


CR 2012/114 - Income tax: return of capital: Energy Technologies Ltd (EGY)

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Class Ruling

Income tax: return of capital: Energy Technologies Ltd (EGY)

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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 to be 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 is the shareholders of Energy Technologies Limited (EGY)¹ who:

- are registered on the EGY share register on the Record Date for determining entitlements to receive the return of capital;
- hold their EGY shares on capital account;
- are not 'temporary residents' of Australia within the meaning of section 995-1 of the ITAA 1997; and
- 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 EGY 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 35 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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¹ For ease of understanding EGY will be referred to by its current name throughout this Class Ruling.

Date of effect

8. This Ruling applies from 1 July 2012 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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 information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Class Ruling Application dated 19 September 2012.
- Market Announcement dated 11 October 2010 (Notice of proposal received for shares of Dulhunty Power International Limited).
- Market Announcement dated 24 August 2011 (proposed sale of Dulhunty Power International Limited).
- Explanatory Statement dated 25 August 2011 in relation to the General Meeting to be held on 27 September 2011.
- Result of General Meeting dated 27 September 2011.
- Market Announcement dated 5 October 2011 (Sale of Dulhunty Power International Limited).
- Market Announcement dated 12 October 2011 (Sale of Dulhunty Power International Limited).
- Application to the Australian Stock Exchange (ASX) for waiver in relation to Listing Rule 7.25 date 20 March 2012.
- Grant of Waiver in relation to Listing Rule 7.25 date 14 May 2012.
- Explanatory Statement dated 30 August 2012 in relation to the General Meeting to be held on 17 October 2012.
- Various EGY Annual Reports.

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

Background

10. EGY is an Australian resident public company that was listed on the Australian Stock Exchange from August 1985 under one of its former names BT Innovation Ltd. EGY has undertaken a number of name changes since it was listed, with the most recent name change from Dulhunty Power Limited to EGY on 21 October 2011.

11. In October 2010 EGY received an unsolicited non-binding proposal from MacLean Power Group to acquire all the shares it held in Dulhunty Power International Limited (DPIL) being 50.82% of the issued share capital. The shares in DPIL comprised the vast majority of the assets of EGY at that time. At that time DPIL held the shares in a number of international companies carrying on the business of manufacturing and sale of electricity transmission and distribution line fittings internationally. The purpose of the offer was to acquire the international business conducted by EGY.

12. On 24 August 2011 EGY entered into transaction documents with MacLean Power Group for the sale of substantially all of the assets and operation of the 50.82% of share capital owned by DPIL. The transaction involved:

- the sale of assets by the United States subsidiary of DPIL;
- DPIL selling its Australian subsidiary, Dulhunty Power (Aust) Pty Limited, which owned 100% of Dulhunty Power (NZ) Limited, resident in New Zealand;
- DPIL selling its Thai subsidiary;
- DPIL selling its 51% shareholding in a Malaysian joint venture company through various share sale transactions; and
- DPIL granting MacLean Power Group an option to acquire 100% of the assets and assume the liabilities of the businesses operated by DPIL's subsidiaries, namely Dulhunty Yangzhou Line Fittings Co Limited, resident in China and China Dulhunty Yangzhou Line Fittings Co Limited.

13. This transaction is known as the 'MacLean Transaction'.

14. The MacLean Transaction was consented to by the shareholders of EGY on 27 September 2011.

15. On 12 October 2011 the conditions precedent for the sale were successfully completed.

16. The completion of the MacLean Transaction resulted in the disposal of the majority of EGY's operations, interests and projects to MacLean Power Group and has resulted in EGY having significant cash assets which are surplus to its current business requirements.

17. The total cash consideration received by EGY, through distributions from DPIL was \$6,861,273. The amount of cash remaining after the payment of debts and contingent liabilities was approximately \$6.65 million.

18. EGY has confirmed that its share capital account is not tainted within the meaning of Division 197 of the ITAA 1997.

Return of Capital

19. At EGY's Annual General Meeting (AGM) on 22 November 2011, the Chairman updated the shareholders on the progress of the sale and re-iterated that it was the directors' view that the proceeds of sale should be dealt with as had been set out in the AGM notice. This involved the proposed return of \$0.02 capital per share.

20. EGY used about \$1 million of the proceeds from the MacLean Transaction to acquire Bambach Wires and Cables Pty Ltd on 2 July 2012.

21. EGY has also increased its investment in Dulhunty Poles Pty Ltd.

22. Consequently the capital proceeds from the MacLean Transaction held in cash are currently surplus to EGY's needs. The Directors consider that it is not in the interests of the shareholders of EGY to maintain a situation where the business assets of EGY are overshadowed by a huge unnecessary cash reserve. The proposed return of capital will relieve the potential market instability of EGY. The directors of EGY therefore consider that it is in the best interests of the shareholders as a whole to return the surplus capital to the shareholders.

23. EGY plans to make a pro-rata return of capital in two tranches to its shareholders totalling \$0.02 per ordinary share, or approximately \$3,285,000. No shares will be cancelled as a result of the distributions.

24. The first return of capital, of \$0.015 per ordinary share, is proposed to be undertaken in October 2012 subject to shareholder approval. A second return of capital, of \$0.005 per ordinary share, is proposed to be undertaken around June 2013.

25. The Record Date for the first return of capital will be 25 October 2012 and the Payment Date for the return of capital will be in early November 2012. The second return of capital is proposed to be made around June 2013.

26. Both of the proposed returns of capital will be debited to EGY's share capital account.

27. EGY has applied to and received ASX approval of the waiver required under ASX Listing Rule 7.25 in relation to the proposed reorganisation of capital involving a return of capital of \$0.02 per share.

28. There will be no change in either the number of ordinary shares held by each EGY shareholder or the proportionate interest of each shareholder in EGY as a result of the return of capital.

Distribution history

29. EGY has only paid one dividend, in July 1999, to its shareholders since the time of its incorporation.
30. There have been two returns of capital, in August 1991 and December 1992.
31. There have been no other distributions of profits or capital to the shareholders since EGY was listed on the ASX.

Capital structure

32. As at 4 September 2012 EGY had only one class of share on issue comprising 164,263,758 fully paid ordinary shares amounting to \$10,163,080 of share capital.
33. The shareholders of EGY will comprise a mix of both Australian resident shareholders and foreign resident shareholders.
34. EGY confirms that its share capital account is not tainted within the meaning of Division 197 of the ITAA 1997.
35. EGY confirms that, at the time of the proposed payment of the returns of capital, an EGY share will not be an 'indirect Australian real property interest' (as defined in section 855-25 of the ITAA 1997).

Ruling

Distributions are not dividends for income tax purposes

36. Neither the first return of capital nor the second return of capital will be a dividend, as defined in subsection 6(1).

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

37. The Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) that section 45C applies to either the first return of capital or the second return of capital. Accordingly, no part of either return of capital will be taken to be a dividend for income tax purposes.

Capital gains tax

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

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

40. CGT event C2 (section 104-25 of ITAA 1997) will happen when EGY pays the first return of capital to an EGY shareholder in respect of an EGY share that they own at the Record Date for the first return of capital but do not own at the Payment Date for the first return of capital.

41. CGT event C2 (section 104-25 of ITAA 1997) will happen when EGY pays the second return of capital to an EGY shareholder in respect of an EGY share that they own at the Record Date for the second return of capital but do not own at the Payment Date for the second return of capital.

Foreign resident shareholders

42. A foreign resident shareholder in EGY who is paid the first return of capital or the second return of capital disregards any capital gain made from CGT event G1 happening if their EGY shares are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

43. A foreign resident shareholder in EGY who is paid the first return of capital or the second return of capital disregards any capital gain or capital loss made from CGT event C2 happening if their right to receive the relevant return of capital is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

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.*

Distributions are not dividends

44. 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).

45. 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.

46. '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.

47. 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. EGY has confirmed that its share capital account is not tainted within the meaning of Division 197 of the ITAA 1997.

48. The first return of capital and the second return of capital will be recorded as debits to EGY's share capital account. As the share capital account of EGY is not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) will apply. Accordingly, neither the first return of capital nor the second return of capital will be a dividend as defined in subsection 6(1).

Anti avoidance provisions

49. 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 proposed return of capital amounts received by the shareholders as an unfranked dividend paid by the company out of profits to the shareholder.

Section 45A – streaming of dividends and capital benefits

50. Section 45A applies where capital benefits are streamed to some shareholders (the Advantaged Shareholders), who would derive a greater benefit from the receipt of capital than other shareholders (the Disadvantaged Shareholders) and these Disadvantaged Shareholders receive, or are likely to receive, dividends.

51. A reference to the 'provision of a capital benefit to a shareholder in a company' is defined in paragraph 45A(3)(b) to include the distribution to the shareholder of share capital. EGY will provide its shareholders with a 'capital benefit' as defined in paragraph 45A(3)(b) when EGY pays either the first return of capital or the second return of capital to its shareholders. The capital benefit in each case will be provided to all of its shareholders in the same proportion as their share holdings.

52. Therefore, section 45A will not apply to the first return of capital or the second return of capital. Accordingly, the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the proposed return of capital amounts.

Section 45B – schemes to provide capital benefits

53. Section 45B applies where certain capital payments, including a return of capital, are paid to shareholders in substitution for dividends. It allows the Commissioner to make a determination that section 45C applies to a capital benefit. 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, 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)).

54. Each of these conditions is considered in paragraphs 55 to 71 of this Ruling.

Scheme

55. 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.

56. 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.

57. As the proposed returns of capital will be debited to EGY's share capital account, EGY will provide shareholders with a capital benefit under paragraph 45B(5)(b) in the form of distributions of share capital.

Tax benefit

58. 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.

59. The proposed distributions to EGY's ordinary shareholders are return of capital payments and therefore constitute capital benefits. In the event that the distributions were dividends rather than capital benefits, it is likely that the amount of tax payable by EGY shareholders would be greater than is payable in respect of the proposed return of capital payments (those payments being the capital benefits). Consequently, the receipt of the capital benefits will give rise to 'tax benefits'.

60. 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. As a result, EGY shareholders will obtain a tax benefit from the return of capital.

Relevant circumstances

61. Paragraph 45B(2)(c) requires the Commissioner to consider the 'relevant circumstances' set out in subsection 45B(8). A consideration of these circumstances determines whether any part of the scheme will be entered into for a purpose, other than an incidental purpose, of enabling the relevant taxpayer (a shareholder in EGY) to obtain a tax benefit.

62. The test of purpose is an objective one. The question is whether it would be concluded that a person who enters into or carries out the scheme does 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.

63. 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 concerned only with the purpose of EGY. The Commissioner cannot ascertain the purposes of EGY's numerous shareholders, all of whom will be eligible to vote on the proposed returns of capital under section 256C of the *Corporations Act 2001*, and all of whom may participate in the proposed returns of capital. Nevertheless, in a case such as this, an objective conclusion as to the purpose of the company, generally speaking, should not be inconsistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who voted in favour of the payments.

64. 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 proposed returns of capital will be made to all EGY 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).

65. 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.

66. The proposed returns of capital are not considered attributable to the profits of EGY. The sale of DPIL assets constituted the disposal of a significant part of the business structure of EGY. The proposed returns of capital are considered to be wholly attributable to the share capital released from the sale of DPIL assets and not to any realised or unrealised profits of EGY. For the year ended 30 June 2012, EGY derives an accounting profit (by way of inter-corporate dividends); however this will cease to exist once it is offset against prior year losses. In accordance with Taxation Ruling TR 2012/5, this prevents any distribution of profits from being made.

67. 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.

68. Since incorporation EGY has only paid one dividend to its shareholders, in July 1999. Two returns of capital were made in August 1991 and December 1992. There have been no other distributions of profits or capital to the shareholders since EGY was listed on the ASX. Profits in the years ended 30 June 2008 and 2010 were offset against accumulated losses. Accordingly, the absence of payment of dividends does not suggest that the proposed returns of capital will be made in substitution for dividends.

69. 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.

70. In this case, the form and substance of EGY's proposed returns of capital do 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.

71. Accordingly, it cannot be concluded that EGY or participating EGY shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a tax benefit. As such, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole or any part of the proposed returns of capital.

Section 45C

72. 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 either return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or the ITAA 1997.

Capital gains tax

CGT event G1 – section 104-135

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

74. CGT event G1 (section 104-35 of the ITAA 1997) will happen when EGY pays the second return of capital to an EGY shareholder in respect of a share that they own in EGY at the Record Date for the second return of capital and continue to own at the Payment Date for the second return of capital.

75. In either case, if the proposed return of capital is equal to or less than the cost base of the EGY share at the time of payment, the cost base and reduced cost base of the share will be reduced (but not below nil) by the amount of the payment (subsection 104-135(4) of the ITAA 1997).

76. An EGY shareholder will make a capital gain if the proposed return of capital in either case is more than the cost base of the EGY share (subsection 104-135(3) of the ITAA 1997). The amount of the capital gain is equal to the excess.

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

78. 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 EGY share was acquired at least 12 months before the payment of the relevant 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

79. The right to receive the first return of capital is one of the rights inherent in an EGY share at the Record Date for the first return of capital. If, after the Record Date but before the Payment Date for the first return of capital, an EGY shareholder ceases to own an EGY share, the right to receive the first return of capital in respect of that share will be retained by the shareholder and is a separate CGT asset. This will also apply in respect of the right to receive the second return of capital.

80. CGT event C2 (section 104-25 of the ITAA 1997) will happen when each return of capital is paid and the right to receive the relevant payment (being an intangible CGT asset) ends.

81. An EGY 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. An EGY 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.

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

83. The cost base of an EGY shareholder's right to receive either 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 the EGY 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 EGY shareholder disposed of the share after the Record Date for either return of capital.

84. Therefore, if the full cost base or reduced cost base of an EGY share has been previously applied in working out a capital gain or capital loss made when a CGT event happened to that share, the right to receive either return of capital will have a nil cost base. Consequently an EGY shareholder will have a capital gain equal to the amount of the return of capital.

85. As the rights to receive the first return of capital and the second return of capital are inherent in the EGY share during the time it was owned, the rights are considered to have been acquired at the time when the corresponding share was acquired (section 109-5 of the ITAA 1997). Accordingly, if the EGY share was acquired at least 12 months before the relevant 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 will 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

86. 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 and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

87. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out 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).

88. EGY has advised that at the time CGT event G1 happens for any foreign resident EGY shareholder who is entitled to either return of capital, an EGY 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.

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

- the EGY share has been used at any time by the foreign resident EGY 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
- the EGY 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).

90. A foreign resident EGY shareholder who has a right to the payment of either return of capital, disregards any capital gain or capital loss made when CGT event C2 happens to that right because 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

Related Rulings/Determinations:

TR 2006/10; TR 2012/5

Subject references:

- anti avoidance measures
- Capital gains tax
- CGT events C1-C3 – end of a CGT asset
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- Capital benefit
- distributions
- dividend streaming arrangements
- dividends
- return of capital on shares
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- shareholder payments

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
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NO: 1-49H2ULR

ISSN: 1445-2014

ATOLaw topic: Income Tax ~ Return of capital