


CR 2007/95 - Income tax: proposed return of capital: Hostworks Group Limited

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Class Ruling

Income tax: proposed return of capital: Hostworks Group Limited

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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 (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided 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 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are the ordinary shareholders of Hostworks Group Limited (HGL) who hold ordinary shares as at the Record Date for the pro-rata capital return.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this 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 14 to 34 of this Ruling.

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 1 July 2007 to 30 June 2008. However, the Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

9. 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.

10. If this 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 Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the 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).

Previous Rulings

13. CR 2006/107 Income tax: proposed return of capital by Hostworks Group Ltd.

Scheme

14. The following description of the scheme is based on information provided by the applicant. The description is based on the following documents:

- request for a Class Ruling from Ernst & Young on behalf of HGL dated 29 June 2007;
- correspondence from HGL providing further particulars dated 2 August 2007 and 3 August 2007; and
- submission in relation to the Draft Class Ruling from Ernst & Young on behalf of HGL dated 14 September 2007.

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.

15. The above documents or relevant parts of them, as the case may be, form part of and are to be read with this description.

16. HGL is an Australian owned and managed company listed on the Australian Securities Exchange. It is the head company of a consolidated group, which also consists of Hostworks Limited (HWL), Hostworks Internet Services Pty Ltd, ISEC Management Ltd and Hostworks Central Pty Ltd.

17. HGL was first established in 1983 as Krondorf Holdings Limited. It subsequently changed its name to Industrial Securities Limited (the name of HGL at that time) in 1987 when the shares were issued and listed on the Australian Securities Exchange.

18. HGL's capital management strategy to date has been to distribute excess cash to shareholders. Previous share buy backs have been done on-market (with the relevant shares subsequently cancelled) and funded out of cash reserves. The source of these cash reserves has been capital that was raised through previous share issues going back over many years and not otherwise required or utilised for expansion.

19. HGL has only one class of shares; the ordinary shares.

20. As of 31 May 2007, 86.09% of HGL's shares were held by Australian residents whilst 13.91% of the shares were held by foreign residents.

21. HGL intends to make a pro-rata return of capital of 1.5 cents per share to all its shareholders subject to shareholders' approval.

22. HGL advises that the return of capital represents a return of excess capital arising from the initial capital raisings in 2003. HGL had cash reserves of \$2–\$3 million each year since 2003. Part of the capital raised by HGL in 2003 (\$2.6 million) was on-lent to HWL, a wholly owned subsidiary, to fund HWL's acquisition of Hostworks Central Pty Ltd (Hostworks Central). This loan was repaid by HWL in February 2007.

23. Based on the number of shares on issue as at 30 June 2007, this proposed transaction should result in a return of capital of around \$2.47 million to the shareholders.

24. The return of capital will be applied equally to each holder of fully paid ordinary shares as at the Record Date in proportion to the number of shares held. No shares will be cancelled as a result of the capital return and there will be no dilution of the shareholdings in HGL.

25. The pro-rata return of capital will be recorded in the journal entries as follows:

Debit	Contributed Equity	\$2.47 million
Credit	Cash	\$2.47 million

26. HGL has a cash balance in excess of \$3 million for the 2007 income year. HGL believes that as the cash is in excess of its needs and with nothing to invest in, the cash is better off in the hands of the shareholders, where shareholders can earn a return on these funds pursuant to their own personal investment choices and decisions.

27. The Board of HGL considered a number of other options as follows:

- special dividend to all shareholders – this was not considered feasible due to the lack of retained earnings and negligible anticipated accounting profits in the income year ended 30 June 2007; and
- share buy back – this option was not pursued because it was considered to be more expensive and, in any case, since the provisions of the *Corporations Act 2001* only permit a company to buy-back 10% of its shares in any 12 month period, the amount of cash that could be returned to the shareholders as a consequence of the buy back is less than the excess cash that HGL has available.

28. HGL has made two dividend payments in the past six years which were paid out of profits. A 0.3333 of a cent dividend payment in February 2005 was 100% franked and a 0.5 of a cent dividend paid in September 2005 was 85% franked.

29. As at 30 June 2006, HGL had no franking credits. While a small tax payment was made in relation to the income year ended 30 June 2006, the current balance remains negligible.

30. For the 2006/2007 income year there is an after tax profit of approximately \$2.34 million for the consolidated group and \$47,469 for HGL.

31. In prior years HGL has recorded losses and these have contributed to the current negative balances in the retained earnings account; a loss of approximately around \$2.460 million for the consolidated group and \$866,291 for HGL for the financial year ended 30 June 2007.

32. Based on the profit projection and the expectation for increased profitability, HGL anticipates that 100% or close to 100% of future profits will be paid out as dividends, subject to the achievement of a positive balance in the retained earnings accounts. HGL considers that it will generate sufficient profits to support a future dividend program, in addition to retaining sufficient cash for future growth.

33. HGL made a pro-rata capital return of 1.0 cent per share in November 2006 at the cost of \$1.647 million.

34. Under HGL's capital management program, its strategy to date has been to return all profits to shareholders as dividends (subject to consideration of the retained earnings position), finance expansion through capital raisings and return surplus capital to shareholders when it is not required in the business. HGL seeks to continue this broad strategy into the future and will also evaluate the use of debt funding as a possible method to finance future expansion.

Ruling

Sections 45A and 45B

35. The Commissioner will not make a determination under section 45A that section 45C applies to the return of capital.

36. The Commissioner will not make a determination under section 45B that section 45C applies to the whole or any part of the return of capital.

Capital gains tax

37. CGT event G1 (section 104-135 of the ITAA 1997) will happen when HGL pays the return of capital to a shareholder in respect of a HGL share that they own at both the Record Date and the Payment Date.

38. CGT event C2 (section 104-25 of the ITAA 1997) will happen when HGL pays the return of capital to a shareholder in respect of a HGL share that they owned at the Record Date but which they ceased to own before the Payment Date.

Foreign resident shareholders

39. A foreign resident HGL shareholder who is paid a return of capital disregards any capital gain from CGT event G1 happening if the shares in HGL are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

40. A foreign resident HGL shareholder who is paid a return of capital disregards any capital gain or capital loss from CGT event C2 happening if the right to the payment is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Commissioner of Taxation

17 October 2007

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.*

Anti-avoidance provisions

41. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination under section 45C that all or part of the distributions of capital received by the shareholder under the capital return is treated as an unfranked distribution. Accordingly, the application of these two provisions to the capital return must be considered.

Section 45A – streaming of dividends and capital benefits

42. 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 capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

43. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) is provided to participating shareholders under the capital return, the circumstances of the HGL capital return indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders.

44. Accordingly, section 45A has no application to the proposed return of capital.

Section 45B – schemes to provide capital benefits

45. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- under the scheme a taxpayer (the 'relevant taxpayer'), who may or may not be the person provided with the capital benefit obtains a tax benefit (paragraph 45B(2)(b)); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

Each of these conditions is considered below.

46. A scheme for the purpose of section 45B is defined under subsection 177A(1) to include:

- any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- any scheme, plan, proposal, action, course of action or course of conduct.

47. The arrangement involving HGL's proposed return of capital to its ordinary shareholders will constitute a 'scheme' for the purposes of section 45B.

48. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). It states that a person is provided with a capital benefit if:

- an ownership interest in a company is issued to the person;
- there is a distribution to the person of share capital; or
- the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.

49. As HGL's return of capital will be recorded as a debit to the contributed equity account, its shareholders would be taken to have been provided with a capital benefit under paragraph 45B(5)(b).

50. A shareholder 'obtains a tax benefit' as defined in subsection 45B(9) if:

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

would, apart from the operation of section 45B:

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

if the capital benefit instead had been a dividend.

51. As discussed in paragraph 53 of this Ruling, the distribution to the ordinary shareholders will be a return of capital and constitute a capital benefit. In the event that the relevant distribution did represent a dividend rather than a capital benefit, it is likely that a shareholder would have incurred a greater tax liability. Consequently, the receipt of the capital benefit will represent a tax benefit.

52. For the purposes of paragraph 45B(2)(c) the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) to determine 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.

53. The test for the purpose is an objective one. The question is whether objectively, 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'. The purpose does not have to be the dominant purpose but it must be more than an incidental purpose.

54. In this case the 'relevant taxpayers' are the holders of ordinary shares in HGL and some of the relevant circumstances of the scheme are as follows:

- Paragraph 45B(8)(a) refers to the extent that 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. HGL advises that the \$2.47 million return of capital is funded from HGL's excess cash reserves that have been accumulated from the previous capital raisings. Specifically, that it is attributable to the capital which was raised in 2003 and subsequently lent to HWL to acquire Hostworks Central. As this loan was repaid by HWL in 2007, it is using its excess cash reserves to fund the return of capital.
- Paragraph 45B(8)(b) refers to the pattern of distribution made by a company or an associate of the company. HGL has previously paid a 100% franked dividend in February 2005 and 85% franked dividend in September 2005 which was paid out of profits. HGL made a pro-rata capital return of 1 cent per share in November 2006 at the total cost of \$1.647 million. HGL anticipates that 100% or close to 100% of future profits will be paid out as dividends (subject to consideration of the retained earnings). Overall there is no pattern of distribution of dividends for HGL which suggests that the return of capital is made in substitution for dividends.

- Paragraph 45B(8)(c) refers to whether the relevant taxpayer (the shareholder) has capital losses that apart from the scheme would be carried forward for a later income year. We are advised that the market price of HGL shares has not been less than 1.5 cents per share and therefore should have a cost base that is higher than 1.5 cents per share. However, as the cost base of some shareholders may have been reduced by 1 cent because of the November 2006 return of capital, the cost base for those shareholders may be less than 1.5 cents per share resulting in a capital gain that would affect any capital losses of those relevant shareholders.
- Paragraph 45B(8)(d) refers to whether any of the ownership interests were acquired before 20 September 1985. We are advised that a small number of shareholders may still hold some pre-CGT shares from the time HGL was known as Krondorf Holdings. However, as the company did not list until 1987, most of the shareholdings will be post CGT.
- Paragraph 45B(8)(e) refers to whether the relevant taxpayer is a non-resident. HGL is an Australian resident company and as of 31 May 2007 approximately 13.91% of the shareholders are non-residents.
- Paragraph 45B(8)(f) refers to whether the cost base of the shares is not substantially less than the value of the capital benefit. As discussed under paragraph 45B(8)(c) above, although HGL's shares at any stage had not been less than 1.5 cents, because of the 1 cent return of capital in November 2006 there is a possibility that some shareholders' cost base is less than the value of the current return of capital.
- Paragraph 45B(8)(g) does not apply as it has been repealed.
- Paragraph 45B(8)(h) refers to whether the interest held by the relevant taxpayer after the distribution of share capital is the same as the interest would have been if an equivalent dividend had been paid instead. The comparative rights and interests held by the shareholders of HGL after the proposed return of capital will be the same as those that would have been held had an equivalent dividend been paid instead of the capital benefit. The capital return will not reduce the number of shares on issue. The shareholders will continue to have the same shareholding and be entitled to the same share of dividends before and after the proposed return of capital.

- Paragraphs 45B(8)(i) and 45B(8)(j) pertaining to the provision of ownership interests and demerger are not relevant to this scheme.
- Paragraph 45B(8)(k) requires the Commissioner to consider the matters listed 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. In the present circumstances the return of capital will apply to all the ordinary shareholders of HGL. Therefore, the form and substance of HGL's proposed return of capital does not lead to a conclusion that the requisite purpose exists that the scheme was carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

55. Having regard to the relevant circumstances outlined in paragraph 54 of this Ruling, it is considered that the scheme as described will not be entered into for more than an incidental purpose of enabling a shareholder to obtain a tax benefit. As such, section 45B will have no application to the proposed return of capital.

56. Accordingly, the Commissioner will not make a determination pursuant to subsection 45B(3) that section 45C applies to the return of capital.

CGT event G1 – section 104-135

57. CGT event G1 (section 104-135 of the ITAA 1997) will happen when HGL pays the return of capital in respect of a share that a HGL shareholder owned at the Record Date and continues to own at the Payment Date, and some or all of the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997.

58. HGL proposes to make a payment to its shareholders out of its untainted share capital account. This payment will not be a dividend as defined in subsection 995-1(1) of the ITAA 1997. If the return of capital (1.5 cents per share) is not more than the cost base of the HGL share at the time of the payment, the cost base and reduced cost base of the share are reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

59. A HGL shareholder will make a capital gain if the return of capital is more than the cost base of the HGL share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

60. If a HGL shareholder makes a capital gain, the cost base and reduced cost base of the share are reduced to nil (subsection 104-135(3) of the ITAA 1997). A HGL shareholder can not make a capital loss when CGT event G1 happens.

61. If a HGL shareholder acquired the share before 20 September 1985, any capital gain is disregarded under subsection 104-135(5) of the ITAA 1997.

62. If the HGL share to which the payment relates was acquired by a HGL shareholder at least 12 months before the payment of the return of capital, a capital gain from CGT event G1 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).

CGT event C2 – section 104-25

63. The right to receive the payment of the return of capital is one of the rights inherent in a HGL share at the Record Date. If, after the Record Date but before the Payment Date, a HGL shareholder ceases to own some, or all, of their shares in HGL in respect of which the return of capital is payable, the right to receive the payment in respect of each of the shares disposed of will be retained by the shareholder and is considered to be a separate CGT asset.

64. A HGL shareholder's right to receive the payment will be discharged or satisfied when the payment is made under the scheme, causing CGT event C2 to happen.

65. In working out the capital gain or capital loss made from CGT event C2 happening, the capital proceeds will be the amount of the return of capital (subsection 116-20(1) of the ITAA 1997).

66. The cost base of a HGL shareholder's right to receive the payment under the scheme is worked out in accordance with Division 110 of the ITAA 1997. The cost base of the right does not include the cost base (or reduced cost base) of the share previously owned by the HGL shareholder that has been applied in working out a capital gain or capital loss when a CGT event happened to the share – for example, when the HGL shareholder disposed of the share.

67. As the right to receive the payment of the return of capital was inherent in the HGL share during the time it was owned, the right is considered to have been acquired at the time when the share was acquired (section 109-5 of the ITAA 1997).

68. If a shareholder acquired the HGL share to which the payment relates before 20 September 1985, any capital gain in respect of the right to the payment is disregarded under paragraph 104-25(5)(a) of the ITAA 1997.

69. If the HGL share to which the payment relates was acquired by a HGL shareholder at least 12 months before the payment of the return of capital, a capital gain from CGT event C2 happening to 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

70. A foreign resident must disregard a capital gain or capital loss from a CGT event that happens in relation to a CGT asset that is not 'taxable Australian property' (section 855-10 of the ITAA 1997). The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997, and covers five categories of CGT assets.

71. Broadly, these categories are:

- (1) taxable Australian real property which is held directly;
- (2) indirect Australian real property interests which are not covered by item 5 of the table;
- (3) CGT assets used in carrying on a business through a permanent establishment in Australia, and which are not covered by item 1, 2 or 5 of the table;
- (4) options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table; and
- (5) CGT assets covered by subsection 104-165(3) (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

72. A foreign resident HGL shareholder who receives a payment of the return of capital, and makes a capital gain from CGT event G1 happening to the HGL shares, can disregard the capital gain if the HGL shares are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

73. A foreign resident HGL shareholder who has a right to the payment of the return of capital, and makes a capital gain or capital loss from CGT event C2 happening to that right, can disregard the capital gain or capital loss if the right is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Previous Rulings/Determinations:

CR 2006/107

Subject references:

- return of capital on shares

Legislative references:

- ITAA 1936 45C
- ITAA 1936 45C(1)
- ITAA 1936 45C(2)
- ITAA 1936 177A(1)
- ITAA 1936 177D(b)(i)
- ITAA 1936 177D(b)(ii)
- ITAA 1936 177D(b)(iii)
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- ITAA 1997 104-25
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- ITAA 1997 104-135
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- ITAA 1936 45B(9)

ATO references

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