


CR 2006/67 - Income tax: Central Equity Limited Selective Capital Reduction

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Class Ruling

Income tax: Central Equity Limited Selective Capital Reduction

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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, 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 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:

- section 45A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 116 of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- section 202-5 of the ITAA 1997;
- section 202-40 of the ITAA 1997;

- section 204-30 of the ITAA 1997; and
- section 207-145 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the Australian resident shareholders of Central Equity Limited (Central Equity), a publicly listed company, who held their shares on capital account and who had their shares cancelled under the selective capital reduction which was announced by Central Equity on 17 March 2006 and described in the Scheme part of this Ruling. In this Ruling, this class of entities are referred to as 'participating shareholders'.

4. The class of entities to which this Ruling applies does not include Central Equity. The Ruling does not deal with how the taxation law applies to Central Equity in relation to the capital reduction.

Qualifications

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

6. 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 14 to 23 of this Ruling.

7. 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

9. This Class Ruling applies to the income year (as defined in subsection 995-1(1) of the ITAA 1997) in which a shareholder had their shares cancelled under the selective capital reduction. The Scheme will be completed within that income year. For participating shareholders that did not have a substituted accounting period, this will be the income year ending 30 June 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 taxation provisions are not amended.

10. 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)).

11. 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.

12. 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

13. This Class 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 relevant provisions ruled upon, to all persons 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 person's involvement in the scheme.

Scheme

14. The scheme that is the subject of this Ruling is described from paragraph 15 onwards in this Ruling. This description is based on the following documents listed below. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- the application for a Class Ruling dated 23 March 2006;
- correspondence from PricewaterhouseCoopers dated 18 April 2006, 19 April 2006, 6 June 2006, 21 June 2006 and 30 June 2006; and
- announcements published on the Australian Stock Exchange (ASX) and Central Equity's websites dated 17 March 2006, 6 April 2006 and 8 May 2006.

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

15. On 17 March 2006, Central Equity announced that it proposed to undertake a selective capital reduction by way of a share cancellation. The proposal from its Executive Directors was to cancel all shares in Central Equity not held by the Executive Directors or their associated entities, effectively privatising the company. Central Equity announced it would outlay approximately \$67.5 million in the proposed capital reduction of approximately 31.4 million shares. The proposed selective capital reduction by way of a share cancellation was subject to shareholder approval.

16. Central Equity announced it would cancel the shares that are not held by the Executive Directors and their associated entities for \$2.15 per ordinary share. Under the selective capital reduction, \$0.56 of this amount would be debited to Central Equity's share capital account and the balance of the capital reduction amount (\$1.59) would be debited to Central Equity's retained profits.

17. On 8 May 2006, Central Equity shareholders approved the selective capital reduction proposal.

18. The record date for the selective capital reduction was 12 May 2006.

19. Central Equity had 70,869,018 fully paid ordinary shares on issue.

20. The participating shareholders in Central Equity are a mix of individuals, companies, superannuation funds and a small percentage of non-residents.

21. The purposes of the selective capital reduction were as follows:

- to privatise the company and provide an efficient means of returning capital to the existing shareholders;
- to provide an efficient mechanism by which existing shareholders can realise their investment and unlock value; and
- to enable Central Equity to restructure itself in a manner that is consistent with its on-going business strategy.

22. The last day shares in Central Equity were traded on the ASX was 21 June 2006.

23. Central Equity announced on 30 June 2006 that it had cancelled approximately 31.4 million shares on 29 June 2006.

Ruling

Dividend

24. Participating shareholders are taken to have received a dividend of \$1.59 ('the dividend') under section 44 of the ITAA 1936 for each share cancelled.

25. The dividend is a frankable distribution pursuant to section 202-40 of the ITAA 1997, and is therefore capable of being franked in accordance with section 202-5 of the ITAA 1997.

26. As the dividend is fully franked, participating non-resident shareholders are not liable for Australian withholding tax under paragraph 128B(3)(ga) of the ITAA 1936.

Capital gains tax issues

27. The cancellation of Central Equity shares under the scheme constitutes a CGT event C2 for each participating shareholder (section 104-25 of the ITAA 1997).

28. Participating shareholders have received \$2.15 as the capital proceeds in respect of the cancellation of each of their shares on 29 June 2006 (paragraph 116-20(1)(a) of the ITAA 1997).

29. To the extent that the capital proceeds taken to have been received by each participating shareholder exceeds the cost base of their Central Equity shares, a capital gain will result. To the extent that the reduced cost base of each Central Equity share exceeds that capital proceeds amount, a capital loss will arise (subsection 104-25(3) of the ITAA 1997).

30. To the extent that some part of the capital gain arising from CGT event C2 happening to the Central Equity shares is included in the assessable income of the participating shareholder as an assessable dividend, the capital gain will be reduced (section 118-20 of the ITAA 1997).

Qualified persons

31. For the purposes of Division 1A of Part IIIAA of the ITAA 1936 participating shareholders are considered to have satisfied the holding period rule under section 160APHO of the ITAA 1936 and therefore be qualified persons (as long as the related payments rule is also met) in relation to the dividend received under the selective capital reduction if:

- (a) the shares cancelled under the selective capital reduction were acquired on or before 12 May 2006;
- (b) the shareholder has no other positions (for example, an option) in relation to the shares disposed of by way of share cancellation; and
- (c) the shareholder or an associate of the shareholder has not made, is not under an obligation to make, nor is likely to make, any related payments.

32. A participating shareholder who acquired shares after 12 May 2006 that were subsequently cancelled is not a qualified person in relation to the dividend.

The anti-avoidance provisions

33. The Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital amount of the selective capital reduction price received by participating shareholders.

34. The Commissioner will not make a determination under subsection 177EA(5) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received in relation to the dividend received under the selective capital reduction by participating shareholders.

35. The Commissioner will not make a determination under subsection 204-30(3) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received in relation to the dividend received under the selective capital reduction by participating shareholders.

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.*

The dividend

36. Central Equity is a 'franking entity' as defined in section 202-15 of the ITAA 1997, and also satisfies the residency requirement set out in section 202-20 of the ITAA 1997.

37. Subsection 6(1) of the ITAA 1936 provides that 'any distribution made by the company to any of its shareholders, whether in money or property,' is treated as a dividend except where the distribution is debited against an amount standing to the credit of the share capital account of the company. Section 995-1 of the ITAA 1997 has a similar definition. The dividend received is included in the assessable income of a participating shareholder in accordance with section 44 of the ITAA 1936.

38. Subsection 202-40(1) of the ITAA 1997 provides that a dividend within the meaning of the section 6 definition is a 'frankable distribution' for the purposes of Part 3-6 of the ITAA 1997. No part of the distribution is unfrankable under section 202-40 of the ITAA 1997.

39. The dividend received was a distribution made by Central Equity to its shareholders and is debited against its retained earnings account. Therefore, the dividend constitutes a frankable distribution for the purposes of subsection 202-40(1), and was capable of being franked in accordance with section 202-5 and subsection 202-60(1) of the ITAA 1997.

Capital gains tax issues

40. Participating shareholders had their shares cancelled under the selective capital reduction on the share cancellation date being 29 June 2006. CGT event C2 (section 104-25 of the ITAA 1997) happened on the cancellation of the ordinary shares in Central Equity under the selective capital reduction.

41. If Central Equity shares were originally acquired by the participating shareholder at least 12 months before the shares were cancelled, the shares may qualify for a discount capital gain provided that the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied (subsection 115-25(1) of the ITAA 1997).

42. For the purposes of determining the capital proceeds from the cancellation of each ordinary share sections 116-20 and 116-30 of the ITAA 1997 require that the market value of each Central Equity share on the date of cancellation be compared with the amount paid to the participating shareholder in respect of the cancellation of each share. In this case, the Commissioner accepts that the market value of each Central Equity share was \$2.15 on the date of the cancellation of the share.

43. To the extent that some part of the capital gain arising on the cancellation of the Central Equity shares is included in the assessable income of the participating shareholder as an assessable dividend, the capital gain will be reduced (section 118-20 of the ITAA 1997).

44. The CGT outcome for each share cancelled is:

- a capital loss for the difference if the participating shareholder's reduced cost base for the share *is greater than* \$2.15;
- no capital gain or loss if the participating shareholder's cost base for the share *is between* \$0.56 and \$2.15 inclusive; and
- a capital gain for the difference if the cost base for the share *is less than* \$0.56.

Qualified person

45. Paragraph 207-145(1)(a) of the ITAA 1997 provides that, in relation to a franked distribution, an entity that is not a 'qualified person' in relation to the distribution for the purposes of Division 1A of Part IIIA of the ITAA 1936 is denied a gross-up and a tax offset. A person is a 'qualified person' as defined in subsection 995-1(1) of the ITAA 1997 in relation to a distribution, if the person would have been a qualified person in relation to the distribution under Division 1A of Part IIIA of the ITAA 1936, as in force on 30 June 2002. Broadly speaking, to be a 'qualified person' in relation to the dividend paid under the selective capital reduction, the participating shareholder must satisfy both the holding period rule and the related payments rule.

46. The holding period rule requires shareholders to hold the shares, or the interest in the shares, on which the dividend is paid at risk for a continuous period of at least 45 days. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

47. Under subsection 160APHM(2) of the ITAA 1936, a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the 'net position' of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares.

48. In this case, the Commissioner does not regard the announcement of the selective capital reduction by way of share cancellation as affecting whether the shares or an interest in shares was held at risk or not. The Commissioner is satisfied that, by virtue of the *Corporations Act 2001*, Central Equity shares were held at risk until the date of cancellation.

49. There are 45 clear days after 12 May 2006 and before 29 June 2006. Therefore, a shareholder who acquired shares on or after 15 May 2006 will not satisfy the holding period rule. Only shares purchased on or before 12 May 2006 satisfies the holding period rule as long as those shares were held at risk for at least 45 continuous days. A shareholder who acquired shares after 12 May 2006 that were subsequently cancelled under the selective capital reduction is not a qualified person in relation to the dividend paid under the selective capital reduction for the purposes of Division 1A of Part IIIAA of the ITAA 1936.

50. Generally, under the holding period rule a shareholder will be deemed to have disposed of his or her most recently acquired shares first; (subsection 160APHI(4) of the ITAA 1936). The 45 day rule operates on a last-in first-out basis, so that shareholders will be deemed to have disposed of their most recently acquired shares first for the purposes of applying the 45 day rule. Accordingly, shareholders who, on or after 15 May 2006, acquired any additional Central Equity shares which conferred an entitlement to participate in the selective capital reduction, may not qualify for the franking credits attached to the dividends paid on some or all of their shares cancelled under the capital reduction.

The anti-avoidance provisions

Sections 45A and 45B of the ITAA 1936

51. Sections 45A and 45B 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 distribution of capital received by the shareholder under the selective capital reduction is treated as an unfranked dividend. Accordingly, the application of these two provisions to the capital reduction must be considered.

52. Section 45A is an anti-avoidance provision that applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of share capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

53. Although a 'provision of capital benefit' (as defined in subsection 45A(3)) is provided to participating shareholders under the selective capital reduction, the circumstances of the selective capital reduction indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly, section 45A has no application to the capital reduction.

54. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends. In broad terms, section 45B applies where:

- (a) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- (b) under the scheme, a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- (c) 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 taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

55. In the case of the selective capital reduction, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) have been met, the requisite purpose of enabling the shareholder to obtain a tax benefit – by way of capital distribution – was not present.

56. Having regard to the 'relevant circumstances' of the scheme (the selective capital reduction), as set out in subsection 45B(8), it is concluded that there was no requisite purpose, by way of capital distribution, of enabling the shareholders to obtain a tax benefit. Further, the capital amount of the selective capital reduction cannot be said to be attributable to the profits of the company, nor does the pattern of distributions that have been made by Central Equity in the past indicate that the capital amount was being paid in substitution for a dividend.

Section 177EA of the ITAA 1936

57. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares. This would include a capital reduction with a franked dividend amount.

58. Specifically, subsection 177EA(3) provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) 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 an imputation benefit.

59. In the present case the conditions of paragraphs 177EA(3)(a) to (d) are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of Central Equity, its shareholders or any other relevant party, there is a purpose more than merely an incidental purpose of conferring an imputation benefit under the scheme. Under this scheme the relevant taxpayer is the participating shareholder and the scheme comprises the circumstances surrounding the selective capital reduction.

60. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17). The relevant circumstances encompass a range of circumstances which, taken individually or collectively, could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may not be present at any one time in any one scheme.

61. Having regard to the relevant circumstances of the scheme, the Commissioner has come to the view that section 177EA does not apply to the selective capital reduction.

Section 204-30 of the ITAA 1997

62. Section 204-30 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

63. Relevantly, if section 204-30 applies the Commissioner is vested with a discretion under subsection 204-30(3) to make a determination in writing either:

- that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); or
- that no imputation benefit is to arise in respect of any streamed distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

64. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from imputation benefits than other members. The words 'derives a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

65. Having regard to the matters set out in the definition in subsection 204-30(8), the Commissioner has come to the view that section 204-30 does not apply to the selective capital reduction.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Subject references:

- cancellation of shares
- capital reductions
- franked dividend
- holding period rule
- qualified person
- related payment rule

Legislative references:

- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968
- Corporations Act 2001
- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(8)
- ITAA 1936 45C
- ITAA 1936 128B(3)(ga)
- ITAA 1936 Pt IIIA Div 1A
- ITAA 1936 160APHI(4)
- ITAA 1936 160APHM(2)
- ITAA 1936 160APHO
- ITAA 1936 177EA
- ITAA 1936 177EA(3)
- ITAA 1936 177EA(3)(a)
- ITAA 1936 177EA(3)(b)
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- ITAA 1936 177EA(3)(d)
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- ITAA 1997 104-25
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- ITAA 1997 Subdiv 115-A
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- ITAA 1997 Div 116
- ITAA 1997 116-20
- ITAA 1997 116-20(1)(a)
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- ITAA 1997 118-20
- ITAA 1997 Pt 3-6
- ITAA 1997 202-5
- ITAA 1997 202-15
- ITAA 1997 202-20
- ITAA 1997 202-40
- ITAA 1997 202-40(1)
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- ITAA 1997 204-30
- ITAA 1997 204-30(1)(a)
- ITAA 1997 204-30(1)(b)
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- ITAA 1997 204-30(3)
- ITAA 1997 204-30(3)(a)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 204-30(8)
- ITAA 1997 207-145
- ITAA 1997 207-145(1)(a)
- ITAA 1997 995-1
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ATO references

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