CR 2021/53 - ICSGlobal Limited - return of share capital and special dividend

Class Ruling

ICSGlobal Limited – return of share capital and special dividend

Relying on this Ruling

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

*[**Note:** This is a consolidated version of this document. Refer to the Legal database (www.ato.gov.au/Law) to check its currency and to view the details of all changes.]*

Table of Contents **Paragraph**

What this Ruling is about

1. This Ruling sets out the tax consequences for shareholders of ICSGlobal Limited (ICS) who received the return of share capital payment of $1.56 per ordinary ICS share and the unfranked special dividend of 19 cents per ordinary ICS share on 20 July 2021 (Payment Date).

2. Full details of this scheme are set out in paragraphs 20 to 39 of this Ruling.

3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:

- were registered on the ICS share register on 13 July 2021 (Record Date)
- held your ICS shares on capital account on the Record Date; that is, you did not hold your ICS shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)), and
- received the return of capital payment $1.56 per ordinary ICS share and the unfranked special dividend of 19 cents per ordinary ICS share on the Payment Date.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 20 to 39 of this Ruling.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2021 to 30 June 2022.

Ruling

Special dividend and the assessability of special dividend

7. The unfranked special dividend of 19 cents per ICS share is a 'dividend' as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

8. If you are a resident of Australia as defined in subsection 6(1) of the ITAA 1936, you include the special dividend in your assessable income under paragraph 44(1)(a) of the ITAA 1936.

9. If you are a non-resident, the special dividend is non-assessable non-exempt income and is not included in your assessable income as the special dividend was declared to be conduit foreign income (paragraph 802-15(1)(a)). You are also not liable to pay withholding tax in respect of the special dividend (paragraph 802-15(1)(b)).

10. [Omitted.]

Return of capital is not a dividend

11. No part of the return of capital paid to you by ICS on the Payment Date is a dividend as defined in subsection 6(1) of the ITAA 1936.

12. No part of the return of capital payment is included in your assessable income as a dividend under section 44 of the ITAA 1936.

Sections 45A, 45B and 45C of the ITAA 1936 do not apply

13. The Commissioner will not make a determination under either subsection 45A(2) of the ITAA 1936 or paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to any part of the return of capital ICS paid to you on the Payment Date.

Capital gains tax consequences

CGT event G1

14. CGT event G1 (section 104-135) happened to your ICS shares on the Payment Date when ICS paid you the return of capital of $1.56 per share in respect of the ICS shares you owned on the Record Date and continued to own on the Payment Date.

15. You made a capital gain when CGT event G1 happened to your ICS shares if the amount of the return of share capital of $1.56 per share you received exceeded the total cost base of your ICS share. The capital gain is equal to the difference. You are also required to reduce the cost base and reduced cost base of your ICS share to nil

(subsection 104-135(3)). You cannot make a capital loss when CGT event G1 happened (Note 1 to subsection 104-135(3)).

16. If the amount of the return of capital payment of $1.56 per ICS share you received is equal to or less than the cost base of the share, the cost base and reduced cost base of your ICS share is reduced by the total amount of the return of capital payment you received for that share (subsection 104-135(4)).

CGT event C2

17. CGT event C2 (section 104-25) happened when ICS paid you the return of capital payment of $1.56 per share in respect of ICS shares you owned on the Record Date and ceased to own before the Payment Date.

Discount capital gain

18. You can treat a capital gain made when CGT event G1 or CGT event C2 happened to your ICS share as a discount capital gain under Subdivision 115-A if you acquired the ICS share at least 12 months before the Payment Date (subsection 115-25(1)) and the other conditions in Subdivision 115-A are satisfied.

Foreign-resident shareholders are able to disregard capital gains tax

19. If you were a foreign resident or a trustee of a foreign trust for capital gains tax purposes, you disregard any capital gain made from CGT event G1 or any capital gain or capital loss made from CGT event C2 under subsection 855-10(1) as an ICS share is not an indirect Australian real property interest (table item 2 of section 855-15), provided that:

- you did not use the ICS share at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- the ICS share was not covered by subsection 104-165(3) about individuals who defer capital gains upon ceasing to be Australian residents (table item 5 of section 855-15).

Scheme

20. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Background

21. ICS is an Australian-resident company for tax purposes.

22. ICS was established on 19 April 1996 and listed on the Australian Securities Exchange on 23 December 1999.

23. ICS is the parent company of the ICS global group, which operates in the computer system design and related services sector and is predominantly involved in providing information technology services within the health sector.

24. The ICS global group pursued a project to build and then deploy an internet-based transactional exchange for the healthcare industry, the THELMA platform, soon after listing. THELMA stands for ‘Transaction Health Exchange Linking Multiple Applications’.

25. In 2007, ICS expanded its involvement in the eHealth sector through the acquisition of the London Patient Billing Service (now called Medical Billing Collection) via its wholly-owned United Kingdom (UK) subsidiary Thelma-EU Limited (Thelma-EU).

26. As at 30 June 2020, ICS had one subsidiary, Thelma-EU, which was located in the UK.

Return of share capital and payment of special dividend

27. On 18 December 2020, ICS announced that it had entered into an agreement to sell all of its shares in Thelma-EU, its UK subsidiary which operated the business of Medical Billing Collection, to an unrelated third party.

28. The sale was completed on 24 February 2021. Available cash funds in ICS after receipt of cash proceeds from the sale was approximately A$22.8 million.

29. On 3 June 2021, ICS announced that proceeds of the sale of Thelma-EU were proposed to be used by ICS to make a return of share capital and a special dividend to ICS shareholders.

30. On 7 July 2021, ICS shareholders approved a return of share capital of $1.56 per share pursuant to section 256C of the *Corporations Act 2001*.

31. On 7 July 2021, the directors of ICS resolved to distribute a special dividend of 19 cents per share with the total special dividend amount of $2,014,763. The distribution statement associated with the special dividend declared 100% of the special dividend to be conduit foreign income pursuant to section 802-15. Further, the special dividend was not franked (that is, its franking percentage was 0%).

32. The Record Date for ICS shareholders to be entitled to receive the special dividend and return of share capital was 13 July 2021.

33. The special dividend (sourced from conduit foreign income) was paid on the Payment Date to each ICS shareholder and was not debited against the share capital account of ICS. The special dividend was debited against its retained earnings.

34. The return of share capital was paid on the Payment Date and debited against the share capital account of ICS. After rounding, the total amount of share capital paid was $16,542,269.

Other matters

35. At the Record Date, ICS had 10,604,019 fully-paid ordinary shares on issue, and ICS had only ordinary shares on issue.

36. ICS's share capital account (as defined in section 975-300) is not tainted (within the meaning of Division 197).

37. ICS paid its first dividends (partially franked) in the 2011–12 income year, and it has paid both interim and final dividends in each subsequent income year.

38. ICS made an interim dividend payment to shareholders on the Payment Date of 4 cents per share, totalling $424,161.

39. ICS confirmed that ICS shares do not constitute an ‘indirect Australian real property interest’ (as defined in section 855-25).

Commissioner of Taxation
4 August 2021

Appendix – Explanation

This Explanation 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.

Table of Contents **Paragraph**

Return of capital is not a dividend

40. 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 the shareholder is a resident of Australia.

41. 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, paragraph (d) of the definition of 'dividend' excludes a distribution from the meaning of dividend if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

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

43. Subsection 975-300(3) provides that an account is generally taken not to be a share capital account if it is tainted. ICS has confirmed that its share capital account is not tainted within the meaning of Division 197.

44. The return of capital was recorded as a debit to ICS's untainted share capital account. As such, paragraph (d) of the definition of dividend in subsection 6(1) of the ITAA 1936 applies and the return of capital is not a dividend.

45. As the return of capital is not a dividend as defined in subsection 6(1) of the ITAA 1936, no part of the return of capital is included in your assessable income as an ICS shareholder under subsection 44(1) of the ITAA 1936.

Sections 45A, 45B and 45C of the ITAA 1936 do not apply

46. Sections 45A and 45B of the ITAA 1936 are two 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 return of

capital received by ICS shareholders is treated as an unfranked dividend paid by ICS out of profits.

Section 45A – streaming of dividends and capital benefits

47. Section 45A of the ITAA 1936 generally applies where:

- a company streams capital benefits to some shareholders who would derive a greater benefit from the receipt of capital than other shareholders (disadvantaged shareholders), and
- it is reasonable to assume that the disadvantaged shareholders have received, or are likely to receive, dividends.

48. Paragraph 45A(3)(b) of the ITAA 1936 provides that capital benefits include the distribution of share capital.

49. A capital benefit was provided to ICS shareholders. However, the circumstances of the return of capital indicate that there was no streaming of capital benefits to some ICS shareholders and dividends to other ICS shareholders.

50. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the return of capital paid to ICS shareholders.

Section 45B – scheme to provide capital benefits

51. Section 45B of the ITAA 1936 applies where certain capital payments are made to shareholders in substitution for dividends. In broad terms, section 45B of the ITAA 1936 applies where:

- there is a scheme under which a person is provided with a capital benefit by a company
- under the scheme, a taxpayer (relevant taxpayer) who may or may not be the person provided with the capital benefit obtains a tax benefit, 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 a relevant taxpayer to obtain a tax benefit.

52. The return of capital satisfies the first two conditions referred to in paragraph 51 of this Ruling. However, having regard to the relevant circumstances of the scheme, it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling ICS shareholders to obtain a tax benefit.

53. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the return of capital ICS shareholders received.

Capital gains tax consequences

CGT event G1

54. CGT event G1 happens if:

- a company makes a payment to a shareholder in respect of a share they own in the company
- some or all of the payment (the non-assessable part) is not a dividend, or an amount that is taken to be a dividend under section 47 of the ITAA 1936, and
- the payment is not included in the shareholder's assessable income (section 104-135).

55. CGT event G1 happened to your ICS shares when you received the return of capital payment on the ICS shares which you continued to own at the Payment Date.

56. You made a capital gain when CGT event G1 happened where the amount of the return of capital of $1.56 per ICS share exceeded the cost base of the share. The capital gain is equal to the excess, and the cost base and reduced cost base of the ICS share is reduced to nil (subsection 104-135(3)). You cannot make a capital loss when CGT event G1 happens (Note 1 to subsection 104-135(3)).

57. If the amount of the return of capital of $1.56 per share is less than the cost base of your ICS share, you reduce both the cost base and reduced cost base of the share (but not below nil) by the amount of the return of capital (subsection 104-135(4)).

CGT event C2

58. If, after the Record Date but before the Payment Date, you ceased to own an ICS share in respect of which the return of capital was made, the right to receive the return of capital in respect of that share is retained by you and is a separate CGT asset from the ICS share.

59. CGT event C2 happened when the return of capital was made. The right to receive the return of capital, being an intangible asset, ended by the right being discharged or satisfied when the return of capital was made (section 104-25).

60. You will make a capital gain under CGT event C2 if the capital proceeds from the ending of the right are more than the cost base of the right. The capital gain is equal to the amount of the excess. You will make a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right. The capital loss is equal to the amount of the difference (subsection 104-25(3)).

61. In working out the capital gain or capital loss when CGT event C2 happens, the capital proceeds are equal to the amount of the return of capital ($1.56 per share) (subsection 116-20(1)).

62. The cost base of your right to receive each return of capital is worked out under Division 110 (modified by Division 112). The cost base of the right does not include the cost base or reduced cost base of the share previously owned by you to the extent that it was applied in working out a capital gain or capital loss made when a CGT event happened to the share, for example, when you disposed of the ICS share after the Record Date and before the Payment Date. Therefore, if the cost base or reduced cost base of the ICS share previously owned by you has been fully applied in working out a capital gain or capital loss on the share, the right to receive the return of capital will have a nil cost base.

As a result, you will, in those circumstances, make a capital gain equal to the capital proceeds, being $1.56 per ICS share owned at the Record Date.

Foreign-resident shareholders

63. Under subsection 855-10(1), you disregard a capital gain or capital loss made from a CGT event if:

- just before the CGT event happened, you are a foreign resident, or the trustee of a foreign trust for CGT purposes, and
- the CGT event happens in relation to a CGT asset that is not taxable Australian property.

64. Section 855-15 sets out when a CGT asset is 'taxable Australian property', as summarised here:

Table 1: Categories of CGT assets that are taxable Australian property

Item 1	Taxable Australian real property
Item 2	An indirect Australian real property interest not covered by table 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 table items 1, 2 or 5
Item 4	An option or right to acquire a CGT asset covered by table items 1, 2 or 3
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)

65. If you were a foreign resident or the trustee of a foreign-resident trust for CGT purposes, you disregard a capital gain made if CGT event G1 happened to your ICS share or a capital gain or capital loss made if CGT event C2 happened in relation to your ICS share under subsection 855-10(1) because your ICS share was not an indirect Australian real property interest (table item 2 of section 855-15), provided also that your ICS share:

- had not been used at any time by you in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- was not covered by subsection 104-165(3) (table item 5 of section 855-15, about individuals choosing to disregard capital gains upon ceasing to be Australian residents).

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References

Previous draft:

Not previously issued as a draft

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(1)
- ITAA 1936 44(1)(a)
- ITAA 1936 44(1)(b)
- ITAA 1936 44(1)(c)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(3)
- ITAA 1936 45B(3)(b)
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1936 128B(3E)
- ITAA 1936 128D
- 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)
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 197
- ITAA 1997 Div 230
- ITAA 1997 802-15
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 855-25
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953
- Corporations Act 2001 256C

ATO references

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