of \$0.06 per share (total return of \$11,519,597).

17. The return of capital was paid on 31 March 2014 (payment date) to all Aviva ordinary shareholders on the share capital register as at the record date.

18. The return of capital was sourced from Aviva's existing excess cash reserves.

19. The return of capital was recorded as a debit to Aviva's share capital account. There was no change in either the number of Aviva shares on issue or the proportionate interest of each Aviva shareholder in Aviva immediately after the payment date.

20. The reduction of share capital is a condition precedent to the acquisition of Decimal.

## **Capital structure**

21. As at 11 March 2014, Aviva has 191,993,287 fully paid up ordinary shares on issue and 11,500,000 unlisted options. The total value of issued capital before the reduction of capital was \$48,211,296.

## **Other matters**

22. Aviva has never paid a dividend to its shareholders.

23. None of the Aviva shareholders acquired their shares in Aviva before 20 September 1985.

24. Aviva's interim financial report for the year ended 31 December 2013 discloses accumulated losses of \$25,719,298.

25. Aviva 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.

26. Aviva confirmed that, at the time the return of capital payment was made, an Aviva share was not an 'indirect Australian real property interest' (as defined in section 855-25 of the ITAA 1997).

## **Ruling**

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### **Distribution is not a dividend**

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

### **Application of sections 45A, 45B and 45C of the ITAA 1936**

28. The Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the return of capital.

29. The Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the return of capital.

### **Capital gain (CGT) consequences**

#### ***CGT event G1***

30. CGT event G1 happened when Aviva paid the return of capital to an Aviva shareholder in respect of an Aviva share owned by the shareholder at the record date which the shareholder continued to own at the payment date (section 104-135 of the ITAA 1997).

31. An Aviva shareholder made a capital gain when CGT event G1 happened if the return of capital amount received for each Aviva share exceeded the cost base of that share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997). No capital loss can be made when CGT event G1 happens.

#### ***CGT event C2***

32. CGT event C2 happened when Aviva paid the return of capital to an Aviva shareholder in respect of an Aviva share that they own at the record date but which they cease to own before the payment date (section 104-25 of the ITAA 1997).

33. An Aviva shareholder made a capital gain if the capital proceeds from the ending of the right are more than the cost base of the right. The capital gain is equal to the amount of excess. An Aviva shareholder made a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right. The capital loss is equal to the amount of the difference (subsection 104-25(3) of the ITAA 1997).

## ***Discount capital gain***

34. If an Aviva shareholder acquired their shares at least 12 months before the payment of the capital reduction amount, any capital gain made 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).

## **Foreign resident shareholders**

35. An Aviva shareholder who is a foreign resident just before CGT event G1 happened disregards any capital gain made when CGT event G1 happened if their Aviva shares did not constitute 'taxable Australian property' (section 855-10 of the ITAA 1997).

36. An Aviva shareholder who is a foreign resident just before CGT event C2 happened disregards any capital gain or loss made when CGT event C2 happened if their right to the return of capital is not in respect of 'taxable Australian property' (section 855-10 of the ITAA 1997).

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**Commissioner of Taxation**

7 May 2014

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## **Appendix 1 – Explanation**

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**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**

37. 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).

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

39. '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 on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

40. Subsection 975-300(3) of the ITAA 1997 states that an account is not a share capital account if it is tainted.

41. The return of capital was debited to Aviva's share capital account. As the share capital account of Aviva was not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies to exclude the distribution from being treated as a dividend under subsection 6(1).

### **Application of sections 45A, 45B and 45C of the ITAA 1936**

42. Sections 45A and 45B are 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 amounts received by Aviva shareholders as an unfranked dividend paid by the company out of profits.

### **Section 45A – streaming of dividends and capital benefits**

43. Section 45A applies where capital benefits are streamed to certain shareholders (advantaged shareholders), who derive a greater benefit from the receipt of capital than other shareholders (disadvantaged shareholders) and the disadvantaged shareholders received, or are likely to receive, dividends.



44. Although a 'capital benefit', as defined in paragraph 45A(3)(b), is provided to participating Aviva shareholders under the return of capital, the capital benefit was provided to all shareholders in the same proportion as their shareholdings in Aviva. Consequently, there are no advantaged or disadvantaged shareholders as contemplated by subsection 45A(1).

45. Accordingly, section 45A does 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 return of capital.

### ***Section 45B – scheme to provide capital benefits***

46. 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 (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 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 47 to 55 of this Explanation.

### ***Scheme to provide capital benefits***

47. A 'scheme' for the purposes of section 45B is defined under subsection 995-1(1) of the ITAA 1997 to include any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal. The return of capital constitutes a scheme.

48. 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 provided 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.

49. The return of capital at the rate of \$0.06 per share following the disposal of a number of projects undertaken by Aviva, will constitute a scheme for the provision of a capital benefit under paragraph 45B(5)(b).

### ***Tax benefit***

50. A relevant taxpayer 'obtains a tax benefit' for the purposes of paragraph 45B(2)(b) as defined in subsection 45B(9) if:

- the amount of tax payable, or
- any other amount payable under the ITAA 1936 of 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 had instead been a dividend.

51. As discussed in paragraph 49 of this Explanation, the return of capital to shareholders is a capital benefit. The return of capital would ordinarily be subject to the CGT provisions. Unless the amount of 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. 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, an Aviva shareholder would obtain a tax benefit from the return of capital.

### ***Relevant circumstances***

52. 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 if 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.

53. The test for 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 their 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.

54. The purpose which causes section 45B to apply may be the purpose of any party to the scheme.

55. Having regard to the relevant circumstances of the scheme, it cannot be concluded that the scheme was entered into for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the return of capital.

## **Capital gains tax consequences**

### ***CGT event G1***

56. CGT event G1 happened when Aviva made the return of capital payment to an Aviva shareholder in respect of a share that the shareholder owned at the record date and continued to own at the time of payment (section 104-135 of the ITAA 1997).

57. An Aviva shareholder made a capital gain if the return of capital is more than the cost base of the Aviva share. The amount of the capital gain is equal to the excess (subsection 104-135(3) of the ITAA 1997).

58. If an Aviva shareholder made a capital gain when CGT event G1 happened, the cost base and reduced cost base of the Aviva share is reduced to nil. An Aviva shareholder cannot make a capital loss when CGT event G1 happened (subsection 104-135(3) of the ITAA 1997).

59. If the return of capital (\$0.06 per share) is equal to or less than the cost base of the Aviva share at the payment date, the cost base and reduced cost base of the share will be reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

60. A capital gain made when CGT event G1 happened will be eligible to be treated as a discount capital gain under Division 115 of the ITAA 1997 provided that the shareholder acquired the Aviva share at least 12 months before the return of share capital payment was made (subsection 115-25(1) of the ITAA 1997) and the other conditions of that Division are satisfied.

### ***CGT event C2***

61. The right to receive the payment of the return of capital is one of the rights inherent in an Aviva share at the record date. If, after the record date but before the payment date, an Aviva shareholder ceases to own some, or all, of their shares in Aviva, the right to receive the payment of the return of capital in respect of each of the shares disposed of will be retained by the shareholder and is considered to be a separate CGT asset.

62. CGT event C2 happened when the return of capital payment was made (section 104-25 of the ITAA 1997).

63. An Aviva shareholder made a capital gain if the capital proceeds from the ending of the right are more than its cost base. The capital gain is equal to the amount of excess. An Aviva shareholder made a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right. The capital loss is equal to the amount of the difference (subsection 104-25(3) of the ITAA 1997).

64. In working out the capital gain or capital loss made when CGT event C2 happened, the capital proceeds will be the amount of the return of capital (\$0.06 per share) (subsection 116-20(1) of the ITAA 1997).

65. The cost base of the Aviva shareholders' right to receive the return of capital is worked out under 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 previously owned by an Aviva shareholder that was applied in working out a capital gain or capital loss made when a CGT event happened to the share – for example when the Aviva shareholder disposed of the share after the record date.

66. Therefore, if the entire cost base or reduced cost base of the Aviva share was applied in working out a capital gain or capital loss when the Aviva shareholder disposed of the share, then the right to receive the return of share capital is likely to result in a cost base of nil. Accordingly, the Aviva shareholder made a capital gain equal to the amount of the return of capital payment of 6.0 cents per share.

67. As the right to receive the payment of the return of capital was inherent in the Aviva share during the time it was owned, the right is considered to have been acquired at the time when the corresponding share was acquired (section 109-5 of the ITAA 1997). Accordingly, if the Aviva share was acquired at least 12 months before the payment of the return of share capital, a capital gain made from the ending of the corresponding right satisfies the requirements of section 115-25 of the ITAA 1997. The capital gain may be eligible to be treated as a discount capital gain under Division 115 of the ITAA 1997 provided the other conditions of that Division are satisfied.

### **Foreign resident shareholders**

68. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made from a CGT event if:

- just before the CGT event happened, the entity is a foreign resident, or is the trustee of a foreign trust for CGT purposes; and
- the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

69. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out five categories of CGT assets:

Item 1	taxable Australian real property
Item 2	an indirect Australian real property interest not covered by item 5
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2, or 5
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3, and
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

70. Aviva confirmed that, at the time CGT event G1 and CGT event C2 happened for any foreign resident Aviva shareholder who is entitled to the return of capital, an Aviva share was not an indirect Australian real property interest (as defined in section 855-25 of the ITAA 1997).

71. However, a foreign resident Aviva shareholder cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain made if:

- the Aviva share was used at any time by the foreign resident Aviva shareholder in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997); or
- the Aviva share is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

## **Appendix 2 – Detailed contents list**

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

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## References

<i>Previous draft:</i>	- ITAA 1936 45B(3)
Not previously issued as a draft	- ITAA 1936 45B(5)
	- ITAA 1936 45B(8)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 45B(9)
TR 2006/10	- ITAA 1936 45C
	- ITAA 1936 128B
<i>Subject references:</i>	- ITAA 1997
- capital benefit	- ITAA 1997 104-25
- capital gains tax	- ITAA 1997 104-25(3)
- capital reductions	- ITAA 1997 104-135
- CGT capital proceeds	- ITAA 1997 104-135(3)
- CGT cost base	- ITAA 1997 104-135(4)
- CGT discount	- ITAA 1997 104-165(3)
- CGT events C1-C3 – end of a CGT asset	- ITAA 1997 109-5
- CGT events G1-G3 – shares	- ITAA 1997 Div 110
- dividend income	- ITAA 1997 Div 112
- return of capital on shares	- ITAA 1997 Div 115
- share capital	- ITAA 1997 Subdiv 115-A
	- ITAA 1997 115-25
	- ITAA 1997 115-25(1)
	- ITAA 1997 116-20(1)
<i>Legislative references:</i>	- ITAA 1997 Div 197
- ITAA 1936	- ITAA 1997 Div 230
- ITAA 1936 6(1)	- ITAA 1997 Pt 3-90
- ITAA 1936 44(1)	- ITAA 1997 855-10
- ITAA 1936 45A	- ITAA 1997 855-10(1)
- ITAA 1936 45A(1)	- ITAA 1997 855-15
- ITAA 1936 45A(2)	- ITAA 1997 855-25
- ITAA 1936 45A(3)(b)	- ITAA 1997 975-300
- ITAA 1936 45B	- ITAA 1997 975-300(3)
- ITAA 1936 45B(2)(a)	- ITAA 1997 995-1(1)
- ITAA 1936 45B(2)(b)	- TAA 1953
- ITAA 1936 45B(2)(c)	- Copyright Act 1968

### ATO references

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