CR 2021/2 - Home Consortium Group - return of capital by way of in specie distribution

This cover sheet is provided for information only. It does not form part of *CR 2021/2 - Home Consortium Group - return of capital by way of in specie distribution*

Class Ruling

Home Consortium Group – return of capital by way of in specie distribution

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.

Table of Contents	**Paragraph**

What this Ruling is about

1. This Ruling sets out the income tax consequences for stapled securityholders of the Home Consortium Group (HomeCo) who received a return of capital from Home Consortium Limited (HCL) on 26 November 2020 (the Implementation Date) by way of an in specie distribution of units in HomeCo Daily Needs REIT.

2. Details of the in specie distribution are set out in paragraphs 18 to 39 of this Ruling.

3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:

- held HomeCo stapled securities on 24 November 2020 (the Record Date) for the in specie distribution
- held your HomeCo stapled securities on capital account, that is, your HomeCo stapled securities were neither held as revenue assets (as defined in section 977-50 or as trading stock (as defined in subsection 995-1(1)), and
- did not acquire your HomeCo stapled securities pursuant to an employee share scheme.

5. This Ruling does not apply to you if you are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 18 to 39 of this Ruling.

Note: Division 230 will not apply to you if you are an individual, unless you have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2020 to 30 June 2021.

Ruling

Return of capital is not a dividend

7. No part of the return of capital you received from HCL on the Implementation Date by way of the in specie distribution of units in HomeCo Daily Needs REIT is a 'dividend' as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

Return of capital is not assessable as ordinary income

8. The return of capital you received from HCL on the Implementation Date by way of the in specie distribution of units in HomeCo Daily Needs REIT is not assessable as ordinary income under section 6-5.

Sections 45A, 45B and 45C of the ITAA 1936 do not apply

9. The Commissioner will not make a determination under either subsection 45A(2) of the ITAA 1936 or paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to any part of the return of capital by way of in specie distribution you received from HCL on the Implementation Date.

Capital gains tax consequences

CGT event G1

10. CGT event G1 happened to your HCL shares on the Implementation Date when HCL made a return of capital to you by way of the in specie distribution in respect of each HCL share you owned on the Record Date and continued to own on the Implementation Date (section 104-135).

11. You made a capital gain from CGT event G1 happening to your HCL shares if the amount of the return of capital of $1.3722 per HomeCo Daily Needs REIT unit received (multiplied by the number of HomeCo Daily Needs REIT units received) under the in specie distribution is more than the cost base of your HCL shares. The capital gain is equal to the difference, and the cost base and reduced cost base of your HCL shares is reduced to nil (subsection 104-135(3)). You cannot make a capital loss from CGT event G1 happening (Note 1 to subsection 104-135(3)).

12. If the amount of the return of capital of $1.3722 per HomeCo Daily Needs REIT unit received (multiplied by the number of HomeCo Daily Needs REIT units received) is not more than the cost base of your HCL shares, the cost base and reduced cost base of your HCL shares is reduced by the amount of the return of capital (but not below nil) (subsection 104-135(4)).

CGT event C2

13. CGT event C2 (section 104-25) happened when HCL made a return of capital to you of $1.3722 per HomeCo Daily Needs REIT unit received by way of the in specie distribution in respect of the HCL shares you owned on the Record Date and ceased to own on the Implementation Date.

Discount capital gain

14. You can treat a capital gain made when CGT event G1 or CGT event C2 happened in respect of the return of capital as a discount capital gain if you acquired your HCL share at least 12 months before the Implementation Date (subsection 115-25(1)), provided the other conditions in Subdivision 115-A are satisfied.

Cost base and reduced cost base of HomeCo Daily Needs REIT unit

15. The first element of the cost base and reduced cost base of each HomeCo Daily Needs REIT unit you received is $1.3722, being the market value of each HomeCo Daily Needs REIT unit, worked out as at the time of their acquisition (subsections 110-25(2) and 110-55(2)).

16. You are taken to have acquired the HomeCo Daily Needs REIT unit you received by way of the in specie distribution on the Implementation Date (Event number A1 (case 1) of the table in subsection 109-5(2)).

Foreign resident shareholders

17. If you are a foreign resident or the trustee of a foreign trust for capital gains tax (CGT) purposes at the Implementation Date, you cannot disregard any capital gain made from CGT event G1 or capital gain or capital loss made from CGT event C2 in relation to your HCL share pursuant to section 855-10 if:

- your HCL share was an indirect Australian real property interest (table item 2 of section 855-15), having satisfied the non-portfolio test in section 960-195 at the Implementation Date, or throughout a 12-month period that began no earlier than 24 months before the Implementation Date and ended no later than that time
- you used your HCL share at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- you held your HCL share as an individual and your share was covered by subsection 104-165(3) (table item 5 of section 855-15).

Scheme

18. 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

19. HomeCo is an Australian property group focused on ownership, development and management. HomeCo was listed on the Australian Securities Exchange (ASX) on 14 October 2019 as a stapled security. Each stapled security consists of one separate

HCL ordinary share and one separate Home Consortium Developments Limited (HCDL) ordinary share. The effect of the stapling is that the HCL shares and HCDL shares can only be dealt with as one security on the ASX.

20. As at 24 November 2020, HomeCo had 257.2 million stapled securities on issue. HCL and HCDL had no other classes of shares on issue.

21. HCDL is an Australian resident company incorporated on 29 August 2019. It is currently dormant and has nominal share capital and assets.

22. On 1 July 2020, HomeCo announced a proposal to be put to HomeCo stapled securityholders to establish the HomeCo Daily Needs REIT. HomeCo proposed to transfer a portfolio of HomeCo's convenience focused retail and services assets to the HomeCo Daily Needs REIT, spin-off and list the HomeCo Daily Needs REIT, and provide HomeCo stapled securityholders with one unit in the HomeCo Daily Needs REIT for every two HCL shares held via a distribution in specie (rounded down to the nearest whole number of units). The proposal would result in the in specie transfer of approximately 129 million HomeCo Daily Needs REIT units for nil consideration to HomeCo stapled securityholders. Existing HomeCo stapled securityholders would own approximately 27% of the units in the HomeCo Daily Needs REIT.

23. HomeCo Daily Needs REIT is an Australian real estate investment trust which was established on 15 October 2020.

24. HMC Funds Management Limited (Responsible Entity) is a wholly-owned subsidiary of HomeCo and the responsible entity of the HomeCo Daily Needs REIT.

Return of capital

25. At HomeCo's Annual General Meeting held on 18 November 2020, HomeCo stapled securityholders approved a reduction in the share capital of HCL as follows:

- the share capital of HCL be reduced on the Implementation Date by the capital reduction amount, with such amount being applied equally against each HCL share on issue as at the Record Date, and
- the reduction be effected and satisfied by the in specie distribution by HCL to each HomeCo stapled securityholder of one unit in HomeCo Daily Needs REIT for every two HCL shares held by the HomeCo stapled securityholder as at the Record Date (rounded down to the nearest whole number of units).

26. The key events for the return of capital by way of in specie distribution were as follows:

19 November 2020	HCL transferred its interests in 13 convenience-focused assets to the HomeCo Daily Needs REIT.
20 November 2020	The HomeCo Daily Needs REIT issued units to HCL, including the units to be distributed to HomeCo stapled securityholders.
23 November 2020	HomeCo Daily Needs REIT commenced trading on the ASX on a conditional and deferred settlement basis.
24 November 2020	Record Date: The return of capital by way of in specie distribution of HomeCo Daily Needs REIT units.

26 November 2020	Implementation Date: The return of capital (being $1.3722 per HomeCo Daily Needs REIT unit distributed) was made to all HomeCo stapled securityholders. HomeCo implemented the return of capital by way of HCL making an in specie distribution of approximately 129 million HomeCo Daily Needs REIT units on a pro rata basis of one unit in HomeCo Daily Needs REIT for every two HCL shares held by a HomeCo stapled securityholder as at the Record Date.
30 November 2020	HomeCo Daily Needs REIT units commenced trading on the ASX on a normal settlement basis.

27. No amount was paid to HomeCo stapled securityholders in respect of their HCDL shares.

28. The return of capital of approximately $176.5 million was debited in full against HCL's share capital account, or $1.3722 per HomeCo Daily Needs REIT unit distributed.

29. The amount of the return of capital per HCL share is equal to the market value of the HomeCo Daily Needs REIT Units issued to HomeCo stapled securityholders at the time of the in specie distribution. The market value of a HomeCo Daily Needs REIT unit received by a HomeCo stapled securityholder on the Implementation Date was determined using the one-day volume weighted average price of HomeCo Daily Needs REIT units on the ASX, on the Implementation Date, being 26 November 2020. The market value of a HomeCo Daily Needs REIT unit received by a HomeCo stapled securityholder was $1.3722.

Other matters

30. HomeCo's Annual Report for the year ended 30 June 2020 disclosed:

HomeCo financial statement information	Consolidated	HCL Stand-alone
	(DR)/CR	(DR)/CR
Equity	$m	$m
Share capital	3,608.0	3,608.0
Share based payment reserve	0.5	0.5
Dividend reserve	38.6	38.6
Accumulated losses	-2,917.6	-2,907.4
Total equity	**729.5**	**739.7**

31. As at 18 November 2020, HomeCo had a market capitalisation of $1.02 billion.

32. HCL's share capital account (as defined in section 975-300) is not tainted within the meaning of Division 197.

33. As at 3 August 2020, 3% of HCL's shares were held directly or indirectly by non-resident shareholders.

34. Demerger relief (being demerger roll-over under Division 125 and demerger dividend treatment under subsections 44(3) and (4)) of the ITAA 1936 is not available as the scheme does not satisfy the requirements of a demerger under subsection 125-70(1). In particular, HomeCo stapled securityholders received ownership interests in a unit trust (and not a company), and the 80% interest threshold was not met.

35. HCL paid a franked dividend of 4.5 cents per share in March 2020 and 7.5 cents per share in September 2020.

36. HCL intends to pay a dividend for the six months to 30 June 2021 from its Dividend Reserve. HCL expects to continue to pay regular dividends to HomeCo stapled securityholders, subject to having sufficient distributable accounting profits.

37. On the Record Date, the sum of the market values of HCL's assets and its subsidiaries that are taxable Australian real property exceeded the sum of the market values of its other assets for the purposes of section 855-30.

38. Concurrent to the return of capital by way of in specie distribution, the Responsible Entity made an offer of approximately 226 million new HomeCo Daily Needs REIT units to new investors and raised proceeds of approximately $300 million (the Offer). The Offer resulted in new investors owning approximately 46% of the HomeCo Daily Needs REIT units. The proceeds from the Offer will be used by the HomeCo Daily Needs REIT to fund the acquisition of new properties, to fund capital expenditure for existing properties, provide working capital and fund transaction costs.

39. Following the in specie distribution and the Offer, HomeCo retains approximately 27% ownership of the HomeCo Daily Needs REIT units which are subject to an escrow arrangement preventing HomeCo from disposing of any units held by it for one year following implementation of the proposal.

Commissioner of Taxation
13 January 2021

Appendix – Explanation

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.

Table of Contents **Paragraph**

Return of capital not a dividend

40. 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 if the shareholder is a resident of Australia.

41. 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.

42. 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.

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

44. The return of capital was recorded as a debit to HCL'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.

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

45. Sections 45A and 45B of the ITAA 1936 are anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies. The effect of such a determination is that all or part of the return of capital received by HomeCo stapled securityholders by way of the in specie distribution is treated as an unfranked dividend paid by HCL out of profits.

Section 45A – streaming of dividends and capital benefits

46. Section 45A of the ITAA 1936 generally applies where a company:

- streams capital benefits to some 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 have received, or are likely to receive, dividends.

47. Paragraph 45A(3)(b) of the ITAA 1936 provides that capital benefits include the distribution of share capital.

48. A capital benefit was provided to HomeCo stapled securityholders. However, as all HomeCo stapled securityholders received the in specie distribution of one unit in HomeCo Daily Needs REIT for every two HCL shares they held, the circumstances of the return of capital indicate that there was no streaming of capital benefits to some HomeCo stapled securityholders and dividends to other HomeCo stapled securityholders.

49. 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

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

- there is a scheme under which a person is provided with a capital benefit by a company
- under the scheme, a taxpayer (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 a relevant taxpayer to obtain a tax benefit.

51. The return of capital satisfies the first two conditions. 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 HomeCo stapled securityholders to obtain a tax benefit.

52. 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.

Capital gains tax consequences

CGT event G1

53. CGT event G1 happens if:

- a company makes a payment to a shareholder in respect of a share 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).

54. CGT event G1 happened to your HCL shares when you received the return of capital by way of in specie distribution from HCL in respect of HCL shares you owned at the Record Date and continued to own at the Implementation Date (section 104-135).

55. You made a capital gain when CGT event G1 happened if the amount of the return of capital of $1.3722 per HomeCo Daily Needs REIT unit received (multiplied by the number of HomeCo Daily Needs REIT units received) under the in specie distribution exceeded the cost base of your HCL shares. If so, the capital gain is equal to the amount of the excess and the cost base and reduced cost base of the HCL shares is reduced to nil (subsection 104-135(3)). You cannot make a capital loss when CGT event G1 happens (Note 1 to subsection 104-135(3)).

56. If the amount of the return of capital of $1.3722 per HomeCo Daily Needs REIT unit received (multiplied by the number of HomeCo Daily Needs REIT units received) is less than the cost base of your HCL shares, you reduce both the cost base and reduced cost base of the HCL shares (but not below nil) by the amount of the return of capital (subsection 104-135(4)).

CGT event C2

57. If, after the Record Date but before the Implementation Date, you ceased to own a HCL share in respect of which the return of capital was made, the right to receive the return of capital in respect of that HCL share is retained by you and is a separate CGT asset from the HCL share.

58. CGT event C2 happened when the return of capital was made. The right to receive the return of capital, being an intangible asset, ended by the right being discharged or satisfied when the return of capital was made (section 104-25).

59. You will make a capital gain under CGT event C2 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 the excess. You will make 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)).

60. In working out the capital gain or capital loss when CGT event C2 happens, the capital proceeds are equal to the amount of the return of capital (being $1.3722 per HomeCo Daily Needs REIT unit received multiplied by the number of HomeCo Daily Needs REIT units received) (subsection 116-20(1)).

61. The cost base of your right to receive each return of capital is worked out under Division 110 (modified by Division 112). The cost base of the right does not include the cost base or reduced cost base of the share previously owned by you to the extent that it

was applied in working out a capital gain or capital loss made when a CGT event happened to the share, for example, when you disposed of the HomeCo stapled security after the Record Date and before the Implementation Date. Therefore, if the cost base or reduced cost base of the HCL share previously owned by you has been fully applied in working out a capital gain or capital loss on the HCL share, the right to receive the return of capital will have a nil cost base. As a result, you will, in those circumstances, make a capital gain equal to the capital proceeds, being $1.3722 per HomeCo Daily Needs REIT unit received (multiplied by the number of HomeCo Daily Needs REIT units received).

62. For the purposes of Subdivision 109-A, you are considered to have acquired the right at the time when you acquired your HCL share. Therefore, you can treat a capital gain made when CGT event C2 happened on the ending of the right as a discount capital gain under Subdivision 115-A if you acquired your HCL share at least 12 months before the Implementation Date (subsection 115-25(1)) provided the other conditions in Subdivision 115-A are satisfied.

Non-resident shareholders

63. You disregard a capital gain or capital loss you made from a CGT event if:

- just before the CGT event happened, you are 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 (subsection 855-10(1)).

64. Your HCL share will be taxable Australian property on the Implementation Date if the HCL share:

- was an indirect Australian real property interest within table item 2 of section 855-15 (see paragraphs 65 to 68 of this Ruling)
- had been used at any time by you in carrying on a business through a permanent establishment in Australia within table item 3 of section 855-15, or
- was covered by subsection 104-165(3) within table item 5 of section 855-15, about individuals choosing to disregard capital gains upon ceasing to be Australian residents.

65. An indirect Australian real property interest is a membership interest held by an entity in another entity if the interest passes the principal asset test (section 855-30) and the non-portfolio interest test in section 960-195 (section 855-25).

66. A HCL share passes the principal asset test as the sum of the market values of HCL's assets that were taxable Australian real property exceeds the sum of the market values of its assets that were not taxable Australian real property (subsection 855-30(2)).

67. The non-portfolio interest test is passed if the sum of the direct participation interests held in HCL shares by a foreign resident and its associates was 10% or more of the total interests in HCL shares.

68. Therefore, if you are a foreign resident HomeCo stapled securityholder, or the trustee of a non-resident trust for CGT purposes, and you and your associates held at least 10% of the direct participation interests in HCL, you cannot disregard a capital gain made when CGT event G1 or C2 happened in respect of the return of capital under subsection 855-10(1).

References

Previous draft:

Not previously issued as a draft

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 44(3)
- ITAA 1936 44(4)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(3)
- ITAA 1936 45B(3)(b)
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1997 6-5
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 109-5(2)
- ITAA 1997 Subdiv 109-A
- ITAA 1997 Div 110
- ITAA 1997 110-25(2)
- ITAA 1997 110-55(2)
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 125
- ITAA 1997 125-70(1)
- ITAA 1997 Div 197
- ITAA 1997 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 855-25
- ITAA 1997 855-30
- ITAA 1997 855-30(2)
- ITAA 1997 960-195
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953

ATO references

NO:	1-MW8XV1M
ISSN:	2205-5517
BSL:	PGI
ATOlaw topic:	Income tax ~~ Capital management ~~ Returning capital ~~ Share capital return

---

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).