


CR 2011/20 - Income tax: CSR Limited - return of capital

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Class Ruling

Income tax: CSR Limited – return of capital

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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 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.

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 CSR Limited (CSR) who:
- (a) are registered on the CSR share register on the Record Date, being the date for determining entitlement under the return of capital;
 - (b) hold their ordinary shares on capital account; and
 - (c) 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 CSR 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 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 9 to 22 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 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).

Scheme

9. The following description of the scheme is based on documents and information provided by the applicant.

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

10. CSR, an Australian resident public company, was a diversified entity with three distinct operating businesses: sugar, building products and aluminium.

11. The financial statements of the CSR group of companies, as at 31 March 2010, disclose \$1,700.9 million in share capital and \$49.8 million in accumulated losses. As at 30 September 2010, CSR had 1,517,907,314 ordinary shares on issue.

Business disposals and former demerger proposal

12. In 2009, CSR proposed a demerger of its sugar and renewable energy business, Sucrogen Limited (Sucrogen) (formerly known as CSR Sugar Limited). As part of the demerger proposal, CSR raised a net amount of \$366.8 million of new capital pursuant to a rights issue for the specific purpose of recapitalising the various entities involved in the demerger proposal.

13. On 5 July 2010, CSR announced that it had entered into an agreement with Wilmar International Limited for the direct acquisition of Sucrogen for approximately \$1.75 billion. The effect of the sale agreement was to terminate the demerger proposal, and to make the capital raised under the rights issue no longer needed for its intended purpose.

14. On 6 July 2010, CSR also announced that it had entered into an agreement with the Rockwool Group to sell the Asian arm of its building products business (Asian Business Segment) for \$128 million.

Return of capital

15. On 7 January 2011, CSR announced the proposal to return capital to its shareholders in order to achieve the following commercial objectives:

- return surplus capital arising from the rights issue undertaken as part of the demerger proposal;

- return surplus capital arising from the sale of Sucrogen;
- return surplus capital arising from the sale of the Asian Business Segment; and
- to ensure that CSR's capital structure will be optimised.

16. The return of capital includes \$366.8 million that was raised as part of the demerger proposal, and an additional amount of \$294.6 million from the sale of the businesses that CSR considered to be excess to current requirements. The total return of capital amounts to \$661.4 million (\$0.4357 per share).

17. The return of capital was authorised by shareholders at a General Meeting held on 8 February 2011. The Record Date for the return of capital of 16 February 2011 and the Payment Date of 3 March 2011 were confirmed at this meeting.

18. The return of capital will be applied equally to each holder of a CSR share who is registered on the CSR share register on the Record Date and will be debited to the share capital account.

19. As a result of the return of capital there will be no change in either the number of CSR shares on issue held by each CSR shareholder or the proportionate interest of each shareholder in CSR.

Other aspects

20. CSR has a history of paying annual dividends. That policy is intended to be sustained following the disposal of Sucrogen and the Asian Business Segment.

21. In addition to the return of capital, CSR paid a fully franked Special Dividend of \$138.6 million (\$0.0913 per share) on 2 February 2011. The Special Dividend amount has been debited to CSR's Retained Earnings account.

22. CSR also has previously paid a fully franked interim dividend of \$0.03 cents per share on 10 December 2010.

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

24. This Ruling is made on the basis that:

- a CSR share is not an 'indirect Australian real property interest' as defined in section 855-25 of the ITAA 1997; and
- a CSR shareholder's right to the payment of the proposed return of capital is not an 'indirect Australian real property interest' as defined in section 855-25 of the ITAA 1997.

Ruling

Distribution is not a dividend

25. The return of capital to CSR shareholders will not be a dividend as defined in subsection 6(1).

The application of sections 45A, 45B and 45C to the return of capital

26. The Commissioner will not make a determination under either subsection 45A(2) or subsection 45B(3) that section 45C applies to the return of capital.

Capital gains tax consequences

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

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

Foreign resident shareholders

29. A foreign resident CSR shareholder who is paid the return of capital disregards any capital gain made when CGT event G1 happens if their CSR share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

30. A foreign resident CSR shareholder who is paid the return of capital disregards any capital gain or capital loss made when CGT event C2 happens if their right to receive the return of capital is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Commissioner of Taxation

16 February 2011

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

31. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholders 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. As the return of capital will be wholly debited against CSR's untainted share capital account, it will not constitute a dividend because of the exclusion in paragraph (d) of the definition of 'dividend' in subsection 6(1).

Subsection 6(4)

36. The exclusion in paragraph (d) of the definition of dividend in subsection 6(1) is limited by subsection 6(4) which applies in circumstances where, under an arrangement:

- (a) a company raises share capital, receiving either cash or property from a person or group of persons, crediting the amount of money or the value of the property to its share capital account; and
- (b) returns the money or property to another person or group of persons, debiting the amount of the money or the value of the property to its share capital account.

37. In the present case, there is no arrangement under which CSR raised share capital from certain shareholders and then distributes the capital raised to other shareholders. Accordingly, subsection 6(4) will have no application in respect of the return of capital.

Anti-avoidance provisions

38. Sections 45A and 45B are two anti-avoidance provisions, which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfranked dividend.

Section 45A – streaming of dividends and capital benefits

39. 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.

40. CSR will provide its shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b)) and the capital benefit will be provided to all CSR shareholders in direct proportion to their individual share holding. As all shareholders benefit equally from the proposed return of capital there is no 'streaming' of capital benefits to some shareholders and not to others.

41. 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 in relation to the return of capital to the shareholders of CSR.

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

42. Section 45B applies where certain payments are made to shareholders in substitution for dividends.

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

- there is a scheme under which a person is provided with a capital benefit by a company (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, 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)).

Each of these conditions is considered in paragraphs 44 to 57 of this Ruling.

Scheme

44. 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.

45. A return of share capital would constitute a scheme for the purposes of paragraph 45B(2)(a), because the return of capital will provide shareholders with a capital benefit.

Tax benefit

46. A 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 had instead been a dividend.

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. Therefore, CSR shareholders will obtain tax benefits from the return of capital.

Relevant circumstances

48. Under paragraph 45B(2)(c) the Commissioner is required to consider the 'relevant circumstances' set out under subsection 45B(8) to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

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 to apply may be the purpose of any party to the scheme. In this case, however, the Commissioner is only concerned with the purpose of CSR. The Commissioner cannot at this stage ascertain the purposes of CSR'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 will participate in the return of capital. 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 proposal.

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 will be made to all CSR shareholders holding ordinary shares, regardless of individual circumstances, paragraphs 45B(8)(c) to (h) do not incline towards 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 respectively, are not relevant. The relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (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. In this case, the return is of capital in excess of CSR's requirements obtained from both the pursuit of the demerger proposal and the sales of Sucrogen and the Asian Business Segment.

53. The capital obtained from the rights issue pursuant to the demerger proposal is clearly attributable to the capital of CSR. That part of the return of capital obtained from the proceeds of the sales of Sucrogen and the Asian Business Segment is reflective of the capital released on disposal of the businesses and is not attributable to any realised or unrealised profits of CSR. Accordingly, the return of capital is attributable to capital only.

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. CSR has a consistent history of making regular fully franked dividend distributions and expects this dividend distribution policy to continue. Accordingly, CSR's pattern of distributions does not suggest that the proposed return of capital will be made in substitution for a dividend.

55. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to (viii). These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, the timing of the scheme, its form and substance, and its financial and other implications for the parties involved.

56. CSR has demonstrated that the scheme seeks to return an amount of capital raised during the pursuit of a proposed demerger and from the disposal of segments of its business. The return will release capital which CSR has stated is in excess of its current requirements. The practical implications of the scheme are consistent with it being, in form and substance, a return of capital.

57. 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.

Capital gains tax consequences

CGT event G1 – section 104-135

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

60. If the return of capital (\$0.4357 per share) is equal to or less than the cost base of the CSR share at the Payment Date, the cost base and reduced cost base of the share will be reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

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

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

63. A capital gain made when CGT event G1 happens will be eligible to be treated as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided that the CSR share was acquired at least 12 months before the payment of the return of capital (subsection 115-25(1) of the ITAA 1997) and the other conditions of that Subdivision are satisfied.

CGT event C2 – section 104-25

64. The right to receive the return of capital is one of the rights inherent in a CSR share at the Record Date. If, after the Record Date but before the Payment Date, a CSR shareholder ceases to own a CSR share in respect of which the return of capital is payable, the right to receive the return of capital in respect of that share will be retained by the shareholder and is a separate CGT asset.

65. CGT event C2 will happen when the return of capital is paid (section 104-25 of the ITAA 1997). The right to receive the payment (being an intangible CGT asset) will end by the right being discharged or satisfied when the payment is made.

66. A CSR shareholder will make a capital gain if the capital proceeds from the ending of the right are more than its cost base. The capital gain is equal to the amount of the excess. A CSR shareholder will make a capital loss if the capital proceeds from the ending of the right are less than its reduced cost base (subsection 104-25(3) of the ITAA 1997). The capital loss is equal to the amount of the difference.

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

68. The cost base of the CSR shareholder's right to receive the return of capital is worked out under 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 previously owned by a CSR shareholder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the share – for example when the CSR shareholder disposed of the share after the Record Date.

69. Therefore, if the full cost base or reduced cost base of the CSR share has been previously applied in working out a capital gain or capital loss when a CGT event happened to that share, then the right to receive the return of capital is likely to have a nil cost base. As a result, the CSR shareholder will generally make a capital gain equal to the amount of the return of capital.

70. As the right to receive the payment of the return of capital was inherent in the CSR share during the time it was owned, the right is considered to have been acquired at the time when the corresponding share was acquired (section 109-5 of the ITAA 1997). Accordingly, if the CSR share was acquired at least 12 months before the payment of the return of capital, a capital gain made from the ending of the corresponding right will satisfy the requirements of section 115-25 of the ITAA 1997. Such a capital gain may be eligible to be treated as a discount capital gain under Subdivision 115-A of the ITAA 1997 provided the other conditions of that Subdivision are satisfied.

Foreign resident shareholders

71. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

72. 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) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident).

73. At the time CGT event G1 happens to a share of a foreign resident CSR shareholder who is entitled to the return of capital, the share will not be an indirect Australian real property interest (as defined in section 855-25 of the ITAA 1997) as the interest will not pass the principal asset test in section 855-30 of the ITAA 1997 at that time.

74. However, a foreign resident CSR shareholder, just before CGT event G1 happens, cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain made if:

- (a) the CSR share has been used at any time by the foreign resident CSR shareholder in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997); or
- (b) the CSR share is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

75. At the time CGT event C2 happens to a foreign resident CSR shareholder who is entitled to the return of capital, the right to the payment will not be an indirect Australian real property interest (as defined in section 855-25 of the ITAA 1997) as the interest will not pass the principal asset test in section 855-30 of the ITAA 1997 at that time.

76. However, a foreign resident CSR shareholder, just before CGT event C2 happens, cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain made if:

- (a) the right to payment has been used at any time by the foreign resident CSR shareholder in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997); or
- (b) the right to payment is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

Appendix 2 – Detailed contents list

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

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References

<i>Previous draft:</i>	- ITAA 1936 45B(8)(i)
Not previously issued as a draft	- ITAA 1936 45B(8)(j)
	- ITAA 1936 45B(8)(k)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 45B(9)
TR 2006/10	- ITAA 1936 45C
	- ITAA 1936 128B
<i>Subject references:</i>	- ITAA 1936 177A(1)
- capital benefit	- ITAA 1936 177D(b)(i)
- capital gains tax	- ITAA 1936 177D(b)(ii)
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- share capital	- ITAA 1936 177D(b)(vi)
- CGT events C1-C3 – end of a CGT asset	- ITAA 1936 177D(b)(vii)
- CGT events G1-G3 – shares	- ITAA 1936 177D(b)(viii)
- distributions	- ITAA 1936 318
	- ITAA 1997
	- ITAA 1997 104-25
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ATO references

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