


# ***CR 2008/42 - Income tax: proposed return of capital: Equities and Freeholds Limited (previously Goldlink GrowthPlus Limited)***

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## Class Ruling

### Income tax: proposed return of capital: Equities and Freeholds Limited (previously Goldlink GrowthPlus Limited)

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#### **① 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:

- subsection 6(1) 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 855-10 of the ITAA 1997.

## Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Equities and Freeholds Limited (EFL) who:
- (a) are ordinary shareholders in EFL on the Record Date (being the date for determining entitlements to the proposed return of capital) and who receive distributions under the proposed share capital reduction as described in paragraphs 13 to 28 of this Ruling; and
  - (b) hold their EFL shares on capital account.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme 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 13 to 28 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

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8. This Ruling applies from 18 March 2008 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).

## Scheme

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13. The following description of the scheme is based on documents provided by the applicant. These documents, or relevant parts of them, form part of and are to be read with this description. The documents include:

- request for a Class Ruling dated 18 March 2008;
- the Prospectus dated 23 May 2005; and
- annual reports for years ended 30 June 2006 and 30 June 2007.

**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.

14. EFL was incorporated as Goldlink GrowthPlus Limited (GrowthPlus) in November 2004 and listed on the Australian Securities Exchange (ASX) in July 2005.

15. EFL raised \$30,000,000 capital from the issue of 30,000,000 ordinary shares under a prospectus dated 23 May 2005. As at 29 February 2008 there were 30,000,001 ordinary shares on issue which were owned by 331 registered shareholders. There were seven foreign resident shareholders holding 76,127 shares, which represents 0.25% of the issued capital of EFL.

16. EFL is an investment company that traded in the bullion market through gold options and gold forwards. The investment philosophy of EFL was aimed at achieving a target objective of 15 to 20 per cent per annum return on capital. This was achieved in 11 months of trading to 30 June 2006 due to the very low short term lease rates and a spike in the volatility priced into gold options.

17. From August 2006, the significant reduction in the level of volatility of the bullion market affected the EFL investment portfolio. In May 2007, EFL ceased investment in the bullion market and commenced liquidation of its bullion portfolio. EFL incurred a loss of \$30,931,784 for the year ended 30 June 2007.

18. In November 2007 Tidewater Investments Limited (Tidewater) made a takeover offer for EFL, offering 3 Tidewater shares for every 14 EFL shares, or a cash offer of 14.5 cents per EFL share.

19. The takeover offer closed on 8 February 2008, culminating in Tidewater acquiring 25,174,316 EFL shares or 83.9% of the issued capital of EFL.

20. As a future strategy, EFL intends to invest in other listed managed investment companies.

21. To implement this investment strategy, EFL wishes to reconstruct its equity capital to introduce debt through a small margin facility and accelerate the growth in net asset value per share.

22. EFL proposes a return of capital of 6.67 cents per fully paid ordinary share for all holders of ordinary shares in EFL at the Record Date. The proposed return of capital will be debited against the untainted share capital account of EFL, as defined in section 975-300 of the ITAA 1997.

23. At 30 June 2007, EFL had accumulated losses of \$24,391,994. At 29 February 2008, EFL had current year losses of \$276,725. EFL has no franking credits.

24. EFL has never paid a dividend.

25. As at 29 February 2008, EFL had total shareholder equity of \$28,770,152, and cash balances and a term deposit of \$4,135,676. It had no investments capable of generating unrealised gains.

26. The proposed return of capital is to be funded from cash.

27. On 14 March 2008, EFL commenced an on-market share buy back for 1.5 million shares over 6 months.

28. On 2 May 2008, GrowthPlus was renamed Equities and Freeholds Limited (EFL).

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## Ruling

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### **Distribution is not a dividend**

29. The payment of the proposed return of capital to EFL shareholders will not be a dividend, as defined in subsection 6(1) of the ITAA 1936.

### **Application of section 45C**

30. 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 payment of the proposed return of capital to be received by EFL shareholders.

### **Capital gains tax**

31. CGT event G1 will happen when EFL pays the proposed return of capital of 6.67 cents per share to an EFL shareholder in respect of an EFL share that they own at the Record Date and continue to own at the Payment Date (section 104-135 of the ITAA 1997).

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

### **Foreign resident shareholders**

33. Any capital gain made by a foreign resident shareholder when CGT event G1 happens will be disregarded if their EFL shares are not 'taxable Australian property' at that time (section 855-10 of the ITAA 1997).

34. Any capital gain or capital loss made by a foreign resident shareholder when CGT event C2 happens will be disregarded as their right to payment is not 'taxable Australian property' at that time (section 855-10 of the ITAA 1997).

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**Commissioner of Taxation**

11 June 2008

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## Appendix 1 – Explanation

**①** *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.*

### **Distribution is not a dividend**

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

36. 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, this broad definition is confined by later paragraphs in the definition which expressly excludes certain items from being a dividend for income tax purposes.

37. Paragraph 6(1)(d) of the ITAA 1936 specifically excludes from the definition of 'dividend':

...moneys 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 (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.

38. The proposed return of capital will be wholly debited against the untainted share capital account of EFL. Therefore, paragraph (d) of the definition of 'dividend' applies and the proposed return of capital will not be a dividend as defined in subsection 6(1) of the ITAA 1936.

### **Anti-avoidance provisions**

#### **Sections 45A and 45B**

39. 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 distribution of capital received by the shareholders under the proposed return of capital is treated as an unfranked dividend. Accordingly, the application of these two provisions to the proposed return of capital must be considered.

**Section 45A: Streaming of dividends and capital benefits**

40. Section 45A of the ITAA 1936 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.

41. Although EFL will be providing its shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936), the capital benefit is to be provided to all of the shareholders in EFL in direct proportion to their individual shareholding. As all shareholders will benefit equally from the proposed return of capital, there is no indication of a 'streaming' of capital benefits to some shareholders and not to others.

42. Accordingly, section 45A of the ITAA 1936 will not apply to the proposed return of capital, and the Commissioner will not make a determination under subsection 45A(2) that section 45C of the ITAA 1936 applies to the proposed return of capital to the shareholders of EFL.

**Section 45B: Schemes to provide capital benefits in substitution for dividends**

43. Section 45B of the ITAA 1936 applies where certain payments are made to shareholders in substitution for dividends.

44. Subsection 45B(2) of the ITAA 1936 sets out the conditions under which the Commissioner may make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies. These conditions are that:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- 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) of the ITAA 1936); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

Each of the conditions is considered below.



## ***Scheme***

45. The proposed return of capital will constitute a 'scheme' within the broad meaning of the term.

46. The phrase 'provided with a capital benefit' is defined at subsection 45B(5) of the ITAA 1936. This definition includes a distribution to a person of share capital. As EFL intends to debit the proposed return of capital against its untainted share capital account, the shareholders of EFL will be provided with a capital benefit.

## ***Tax benefit***

47. A shareholder 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, if:

- 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.

48. The proposed distribution to the ordinary shareholders of EFL will be a return of capital and therefore constitutes a capital benefit. In the event that the relevant distribution represented a dividend rather than a capital benefit, it is likely that the amount of tax payable by EFL shareholders would be greater. Therefore, the receipt of the capital benefit would represent a 'tax benefit'.

49. Whilst the conditions of paragraphs 45B(2)(a) and (b) of the ITAA 1936 are satisfied, the requisite purpose of enabling the shareholder to obtain a tax benefit by way of a capital distribution does not appear to be present. EFL intends to adopt a different investment strategy which will require less equity backing and consequently proposes to return the excess capital to the shareholders who contributed the capital.

## ***Relevant circumstances***

50. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the circumstances set out under subsection 45B(8) of the ITAA 1936 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.

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

52. Having regard to the relevant circumstances, it cannot be concluded that either EFL or the participating shareholders will enter into or carry out the proposed scheme for the purpose of enabling shareholders to obtain a tax benefit.

53. The relevant circumstances under subsection 45B(8) of the ITAA 1936 cover the circumstances of the company and the tax profile of the shareholders. In this instance, as the proposed return of capital is made to all EFL shareholders regardless of individual 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 demerger are not relevant here. In this case, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k).

54. Paragraph 45B(8)(a) of the ITAA 1936 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 ITAA 1936) of the company. EFL has decided to return to its shareholders contributed share capital which is excess to the requirements of the investment strategy to be undertaken by EFL. The proposed return of capital is not attributable to the profits of EFL. The company has incurred losses for the year ended 30 June 2007 (and to date in the current income year) and holds no investments capable of generating realised or unrealised profits to cover the quantum of the capital return. The company's sole investments are cash balances and a term deposit with a bank, totalling \$4.1 million. The circumstances do not incline towards a conclusion that the proposed return of capital will be paid in substitution of dividends.

55. Paragraph 45B(8)(b) of the ITAA 1936 refers to the pattern of distributions made by a company or an associate (within the meaning of section 318 of the ITAA 1936) of the company. EFL has not paid a dividend since its incorporation in November 2004. EFL has incurred substantial losses for the year ended 30 June 2007. EFL has nil franking balance due to past year losses and does not invest in securities from which franked dividends payments were made. As EFL has substantial accumulated losses, it is accepted that the distribution to be paid under the proposed return of capital will not be made in substitution for a dividend.

56. Paragraph 45B(8)(k) of the ITAA 1936 refers to the matters in subparagraphs 177D(b)(i) to (viii) of the ITAA 1936. 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 considered include the manner in which the scheme is carried out, its form and substance, and its financial and other implications for the parties involved. In the present case, the proposed return of capital will apply to all the ordinary shareholders of EFL. Therefore, the form and substance of the proposed return of capital by EFL does not lead to the conclusion that the requisite purpose of enabling the relevant taxpayer to obtain a tax benefit exists.

57. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the proposed return of capital.

### **Application of Section 45C**

58. As the Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) of the ITAA 1936 in relation to the scheme as described, section 45C of the ITAA 1936 will not deem any part of the proposed return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or of the ITAA 1997.

### **Capital gains tax**

#### ***CGT event G1 – section 104-135***

59. CGT event G1 in section 104-135 of the ITAA 1997 will happen when EFL pays the proposed return of capital in respect of a share that an EFL shareholder owns at the Record Date and continues to own at the Payment Date as the payment will not be a dividend as defined in subsection 995-1(1) of the ITAA 1997.

60. If the proposed return of capital amount (6.67 cents per share) is not more than the cost base of the EFL share at the time of the payment, the cost base (and reduced cost base) of the share will be reduced by the amount of the proposed return of capital (subsection 104-135(4) of the ITAA 1997).

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

62. If an EFL shareholder makes a capital gain as a result of the return of capital the cost base (and reduced cost base) of the share is reduced to nil (subsection 104-135(3) of the ITAA 1997).

63. An EFL shareholder cannot make a capital loss when CGT event G1 happens.

64. If the EFL share to which the payment relates was originally acquired by an EFL shareholder at least 12 months before the payment of the proposed 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***

65. The right to receive the proposed return of capital is one of the rights inherent in an EFL share at the Record Date. If, after the Record Date but before the Payment Date, an EFL shareholder ceases to own some, or all, of their shares in EFL in respect of which the proposed return of capital is payable, the right to receive the payment will be retained by the shareholder. The right to receive the payment is a separate CGT asset (subsection 108-5(1) of the ITAA 1997).

66. CGT event C2 happens when the proposed return of capital is paid and the EFL shareholder's right to receive that payment ends (section 104-25 of the ITAA 1997).

67. An EFL shareholder will make a capital gain if the capital proceeds from the ending of the right are more than the cost base of the right (subsection 104-25(3) of the ITAA 1997). The capital proceeds will be the amount of the proposed return of capital (section 116-20 of the ITAA 1997).

68. The cost base of the EFL shareholder's right to receive the proposed return of capital is worked out in accordance with Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). The cost base of the right does not include the cost base (or reduced cost base) of the share they previously owned. As the EFL shareholder paid nothing for the right, the cost base of the right will be nil. Therefore, the EFL shareholder will make a capital gain equal to the amount of the proposed return of capital.

69. As the right to receive the proposed return of capital amount was inherent in the EFL 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).

70. If the EFL share to which the payment relates was originally acquired by an EFL shareholder at least 12 months before the payment of the proposed return of capital amount, 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

71. A foreign resident disregards a capital gain or capital loss made 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 assets.

72. Broadly, these categories are:

- taxable Australian real property which is held directly;
- indirect Australian real property interests which are not covered by item 5 of the table;
- CGT assets used in carrying on a business through a permanent establishment in Australia, and which are covered by item 1, 2 or 5 of the table;
- options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table; and
- CGT assets covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

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

74. A foreign resident EFL shareholder who has a right to the payment of the return of capital, disregards any capital gain or capital loss made from CGT event C2 happening to that right as the right is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

## **Appendix 2 – Detailed contents list**

75. 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:*

- capital benefit
- capital reductions
- dividend substitution
- return of capital on shares

### *Legislative references:*

- ITAA 1936 45B(8)(k)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- 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
- 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)
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- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20
- ITAA 1997 855-10
- ITAA 1997 855-15
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- TAA 1953
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### ATO references

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