


# ***CR 2010/69 - Income tax: return of capital: Multiplex Acumen Vale Syndicate Limited***

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## Class Ruling

### Income tax: return of capital: Multiplex Acumen Vale Syndicate 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provisions

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 6(4) of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
- section 855-10 of the ITAA 1997.

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

## Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Multiplex Acumen Vale Syndicate Limited (MAVSL) who:

- (a) were ordinary shareholders of MAVSL on the record date and who continued to hold all the ordinary shares at the date the return of capital payment was made (MAVSL shareholder);
- (b) participated in the scheme under which MAVSL made the return of capital payment to its ordinary shareholders;
- (c) hold their MAVSL shares on capital account; and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their MAVSL shares.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

## 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 10 to 25 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 1 November 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

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## Previous Rulings

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9. Class Ruling CR 2008/17.

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## Scheme

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10. The following description of the scheme is based on a number of documents provided to the Commissioner. These documents or relevant parts of them, as the case may be, form part of and are to be read with this description. The documents include:

- Application for Class Ruling from MAVSL dated 26 September 2010;
- MAVSL's prospectus dated 16 August 2005;
- MAVSL's Financial report for the year ended 30 June 2010; and
- correspondence from MAVSL dated 19 October 2010, 12 November 2010 and 16 November 2010.

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

11. MAVSL is an Australian incorporated unlisted company.

12. MAVSL is the head company of a consolidated group which also consists of Multiplex Acumen Vale Landowner Pty Limited (MAVL). MAVSL provides finance to MAVL and also receives dividend income from MAVL.

13. The main activities of MAVL are the sub-division, development and sale of land (Project). The Project commenced in January 2004 and as at 30 June 2010, the Project is 89.5 per cent completed.

14. In its prospectus dated 16 August 2005, MAVSL outlined its intention to progressively pay franked dividends and return capital to shareholders following the completion of various stages of the Project.

## Return of capital

15. As at 2 September 2010, MAVSL has paid total dividends to shareholders of approximately \$22,800,000. In addition, on 31 December 2008 MAVSL made a return of capital payment to shareholders of approximately \$6,000,000.

16. MAVSL also made a return of capital payment of 23.66 cents per ordinary share on 30 November 2010 to each MAVSL shareholder as at the record date of 29 October 2010 ('return of capital' or 'payment'). As a result of the return of capital, there was no change in either the number of MAVSL shares on issue held by each MAVSL shareholder or the proportionate interest of each shareholder in MAVSL.

17. The return of capital was funded using MAVSL's excess cash reserves and was also debited against MAVSL's share capital account.

18. Under the prospectus, the discretion for MAVSL to return capital to MAVSL shareholders is held by the Directors of MAVSL, but is subject to the approval of an ordinary resolution by shareholders.

19. MAVSL has confirmed that its share capital account (as defined in section 975-300 of the ITAA 1997) was not tainted (within the meaning of Division 197 of the ITAA 1997).

## Other matters

20. As at 30 June 2010, there were 30,000,100 MAVSL shares on issue. The only entries to its share capital account are in respect of the subscriptions for shares (as reduced for capital raising costs and the previous return of capital payment of approximately \$6,000,000). No other amounts have been credited or transferred to the share capital account.

21. As at 30 June 2010, the balance of MAVSL's share capital account was \$20,331,565.

22. Under the prospectus, MAVSL will be wound up following the completion of the Project.

23. As at 30 June 2010, a total of 394 separate investors held ordinary shares in MAVSL. At this date, MPX DT Pty Limited, a wholly owned subsidiary of Multiplex Development and Opportunity Fund (MDOF), continued to retain the largest shareholding interest in MAVSL, and currently holds 14,875,000 (49.5 per cent) ordinary shares.

24. Of the remaining shareholders, 184 shareholders (18.2 per cent) are Australian superannuation funds, and 5 shareholders (0.5 per cent) are foreign residents for Australian taxation purposes. The remaining 204 shareholders are resident, retail investors (that is, there are no institutional investors) who all have Australian addresses. None of these investors hold more than 3.3 per cent of MAVSL shares.

25. As at 30 June 2010, a total of 725 superannuation fund investors held a 21.2 per cent unit holding interest in MDOF and a total of 16 non-resident investors held a 0.8 per cent unit holding interest in MDOF. The remaining 1,067 unit holders in MDOF are a mixture of resident retail and institutional investors. Approximately 65 per cent of units are held by investors that each hold less than 0.8 per cent of units in MDOF.

## **Ruling**

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

26. The return of capital is not a dividend, as defined in subsection 6(1).

### **The application of sections 45A, 45B and 45C**

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

28. 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**

29. CGT event G1 (section 104-135 of the ITAA 1997) happened when MAVSL paid the return of capital to a shareholder in respect of a MAVSL share that they owned at the record date and continued to own at the payment date.

### **Foreign resident shareholders**

30. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event G1 happened disregards (under subsection 855-10(1) of the ITAA 1997) any capital gain from CGT event G1 happening if their shares in MAVSL are not 'taxable Australian property' as defined in section 855-15 of the ITAA 1997.

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### **Commissioner of Taxation**

1 December 2010

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## 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.*

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

31. 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 the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

32. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (d) specifically excludes a distribution from the definition of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the share capital account of the company.

33. 'Share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created after 1 July 1998 where the first amount credited to the account was an amount of share capital.

34. Subsection 975-300(3) of the ITAA 1997 states that an account is generally taken not to be a share capital account if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies, is transferred to the account and the account is not already tainted.

35. The return of capital was wholly debited against MAVSL's share capital account. There have been no transfers into MAVSL's share capital account, as defined in section 975-300 of the ITAA 1997.

36. Therefore, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies and the return of capital is not a dividend.

### **Anti-avoidance provisions**

37. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies to treat all or part of the return of capital amount received by the shareholders as an unfranked dividend.

**Section 45A – streaming of dividends and capital benefits**

38. Section 45A 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.

39. MAVSL has provided its shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b)) and the capital benefit was provided to all MAVSL shareholders in the same proportion as their individual share holding. As all shareholders benefit equally from the return of capital, there is no 'streaming' of capital benefits to some shareholders and not to others.

40. 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 whole or any part of the return of capital amount.

**Section 45B – schemes to provide capital benefits**

41. Section 45B applies where certain capital payments, including a return of capital, 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 in paragraphs 42 to 57 of this Ruling.

***Scheme***

42. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal.



43. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936. 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.

44. As the return of capital was debited to MAVSL's share capital account, MAVSL has provided shareholders with a capital benefit under paragraph 45B(5)(b) in the form of a distribution of share capital.

### ***Tax benefit***

45. A relevant taxpayer '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.

46. The distribution to MAVSL's ordinary shareholders includes a return of capital and therefore constitutes a capital benefit. In the event that the relevant distribution were a dividend rather than a capital benefit, it is likely that the amount of tax payable by MAVSL's shareholders would be greater than is payable in respect of the return of capital payment (that payment being the capital benefit). Consequently, the receipt of the capital benefit is a 'tax benefit'.

47. 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 shares, 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 shares that a capital gain arises. A capital gain may not arise at all for certain foreign resident shareholders. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a foreign resident, be subject to dividend withholding tax under section 128B of the ITAA 1936. Therefore, MAVSL shareholders have obtained tax benefits from the return of capital.

***Relevant circumstances***

48. Paragraph 45B(2)(c) requires the Commissioner to consider the 'relevant circumstances' of the scheme as set out in subsection 45B(8). Considering these circumstances determines whether any part of the scheme was entered into for a purpose, other than an incidental purpose, of enabling the relevant taxpayer (an ordinary shareholder in MAVSL) to obtain a tax benefit.

49. 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. This requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

50. The purpose which causes section 45B of the ITAA 1936 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 MAVSL. The Commissioner cannot ascertain the purposes of MAVSL's numerous shareholders, all of whom were eligible to vote on the return of capital under section 256C of the *Corporations Act 2001*, and all of whom have participated in the return of capital paid. 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 voted in favour of the payment.

51. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance, because the return of capital was made to all MAVSL shareholders, regardless of individual circumstances, paragraphs 45B(8)(c) to 45B(8)(h) do not incline for or against a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and 45B(8)(j), pertaining to the provision of ownership interests and demerger respectively, are not relevant. The relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k).

52. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital and profits (realised or unrealised) of the company or an associate (within the meaning of section 318) of the company.

53. The return of capital is not attributable to the profits of MAVSL as most of the profits have been, and will continue to be, returned to MAVSL shareholders as franked dividends; this is supported by the amount of MAVSL's total dividend payments since the commencement of the Project and the near completion of the Project as at 30 June 2010. Accordingly, the return of capital is attributable to capital only and not to any realised or unrealised profits of MAVSL.

54. 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. MAVSL paid fully franked dividends between January 2007 and September 2010 which were paid out of profits following the receipt of dividends from MAVL. MAVSL has outlined in the prospectus an intention to progressively pay franked dividends and to return capital to shareholders following the completion of various stages of the Project. Overall, the pattern of distributions made by MAVSL does not suggest that the return of capital was made in substitution for dividends.

55. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to 177D(b)(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.

56. In this case, in light of MAVSL's business model and the 89.5 per cent completion of the Project, it is considered that the capital distributed under the return of capital is in excess of MAVSL's ongoing operating requirements. Furthermore, as the return of capital applied to all the ordinary shareholders of MAVSL, the form and substance of MAVSL's 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.

57. It cannot be concluded that MAVSL or participating MAVSL shareholders entered into or carried out the scheme for the 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 whole or any part of the return of capital.

### **Section 45C**

58. 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 deem any part of the return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or the ITAA 1997.

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

59. CGT event G1 (section 104-135 of the ITAA 1997) happened when MAVSL paid the return of capital in respect of a share that a MAVSL shareholder owned at the record date and continued to own at the payment date as the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997. The definition of the term dividend in subsection 995-1(1) of the ITAA 1997 incorporates that term set out in subsection 6(1) of the ITAA 1936 as affected by subsection 6(4) of the ITAA 1936. As discussed at paragraphs 31-36, the return of capital payment is not a dividend pursuant to the incorporated definition.

60. Where the return of capital payment of 23.66 cents per share is not more than the cost base of the MAVSL 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 payment (subsection 104-135(4) of the ITAA 1997).

61. A MAVSL shareholder makes a capital gain if the return of capital payment of 23.66 cents per share is more than the cost base of the MAVSL share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

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

63. If the MAVSL share to which the payment relates was acquired by a MAVSL shareholder at least 12 months before the payment of the return of capital, a capital gain from CGT event G1 will 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**

64. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain from a CGT event if they are a foreign resident just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'. As stated in paragraph 62, a MAVSL shareholder cannot make a capital loss when CGT event G1 happens.

65. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2 or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

66. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event G1 happened in respect of the return of capital payment cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain from CGT event G1 if:

- their share in MAVSL was an indirect Australian real property interest (item 2 of the table in section 855-15 of the ITAA 1997); or
- their share in MAVSL had been used at any time by the foreign resident in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15); or
- their share in MAVSL was covered by subsection 104-165(3) (item 5 of the table in section 855-15).

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

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

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## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Previous Rulings/Determinations:*

CR 2008/17

### *Subject references:*

- capital gains tax
- dividend income
- shareholder payments
- return of capital on shares

### *Legislative references:*

- |                       |                              |
|-----------------------|------------------------------|
| - ITAA 1936           | - ITAA 1936 45B(8)(e)        |
| - ITAA 1936 6(1)      | - ITAA 1936 45B(8)(f)        |
| - ITAA 1936 6(1)(d)   | - ITAA 1936 45B(8)(g)        |
| - ITAA 1936 6(4)      | - ITAA 1936 45B(8)(h)        |
| - ITAA 1936 44(1)     | - ITAA 1936 45B(8)(i)        |
| - ITAA 1936 45A       | - ITAA 1936 45B(8)(j)        |
| - ITAA 1936 45A(2)    | - ITAA 1936 45B(8)(k)        |
| - ITAA 1936 45A(3)(b) | - ITAA 1936 45B(9)           |
| - ITAA 1936 45B       | - ITAA 1936 45C              |
| - ITAA 1936 45B(2)(a) | - ITAA 1936 128B             |
| - ITAA 1936 45B(2)(b) | - ITAA 1936 165(3)           |
| - ITAA 1936 45B(2)(c) | - ITAA 1936 177A(1)          |
| - ITAA 1936 45B(3)    | - ITAA 1936 177D(b)(i)       |
| - ITAA 1936 45B(5)    | - ITAA 1936 177D(b)(ii)      |
| - ITAA 1936 45B(5)(b) | - ITAA 1936 177D(b)(iii)     |
| - ITAA 1936 45B(8)    | - ITAA 1936 177D(b)(iv)      |
| - ITAA 1936 45B(8)(a) | - ITAA 1936 177D(b)(v)       |
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| - ITAA 1936 45B(8)(c) | - ITAA 1936 177D(b)(vii)     |
| - ITAA 1936 45B(8)(d) | - ITAA 1936 177D(b)(viii)    |
|                       | - ITAA 1936 318              |
|                       | - ITAA 1997 104-135          |
|                       | - ITAA 1997 104-135(3)       |
|                       | - ITAA 1997 104-165(4)       |
|                       | - ITAA 1997 Subdiv 115-A     |
|                       | - ITAA 1997 115-25(1)        |
|                       | - ITAA 1997 197              |
|                       | - ITAA 1997 197-50           |
|                       | - ITAA 1997 Div 230          |
|                       | - ITAA 1997 855-10           |
|                       | - ITAA 1997 855-15           |
|                       | - ITAA 1997 975-300          |
|                       | - ITAA 1997 995-1(1)         |
|                       | - TAA 1953                   |
|                       | - Copyright Act 1968         |
|                       | - Corporations Act 2001 256C |

### ATO references

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Income Tax ~~ Return of capital