



CR 2006/39 - Income tax: Avatar Industries Limited: proposed return of capital

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Class Ruling

Income tax: Avatar Industries Limited: proposed return of capital

Contents	Para
BINDING SECTION:	
What this Ruling is about	1
Date of effect	8
Withdrawal	12
Scheme	13
Ruling	25
NON BINDING SECTION:	
Appendix 1:	
Explanation	30
Appendix 2:	
Detailed contents list	60

1 This Ruling provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant taxation provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant taxation provision(s)

2. The tax provisions dealt with in this Ruling are:
- subsection 6(1) of the of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 45A of the ITAA 1936;
 - section 45B of the ITAA 1936;
 - section 45C of the ITAA 1936;
 - section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 104-135 of the ITAA 1997; and
 - section 136-10 of the ITAA 1997.

All references are to the ITAA 1936 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is the owners of ordinary shares in Avatar Industries Limited (Avatar) who are registered on the Avatar Share Register on the Record Date, being the date for determining entitlements to the proposed capital return, and who receive distributions under the proposed return of capital described in paragraphs 13 to 24.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in the Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 13 to 24.

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 26 April 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

12. This Ruling is withdrawn and ceases to have effect after 30 June 2006. However, the Ruling continues to apply after its withdrawal in respect of the taxation provisions ruled upon, to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

Scheme

13. The scheme that is the subject of the Ruling is described below. This description is based on, and includes reference to, the following documents:

- application for Class Ruling from PricewaterhouseCoopers (PwC) dated 31 January 2006;
- notes taken during a teleconference held 22 March 2006; and
- e-mails from PwC from 23 February 2006 to 21 April 2006.

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

14. Avatar is an Australian resident public company listed on the Australian Stock Exchange.

15. In 1997 Avatar invested \$1.1 million in a South African company, DrillCorp Africa (Pty) Ltd (DrillCorp Africa), a wholly owned subsidiary in return for \$1.1 million worth of shares. The source of funds for these investments in DrillCorp Africa was a mix of share capital raised by Avatar and debt.

16. On 28 September 2005 Avatar completed the sale of its interests in DrillCorp Africa for \$8.4 million. This resulted in a profit on sale of \$4.2 million.

17. In the late 1980's Avatar, through a mixture of debt and equity finding, invested \$12 million dollars in Sunshine Barbeques. The source of funds for these investments was a mix of share capital raised by Avatar and debt.

18. During the 2006 financial year Avatar closed the Sunshine Barbecues businesses in Australia, Malaysia and the United States, receiving \$4.3 million from the sale of its assets. The sale price of the assets disposed of failed to recoup the original investment in these assets.

19. As a result of the sale of these businesses and assets, Avatar has capital released which it has determined is surplus to its needs.

20. Avatar proposes to return approximately \$3.9 million of this surplus capital, which is not sourced from profit, (equating to 5 cents per fully paid ordinary share on issue) to ordinary shareholders.

21. Avatar's purpose in making the return of capital is to achieve the following commercial objectives:

- to return surplus capital equitably to all shareholders;
- to increase gearing towards target levels and thereby reduce the weighted average cost of capital (WACC);
- to remove the adverse impact on share price which arises from the market perception that a lowly geared balance sheet reflects inefficient capital management and will lead to poor investment decisions; and
- to take advantage of the low cost effective debt facilities available to Avatar.

22. The return of capital is subject to shareholder approval at a general meeting of shareholders to be held on 26 April 2006. All ordinary shareholders registered on the Record Date will be entitled to the return of capital. The Record Date and date of payment of the 5 cents per share will be 10 May 2006 and 17 May 2006, respectively.

23. Avatar will debit the return of capital against its share capital account. Avatar confirms that there have been no transfers to its share capital account, as defined in section 6D of the ITAA 1936, from any of its other accounts.

24. The source of funds for the return of capital is, ultimately, through existing unused finance facilities.

Ruling

Is the return of capital a dividend as defined in subsection 6(1)?

25. The proposed return of capital will not be a dividend as defined in subsection 6(1) of the ITAA 1936.

The application of sections 45A, 45B and 45C to the proposed Return of Capital

26. Subject to the qualifications in paragraphs 4 to 6 of this ruling, the Commissioner will not make a determination (under sections 45A or 45B of the ITAA 1936) that section 45C of the ITAA 1936 applies to the return of capital. Accordingly, no part of the return of capital will be taken to be a dividend for income tax purposes under section 45C.

Capital gains tax consequences

27. CGT event G1 will happen to an Avatar shareholder when the return of capital is paid (section 104-135 of the ITAA 1997).

28. CGT event C2 will happen to an Avatar shareholder receiving the return of capital who ceases to own their Avatar shares after the record date but before the return of capital (section 104-25 of the ITAA 1997).

29. A foreign resident shareholder will only make a capital gain or loss as a result of the return of capital if the relevant asset has the necessary connection with Australia (section 136-10 of the ITAA 1997).

Commissioner of Taxation3 May 2006

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.*

Dividends

30. 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 a resident of Australia) and from an Australian source (if non-resident).

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

32. Relevantly, the specific exclusion in paragraph 6(1)(d) of the definition of 'dividend' provides:

money paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection 6(4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company.

33. The return of capital will be debited against Avatar's share capital account. There have been no transfers into Avatar's share capital account as defined in section 6D from any of Avatar's other accounts. Therefore, paragraph 6(1)(d) of the definition of 'dividend' applies and the return of capital would not constitute a dividend.

Anti-avoidance provisions

34. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfrankable dividend that is paid by the company out of profits to the shareholder.

Section 45A – streaming of dividends and capital benefit

35. Section 45A applies in circumstances where capital benefits are streamed to advantaged shareholders who would, in the year of income in which the capital benefits are provided, derive a greater capital benefit than the other shareholders (the disadvantaged shareholders) who would receive dividends.

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

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

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

38. Subsection 45B(2) sets out the conditions under which the Commissioner will make a determination under subsection 45B(3) that section 45C applies. These conditions are that:

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

39. Therefore, the following elements need to be satisfied before section 45B will apply to the arrangement:

- the return of capital is a 'scheme' within the broad meaning of that term.
- the shareholders will be 'provided with a capital benefit' as defined in subsection 45B(2) by Avatar under the proposed return of capital. The definition includes a distribution of share capital.
- the shareholders will obtain a tax benefit under the arrangement.

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

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

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

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend.

41. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the share there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the share that a capital gain is made. A capital gain may not arise at all for certain non-resident shareholders: see paragraph 58 of this Ruling. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a non-resident, subject to dividend withholding tax. Therefore, the shareholders will obtain tax benefits from the return of capital.

Relevant circumstances

42. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) to determine whether any part of the scheme would be 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.

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

44. 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 Avatar. The Commissioner cannot at this stage apprehend the purposes of Avatar'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 would participate in the return of capital should the proposal be approved. 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 vote in favour of the proposal.

45. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance, as the return of capital is made to all shareholders of Avatar regardless of individual shareholder 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 a demerger respectively are not relevant. In this case, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k).

46. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital and profits (realised and unrealised) of the company or an associate (within the meaning of section 318) of the company. In this case, the return of capital is referable to surplus capital released from the sale of DrillCorp Africa and the liquidation of Sunshine Barbecues. The return of this surplus capital will enable the company to increase its gearing towards target levels (an on-market buy-back of up to 5% of issued shares is also imminent). In these circumstances, the capital benefit is not attributable to profits, realised or unrealised.

47. 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. Avatar seeks to maintain its existing dividend payout ratio in order to remain competitive and in accordance with its business strategies.

48. Avatar recommenced paying half-yearly dividends in March 2004 and has continued to do so. Avatar intends to continue to pay two dividends per year in accordance with company policy, and has recently paid its interim dividend for the year 2005/2006. The pattern of distributions made by Avatar does not suggest that the return of capital is made in substitution for a dividend.

49. 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. Avatar has demonstrated that the scheme, being a return of capital to its shareholders, is a legitimate return of surplus capital aimed at reducing its weighted average cost of capital. This should result in a higher rate of return to shareholders on their investment in the company and upward pressure on the share price. In this case, the practical implications of the scheme are consistent with it being, in form and substance, a distribution of share capital.

50. Therefore, having regard to the relevant circumstances of the scheme to return capital to Avatar's shareholders, as discussed in paragraphs 42 to 49, it would not be concluded that Avatar will enter into or carry out the scheme for a more than incidental 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 return of capital.

Section 45C – deeming dividends to be paid where determination made under sections 45A or 45B

51. 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 apply.

CGT event G1: section 104-135 of the ITAA 1997

52. CGT event G1 (section 104-135 of the ITAA 1997) will happen if a company makes a payment to a shareholder in respect of a share they own in the company and some or all of the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997, or an amount that is taken to be a dividend under section 47.

53. A shareholder will make a capital gain if the return of capital by the company in relation to a share exceeds the cost base of the share (subsection 104-135(3) of the ITAA 1997).

54. The cost base and reduced cost base of each Avatar share will be reduced (but not below nil) by the amount of the return of capital (subsections 104-135(3) and (4) of the ITAA 1997). If the share was acquired by the shareholder at least 12 months before the date of payment, a capital gain from the share may qualify as a discount capital gain (subsection 115-25(1) of the ITAA 1997) if the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied. As the return of capital is expected to be 5 cents per share, it is not likely to result in any capital gains for Avatar shareholders.

CGT event C2: section 104-25 of the ITAA 1997

55. A person who is a registered ordinary shareholder of Avatar on the record date for the proposed return of capital acquires the right to receive the return of capital on that date. A shareholder continues to have the right to the return of capital even if the shareholder ceases to own the shares before the payment is made. The right is a CGT asset separate from the Avatar share.

56. CGT event C2 (section 104-25 of the ITAA 1997) will happen when the return of capital is paid and the right to payment ends. A capital gain will result if the capital proceeds for the event are more than the cost base of the right. The capital proceeds will be the amount of the payment from Avatar. As no amount will have been paid for the right, its cost base is likely to be nil. Therefore a capital gain equal to the payment will likely arise.

57. The right to payment from the company was inherent in the share during the time that it was owned. Therefore, for the purposes of Subdivision 109-A of the ITAA 1997 the right is considered to have been acquired at the time when the share was acquired. Consequently, if the share was originally acquired by the former shareholder at least 12 months before the payment, a capital gain from the right 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: Division 136 of the ITAA 1997

58. If the shareholder is not an Australian resident for income tax purposes, a CGT event G1 capital gain cannot be made unless the shares have the necessary connection with Australia (section 136-25 of the ITAA 1997). Broadly, shares in public companies will not have the necessary connection with Australia, and a capital gain or a capital loss will not be made, where the foreign resident shareholder and their associates beneficially owned less than 10% by value of the shares in the company during the 5 years before the CGT event happens.

59. As rights to receive a return of capital cannot have a necessary connection with Australia (section 136-25 of the ITAA 1997), there will be no CGT event C2 gain or loss for a foreign resident.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant taxation provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	8
Withdrawal	12
Scheme	13
Ruling	25
Is the return of capital a dividend as defined in subsection 6(1)?	25
The application of sections 45A, 45B and 45C to the proposed Return of Capital	26
Capital gains tax consequences	27
Appendix 1 – Explanation	30
Dividends	30
Anti-avoidance provisions	34
Section 45A – streaming of dividends and capital benefit	35
Section 45B – schemes to provide capital benefits in substitution for dividends	37
<i>Relevant circumstances</i>	42
Section 45C – deeming dividends to be paid where determination made under sections 45A or 45B	51
CGT event G1: section 104-135 of the ITAA 1997	52
CGT event C2: section 104-25 of the ITAA 1997	55
Foreign resident shareholders: Division 136 of the ITAA 1997	58
Appendix 2 – Detailed contents list	60

References

Previous draft:

Not previously issued as a draft

Subject references:

- capital reduction
- reduction of share capital
- return of share capital
- share capital

Legislative references:

- Copyright Act 1968
- Corporations Act 2001 256C
- ITAA 1936 6(1)
- ITAA 1936 6(1)(d)
- ITAA 1936 6(4)
- ITAA 1936 6D
- ITAA 1936 44
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(a)
- ITAA 1936 45B(8)(b)
- ITAA 1936 45B(8)(c)
- ITAA 1936 45B(8)(d)
- ITAA 1936 45B(8)(e)

- ITAA 1936 45B(8)(f)
- ITAA 1936 45B(8)(g)
- ITAA 1936 45B(8)(h)
- ITAA 1936 45B(8)(i)
- ITAA 1936 45B(8)(j)
- ITAA 1936 45B(8)(k)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 47
- 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 104-25
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- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 Subdiv 109-A
- ITAA 1997 Subdiv 115-A
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- ITAA 1997 136-10
- ITAA 1997 136-25
- ITAA 1997 995-1(1)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)

ATO references

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Income Tax ~~ Capital Gains Tax ~~ CGT events G1 to G3 – shares