CR 2021/68 - FAR Ltd - return of capital

Class Ruling
FAR Ltd – return of capital

Relying on this Ruling

This publication (excluding appendixes) 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.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for shareholders of FAR Ltd (FAR) who received a return of capital payment of 80 cents per ordinary FAR share on 28 September 2021 (Payment Date).

2. Full details of this scheme are set out in paragraphs 16 to 29 of this Ruling.

3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (as detailed in the table in Appendix 2 of this Ruling).

Who this Ruling applies to

4. This Ruling applies to you if you:

- were registered on the FAR share register on 21 September 2021 (Record Date)
- held your FAR shares on capital account; that is, you did not hold your FAR 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 of 80 cents per FAR 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 16 to 29 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

Return of capital is not a dividend

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

8. No part of the return of capital paid to you by FAR on the Payment Date is included in your assessable income as a dividend under section 44.

Sections 45A, 45B and 45C do not apply

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

Capital gains tax consequences

CGT event G1

10. CGT event G1 happened on the Payment Date in respect of each FAR share you owned on the Record Date and continued to own on the Payment Date (section 104-135).

11. You made a capital gain under CGT event G1 if the amount of the return of capital of 80 cents per FAR share was more than the share's cost base (subsection 104-135(3)). The amount of the gain was equal to the excess.

12. If the return of capital of 80 cents per FAR share was equal to or less than the share's cost base, under CGT event G1, the cost base and reduced cost base of the share was reduced by the amount of the return of capital (subsection 104-135(4)).

CGT event C2

13. CGT event C2 happened on the Payment Date in respect of each FAR share you owned on the Record Date but ceased to own prior to the Payment Date (section 104-135).

Discount capital gain

14. You can treat a capital gain made when CGT event G1 or CGT event C2 happened as a discount capital gain under Subdivision 115-A if you acquired the FAR 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

15. 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 a FAR share and the right to receive the return of capital were not an indirect Australian real property interest (table item 2 of section 855-15), provided that your FAR share or the right to receive the return of capital:

- 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), and/or
- was not covered by subsection 104-165(3) (table item 5 of section 855-15, about individuals who defer capital gains upon ceasing to be Australian residents).

Scheme

16. 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

17. FAR is an Australian-resident company limited by shares and listed on the Australian Securities Exchange (ASX).

18. Incorporated in Australia in 1984 as First Australian Resources NL, the company became a listed public entity in 1986, changing its name to FAR Ltd in 2010.

19. FAR is an independent Africa-focused oil and gas exploration and development company.

Return of capital payment

20. FAR made an ASX announcement on 22 July 2021 advising of its intention to seek shareholder approval for an equal share capital reduction without a cancellation of shares.

21. On 15 September 2021, FAR shareholders approved the return of capital of 80 cents per share.

22. FAR conducted this return of capital because:

- they held an interest in the Production Sharing Contract for the Rufisque, Sangomar, and Sangomar Deep Offshore Blocks offshore Senegal and the relevant Joint Operating Agreement (the RSSD Project) through its wholly-owned subsidiary, FAR Senegal RSSD SA (FAR Senegal)
- the RSSD Project did not proceed as anticipated despite equity having been raised for its development in December 2019 and January 2020
- on 19 January 2021, FAR, together with FAR Senegal, entered into an RSSD Sale and Purchase Agreement to dispose of the RSSD Project to Woodside Energy (Senegal) B.V. (Woodside), and
- Woodside paid FAR Senegal US$45 million and reimbursed FAR Senegal's share of working capital for the RSSD Project totalling approximately US$81 million, resulting in a total receipt of approximately US$126 million.

23. The return of capital was distributed to shareholders on an equal basis.

24. The total amount of the return of capital payment of A$79,832,394 was debited to share capital account.

Other matters

25. On the Record Date, FAR had 99,790,492 ordinary shares on issue.

26. FAR's financial position as at 30 June 2021 disclosed:

- total assets of US$234,276,694
- total liabilities of US$99,118,637
- total equity of US$135,132,650
- accumulated losses of US$309,075,863, and
- issued capital of US$439,623,308

27. On the Payment Date, FAR's share capital account (as defined in section 975-300) was not tainted (within the meaning of Division 197).

28. FAR has not declared any dividends and is not proposing to pay a dividend to any shareholders as at the date of this Ruling.

29. On the Payment Date, the sum of the market values of the assets of FAR and its subsidiaries that are taxable Australian real property did not exceed the sum of the market values of their other assets for the purposes of section 855-30.

Commissioner of Taxation
13 October 2021

Appendix 1 – 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

30. Subsection 44(1) 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.

31. The term 'dividend' is defined in subsection 6(1) 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.

32. 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.

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

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

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

Sections 45A, 45B and 45C do not apply

36. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies. The effect of such a determination is that all or part of the return of capital received by FAR shareholders is treated as an unfranked dividend paid by FAR out of profits.

Section 45A – streaming of dividends and capital benefits

37. Section 45A applies where:

- a company streams capital benefits to some shareholders (advantaged 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 received, or are likely to receive, dividends.

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

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

40. 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 return of capital.

Section 45B – scheme to provide capital benefits

41. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. In broad terms, section 45B 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.

42. The return of capital satisfies the first two conditions. 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 FAR shareholders to obtain a tax benefit.

43. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(b) that section 45C applies in relation to the whole, or a part, of the return of capital.

CGT events G1 or C2 happened

CGT event G1

44. 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, and

- the payment is not included in the shareholder's assessable income (section 104-135).

45. CGT event G1 happened to your FAR shares when FAR paid you the return of capital in respect of FAR shares you owned on the Record Date and continued to own on the Payment Date (section 104-135)

46. You made a capital gain from CGT event G1 happening if the return of capital of 80 cents per FAR share was more than the cost base of the FAR share. The capital gain is equal to the difference, and you reduce both the cost base and reduced cost base of your FAR share to nil (subsection 104-135(3)). You cannot make a capital loss when CGT event G1 happens (Note 1 to subsection 104-135(3)).

47. If the amount of the return of capital of 80 cents you received per FAR share was not more than the cost base of your FAR share, you reduce both the cost base and reduced cost base of your share (but not below nil) by the amount of the return of capital (subsection 104-135(4)).

CGT event C2

48. If, after the Record Date but before the Payment Date, you ceased to own a FAR share in respect of which the return of capital was payable, 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 FAR share.

49. In that case, 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).

50. You made a capital gain under CGT event C2 if the capital proceeds from the ending of the right were more than the cost base of the right. The capital gain is equal to the amount of the excess. You made 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)).

51. In working out the capital gain or capital loss made from CGT event C2, the capital proceeds are equal to the amount of the return of capital (80 cents per share) (subsection 116-20(1)).

52. The cost base of your right to receive the 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 FAR 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 share after the Record Date and before the Payment Date. Therefore, if the cost base or reduced cost base of the 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 80 cents per FAR share owned at the Record Date.

53. For the purposes of Subdivision 109-A, you are considered to have acquired the right at the time when you acquired your FAR share. Therefore, you can treat a capital gain made when CGT event C2 happened to your right to receive the return of capital as a discount capital gain under Subdivision 115-A if you acquired the FAR share (ownership of which on the Record Date gave rise to your right to receive the return of capital) at least 12 months before the Payment Date (subsection 115-25(1)) provided the other conditions in Subdivision 115-A are satisfied.

Foreign shareholders able to disregard CGT

54. 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 (subsection 855-10(1)).

55. Your FAR share or the right to receive the return of capital was taxable Australian property on the Payment Date if the FAR share or the right:

- was an indirect Australian real property interest (table item 2 of section 855- 15)
- had 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 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).

56. An indirect Australian real property interest is a membership interest held by an entity in another entity if the interest passes the principal asset test in section 855-30 and the non-portfolio interest test under section 960-195 (section 855-25).

57. A FAR share held by a foreign-resident shareholder failed the principal asset test on the Payment Date as the sum of the market values of FAR's assets that were taxable Australian real property did not exceed the sum of the market values of its assets that were not taxable Australian real property (subsection 855-30(2)). As such, a FAR share did not constitute an indirect Australian real property interest on the Payment Date. Separately, the right to receive the return of capital was not an indirect Australian real property interest on the Payment Date.

58. Therefore, 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 FAR share or a capital gain or capital loss made if CGT event C2 happened in relation to your right to receive the return of capital under subsection 855-10(1) as a FAR share or the right to receive the return of capital were not an indirect Australian real property interest, provided that your FAR share or the right:

- 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), and/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).

Appendix 2 – Legislative provisions

59. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

Income Tax Assessment Act 1936	subsection 6(1)
Income Tax Assessment Act 1936	section 44
Income Tax Assessment Act 1936	subsection 44(1)
Income Tax Assessment Act 1936	section 45A
Income Tax Assessment Act 1936	subsection 45A(2)
Income Tax Assessment Act 1936	paragraph 45A(3)(b)
Income Tax Assessment Act 1936	section 45B
Income Tax Assessment Act 1936	paragraph 45B(3)(b)
Income Tax Assessment Act 1936	section 45C
Income Tax Assessment Act 1936	section 47
Income Tax Assessment Act 1997	section 104-25
Income Tax Assessment Act 1997	subsection 104-25(3)
Income Tax Assessment Act 1997	section 104-135
Income Tax Assessment Act 1997	subsection 104-135(3)
Income Tax Assessment Act 1997	subsection 104-135(4)
Income Tax Assessment Act 1997	subsection 104-165(3)
Income Tax Assessment Act 1997	Subdivision 109-A
Income Tax Assessment Act 1997	Division 110
Income Tax Assessment Act 1997	Division 112
Income Tax Assessment Act 1997	Subdivision 115-A
Income Tax Assessment Act 1997	subsection 115-25(1)
Income Tax Assessment Act 1997	subsection 116-20(1)
Income Tax Assessment Act 1997	Division 197
Income Tax Assessment Act 1997	Division 230
Income Tax Assessment Act 1997	subsection 855-10(1)
Income Tax Assessment Act 1997	section 855-15
Income Tax Assessment Act 1997	section 855-25
Income Tax Assessment Act 1997	section 855-30
Income Tax Assessment Act 1997	subsection 855-30(2)
Income Tax Assessment Act 1997	section 960-195
Income Tax Assessment Act 1997	section 975-300
Income Tax Assessment Act 1997	subsection 975-300(3)
Income Tax Assessment Act 1997	section 977-50
Income Tax Assessment Act 1997	subsection 995-1(1)

References

Previous draft:
Not previously issued as a draft

Related Rulings/Determinations:
TD 2000/10

Legislative references:
TAA 1953

ATO references

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