


CR 2020/40 - Orora Limited - return of capital and special dividend

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Class Ruling

Orora Limited – return of capital and special dividend

❶ Relying on this Ruling

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

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

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

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What this Ruling is about

1. This Ruling sets out the tax consequences of:
 - the return of share capital (Return of Capital) by Orora Limited (Orora)
 - the special dividend paid on 29 June 2020 (Special Dividend) by Orora, and
 - the consolidation of the ordinary shares in Orora (Orora shares).
2. Full details of the Return of Capital, the Special Dividend and the share consolidation are set out in paragraphs 17 to 34 of this Ruling.
3. All legislative references are to provisions of the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you were a holder of Orora shares who:
 - was listed on the Orora share register on 22 June 2020 (Record Date), being the date for determining entitlements to receive the Return of Capital and Special Dividend, and continued to be listed on the register up to and including 29 June 2020 (the Payment Date)

- held your Orora shares on capital account, that is, your Orora shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)), and
- was paid the Return of Capital and the Special Dividend by Orora on the Payment Date.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 17 to 34 this Ruling.

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

When this Ruling applies

6. This Ruling applies from 1 July 2019 to 30 June 2020.

Ruling

Return of Capital is not a dividend

7. No part of the Return of Capital paid to you by Orora on the Payment Date is a dividend as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

8. No part of the Return of Capital is included in your assessable income as a dividend under subsection 44(1) of the ITAA 1936.

Special Dividend

9. The Special Dividend is a dividend as defined in subsection 6(1) of the ITAA 1936 and is a frankable distribution under section 202-40.

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

10. The Commissioner will not make a determination under either subsection 45A(2) or paragraph 45B(3)(b) that section 45C of the ITAA 1936 applies to the whole, or a part, of the Return of Capital.

Determination under paragraph 177EA(5)(b)

11. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or a part, of the imputation benefits received by you in relation to the Special Dividend.

Determination under paragraph 204-30(3)(c)

12. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or a part, of the imputation benefit received by you in relation to the Special Dividend.

CGT event G1

13. CGT event G1 (section 104-135) happened on the Payment Date when Orora paid you the Return of Capital on your Orora shares you owned at the Record Date and continued to own at the Payment Date.

Discount capital gain

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

Foreign resident shareholders

15. You can disregard any capital gain from CGT event G1 where you are a foreign resident or a trustee of a foreign trust for CGT purposes and the CGT event happens to your Orora shares that were not 'taxable Australian property' (section 855-10).

No CGT event for share consolidation

16. No CGT event happened to you following the Orora share consolidation (section 112-25).

Scheme

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

Background

18. Orora is an Australian resident company which was demerged from Amcor Limited in 2013. Since its demerger, Orora has been listed on the Australian Securities Exchange (ASX) under ASX issuer code 'ORA'.

19. Orora's two key business segments are Orora Australasia (which includes the Australasian Fibre business that was the subject of the Sale detailed in paragraphs 20 and 21 of this Ruling) and Orora North America (which includes the two business groups of Orora Packaging Solutions and Orora Visual).

Return of Capital and Special Dividend

20. On 10 October 2019, Orora announced that it had entered into a binding agreement to sell its Australasian Fibre business to a wholly-owned subsidiary of Nippon Paper Industries Co., Ltd (Nippon Paper) for an enterprise value of \$1.72 billion (Sale).

21. The Sale was predominately a sale of business assets in Australia and New Zealand, in addition to the sale of four Australian subsidiary companies from the Orora Tax Group.

22. The book value of the assets sold was \$1.322 billion as at 30 June 2019 and Orora made a profit on the Sale.

23. On 8 May 2020, the directors of Orora determined to return an amount of \$600 million to its shareholders by way of a:
- Return of Capital of \$150 million, equating to 12.4c per Orora share, and
 - special dividend of \$450 million, equating to 37.3c per Orora share.
24. The Return of Capital was approved by way of ordinary resolution at Orora's general shareholders meeting held on 16 June 2020 (General Meeting).
25. Orora debited the entire amount of the Return of Capital of \$150 million against the company's share capital account. There was no change in either the number of Orora shares on issue or the proportionate interest of each shareholder in Orora.
26. The entire amount of the Special Dividend of \$450 million was debited against the company's retained earnings account and was partially franked at a rate of 50%.
27. On the Payment Date, Orora paid the Return of Capital of 12.4c per Orora share and the special dividend of 37.3c per Orora share to those Orora shareholders who held Orora shares on the Record Date.

Share Consolidation

28. At the General Meeting, Orora shareholders also approved a share consolidation, effective from 25 June 2020, for Orora shares held on the Record Date of 24 June 2020. Each Orora share was converted into 0.80 Orora shares (Share Consolidation), with any resulting fractions of a share held by an Orora shareholder rounded up to the nearest whole number of shares.
29. The Share Consolidation resulted in the reduction in the number of shares on issue from 1,206,684,923 before the consolidation to 965,362,856 after the consolidation.
30. The Share Consolidation was undertaken in accordance with section 254H of the *Corporations Act 2001* (Corporations Act).

Other matters

31. Under Orora's dividend policy, Orora ordinarily targets a pay-out ratio of between 60% – 70% of net profits after tax.
32. Orora's share capital account (as defined in section 975-300) is not tainted (within the meaning of Division 197).
33. Approximately 25% of Orora shares are beneficially held by foreign residents.
34. Orora has confirmed that Orora shares do not constitute 'indirect Australian real property interests' as defined in section 855-25.

Appendix – Explanation

❶ *This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

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Return of Capital is not a dividend

35. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of dividend 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.

36. The term 'share capital account' is defined in section 975-300 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.

37. Subsection 975-300(3) provides that an account is generally taken not to be a share capital account if it is tainted. Orora has confirmed that its share capital account is not tainted within the meaning of Division 197.

38. The Return of Capital was recorded as a debit to Orora's untainted share capital account. As such, paragraph (d) of the definition of dividend in subsection 6(1) of the ITAA 1936 applies and the Return of Capital is not a dividend as defined in subsection 6(1).

39. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends paid to the shareholder out of profits derived by the company from any source. As the Return of Capital is not a dividend as defined in subsection 6(1) of the ITAA 1936, no part of the Return of Capital is included in the assessable income of an Orora shareholder under subsection 44(1).

Special Dividend

40. The payment of the Special Dividend on the Payment Date was a distribution of money by Orora to its shareholders.

41. The funds for the payment of the Special Dividend were sourced from an amount standing to the credit of Orora's retained earnings account. The payment of the Special Dividend was debited against Orora's retained earnings account and not its share capital account. Therefore, the exclusion in paragraph (d) of the definition of dividend in subsection 6(1) of the ITAA 1936 is not applicable and the Special Dividend constitutes a dividend for the purposes of subsection 6(1).

42. The Special Dividend paid by Orora is a distribution in accordance with table item 1 of subsection 960-120(1). A distribution is a frankable distribution to the extent it is not unfrankable (section 202-40). Section 202-45 sets out the circumstances under which an amount or distribution is taken to be unfrankable.

43. None of the circumstances in section 202-45 apply to the Special Dividend paid by Orora. Therefore, the Special Dividend is a frankable distribution under section 204-40.

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

44. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies to treat all or part of the Return of Capital received by Orora shareholders as an unfranked dividend paid by the company out of profits.

Section 45A – streaming of dividends and capital benefits

45. Section 45A of the ITAA 1936 applies where capital benefits are streamed to some shareholders (Advantaged Shareholders), who would derive a greater benefit from the receipt of capital than other shareholders (Disadvantaged Shareholders) and it is reasonable to assume that the Disadvantaged Shareholders receive, or are likely to receive, dividends.

46. Paragraph 45A(3)(b) of the ITAA 1936 provides that a reference to the provision of a capital benefit to a shareholder in a company includes the distribution to the shareholder of share capital.

47. Although a capital benefit was provided to Orora shareholders, the circumstances of the Return of Capital indicate that there was no streaming of capital benefits to some Orora shareholders and dividends to other Orora shareholders.

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

Section 45B – scheme to provide capital benefits

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

- there is a scheme under which a person is provided with a capital benefit by a company
- 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, 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.

50. The Return of Capital satisfies the first two conditions listed in paragraph 49 of this Ruling. However, having regard to the relevant circumstances of the scheme, it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling Orora shareholders to obtain a tax benefit.

51. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the Return of Capital.

Determination under paragraph 177EA(5)(b)

52. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of a particular scheme is to enable a taxpayer to obtain an imputation benefit.

53. It is considered that the conditions of section 177EA of the ITAA 1936 are not satisfied in relation to Orora's payment of the Special Dividend. Therefore, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or a part, of the imputation benefits received by Orora shareholders in relation to the Special Dividend.

Determination under paragraph 204-30(3)(c)

54. Subsection 204-30(1) empowers the Commissioner to make a determination under paragraph 204-30(3)(c) if an entity streams distributions in a certain way.

55. In the present case, all Orora shareholders received an imputation benefit when the Special Dividend, partially franked at a rate of 50%, was paid. The imputation benefit for resident shareholders is in the form of a tax offset (paragraph 204-30(6)(a)), and for non-resident shareholders is in the form of not being liable to pay dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders may derive a greater benefit from franking credits than the non-resident shareholders.

56. However, the Special Dividend was paid to all Orora shareholders as at the Record Date and was partially franked at a rate of 50% regardless of their tax profiles. As the conditions in subsection 204-30(1) have not been met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received by Orora shareholders in relation to the Special Dividend.

CGT event G1

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

58. CGT event G1 happened to an Orora shareholder when Orora paid the Return of Capital to them for the Orora shares they owned at the Record Date and continued to own at the Payment Date (section 104-135).

59. An Orora shareholder will make a capital gain from CGT event G1 happening if the amount of the return of capital of 12.4c per Orora share is more than the cost base of the Orora shareholder's share. If the Orora shareholder makes a capital gain, the cost base and reduced cost base of an Orora share are reduced to nil (subsection 104-135(3)). A shareholder cannot make a capital loss from CGT event G1 (Note 1 to subsection 104-135(3)).

60. If the amount of the Return of Capital of 12.4c per Orora share is not more than the cost base of the Orora shareholder's Orora share, the cost base and reduced cost base of the Orora share is reduced by the amount of the Return of Capital (but not below nil) (subsection 104-135(4)).

Foreign resident shareholders

61. Under subsection 855-10(1), 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 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'.

62. The term 'taxable Australian property' is defined in the table in section 855-15. 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 of this table
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 items 1, 2 or 5 of this table
Item 4	An option or right to acquire a CGT asset covered by items 1, 2 or 3 of this table
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)

63. An Orora shareholder, being a foreign resident or the trustee of a foreign resident trust for CGT purposes, can disregard a capital gain made when CGT event G1 happened to their Orora share under subsection 855-10(1) because their Orora share was not 'an indirect Australian real property interest', provided also that their Orora share:

- had not been used at any time by them in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- was not covered by subsection 104-165(3) (table item 5 of section 855-15, about individuals choosing to disregard capital gains upon ceasing to be Australian residents).

No CGT event in relation to Share Consolidation

64. A CGT event will not happen if a company converts its shares into a smaller

number of shares in accordance with section 254H of the Corporations Act in that:

- the original shares are not cancelled or redeemed in terms of the Corporations Act
- there is no change in the total amount allocated to the share capital account of the company, and
- the proportion of equity owned by each shareholder in the share capital account is maintained.

While there is a change in the form of the original shares, there is no change in their beneficial ownership.

65. As all the conditions in paragraph 64 of this Ruling are met, no CGT event happened as a result of the Share Consolidation (section 112-25). Paragraph 112-25(4)(b) provides that if two or more CGT assets are merged into a single asset, and the taxpayer is the beneficial owner of both CGT assets, each element of the cost base and reduced cost base of the merged single asset (at the time of the merging) is the sum of the corresponding elements of each original asset.

66. Each element of the cost base and reduced cost base of the consolidated Orora share, at the time of the Share Consolidation, is the sum of the corresponding elements of the cost base and reduced cost base of each original Orora share held by the Orora shareholder.

67. The consolidated Orora shares will have the same date of acquisition as the original Orora shares to which they relate.

References*Previous draft:*

Not previously issued as a draft

Legislative references:

- ITAA 1997 115-25(1)
- ITAA 1997 Div 197
- ITAA 1997 202-40
- ITAA 1997 202-45
- ITAA 1997 204-30(1)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 204-30(6)(a)
- ITAA 1997 204-30(6)(e)
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 855-25
- ITAA 1997 960-120(1)
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953
- Corporations Act 2001 254H
- 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(3)(b)
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1936 177EA
- ITAA 1936 177EA(5)(b)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 112-25
- ITAA 1997 112-25(4)(b)
- ITAA 1997 Subdiv 115-A

ATO references

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