

CR 2022/111 - Horizon Oil Limited - return of capital and dividend



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Status: **legally binding**

Class Ruling

Horizon Oil Limited – return of capital and dividend

❶ 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.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for shareholders of Horizon Oil Limited (Horizon) who received the unfranked dividend of \$0.0165 per ordinary share (Dividend) and the return of capital payment of \$0.0135 per ordinary share on 20 October 2022 (Payment Date).
2. Details of this scheme are set out in paragraphs 21 to 41 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 Horizon share register on 13 October 2022 (Record Date) as a holder of fully-paid ordinary shares
 - held your Horizon shares on capital account on the Record Date; that is, you did not hold your Horizon shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)), and
 - received the Dividend of \$0.0165 per Horizon share and the return of capital payment of \$0.0135 per Horizon share on the Payment Date.

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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 21 to 41 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 2022 to 30 June 2023.

Ruling

Assessability of the Dividend – resident

7. The Dividend 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 are required to include the Dividend in your assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).

Assessability of the Dividend – non-resident

9. If you are a non-resident and the Dividend is not attributable to a permanent establishment in Australia, the Dividend is non-assessable non-exempt income and not included in your assessable income (section 802-15).

10. You are not liable to pay withholding tax in respect of the Dividend (section 802-15).

Return of capital is not a dividend

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

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

12. 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 of \$0.0135 per Horizon share you received on the Payment Date.

Capital gains tax consequences – resident

CGT event G1

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

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14. You made a capital gain when CGT event G1 happened if the return of capital of \$0.0135 per Horizon share you received was more than the share's cost base (subsection 104-135(3)).

15. If the return of capital of \$0.0135 per Horizon share you received was equal to or less than the cost base of the share, the cost base and reduced cost base of each share is reduced by the amount of the return of capital (subsection 104-135(4)).

16. If you acquired your Horizon share before 20 September 1985, any capital gain made from CGT event G1 is disregarded (subsection 104-135(5)).

CGT event C2

17. CGT event C2 happened to you on the Payment Date in respect of your right to receive the return of capital for each Horizon share you owned at the Record Date where you ceased to own that Horizon share before the Payment Date (section 104-25).

18. If you acquired your Horizon share before 20 September 1985, any capital gain or capital loss made from CGT event C2 is disregarded (subsection 104-25(5)).

Discount capital gain

19. You can treat a capital gain made when CGT event G1 or CGT event C2 happened as a discount capital gain if you acquired your Horizon shares at least 12 months before the Payment Date (subsection 115-25(1)) and the capital gain was worked out using a cost base that was calculated without reference to indexation at any time (subsection 115-20(1)), provided the other conditions in Subdivision 115-A are satisfied.

Capital gains tax consequences – non-resident

20. You disregard under section 855-10 any capital gain from CGT event G1, and any capital gain or capital loss from CGT event C2, if you are a foreign resident just before the event and your Horizon share or your right to receive the return of capital on your Horizon 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), and
- 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).

Scheme

21. 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

22. Horizon is an Australian incorporated public company listed on the Australian Securities Exchange.

23. Horizon and its subsidiaries carry on a business of producing oil and gas.

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24. As at 30 June 2022, Horizon had in American dollars:
- share capital of US\$159,343,000
 - accumulated losses of (US\$96,536,000)
 - profit reserve of US\$24,326,000.
25. Horizon has a single class of shares on issue, being ordinary shares.
26. As at the Record Date, Horizon had 1,601,442,962 ordinary fully-paid shares on issue.

Return of capital payment and dividend

27. On 29 July 2022, Horizon announced a 12-month extension of its senior debt facility with a revised facility limit of US\$20 million.
28. On 25 August 2022, Horizon announced it would return \$47,368,288.864 in Australian dollars to its shareholders by way of:
- a return of capital of \$0.0135 per share, or A\$21,315,729.99
 - an unfranked dividend of \$0.0165 per share, or A\$26,052,558.87.
29. Following the issue of 22,500,000 new shares to the Horizon Employee Share Trust on 9 September 2022, the total distribution was increased by A\$675,002.22 to the following amounts:
- return of capital of A\$21,619,480.38
 - unfranked dividend of A\$26,423,810.70.
30. The return of capital was debited to Horizon's share capital account and the following accounting entry was recorded:

Dr share capital	A\$21,619,480.38
Cr cash	A\$21,619,480.38

31. The Dividend was debited to Horizon's profit reserve account and the following accounting entry was recorded:

Dr profit reserve	A\$26,423,810.70
Cr cash	A\$26,423,810.70

32. The return of capital and Dividend were paid to each holder of a Horizon share registered on the Horizon share register on the Record Date.
33. The return of capital was funded by Horizon's available cash balances and drawdowns from the extension of its senior debt facility.
34. The return of capital was an equal capital reduction under section 256B of the *Corporations Act 2001*. Horizon obtained shareholder approval for the return of capital by way of an ordinary resolution under section 256C of the *Corporations Act 2001* passed at its Extraordinary General Meeting held on 7 October 2022.
35. The Dividend was declared to be 100% conduit foreign income pursuant to section 802-15 in the distribution statement provided by Horizon to its shareholders on 20 October 2022.

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Other matters

36. Horizon has not declared a dividend in the past 10 years.
37. The Dividend was a frankable distribution under section 202-40.
38. Horizon's share capital account (as defined in section 975-300) was not tainted (within the meaning of Division 197) as at the Payment Date.
39. The total amount of the Dividend declared by Horizon to be conduit foreign income pursuant to section 802-15 did not exceed the amount of Horizon's conduit foreign income when Horizon issued the relevant distribution statement to its shareholders.
40. Horizon shareholders consist of both Australian residents and foreign residents. As at 13 October 2022, approximately 45% of Horizon shareholders were foreign residents.
41. The sum of the market values of the assets of Horizon and its subsidiaries that were 'taxable Australian real property' as defined in section 855-20 on the Payment Date did not exceed the sum of the market values of their assets that were not 'taxable Australian real property' for the purposes of section 855-30 on the Payment Date.

Commissioner of Taxation

14 December 2022

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Appendix – Explanation

❶ *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.*

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Return of capital is not a dividend

42. 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.

43. 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.

44. Subsection 975-300(3) provides that an account is generally taken not to be a share capital account if it is tainted. Horizon has confirmed that its share capital account was not tainted within the meaning of Division 197, as at the Payment Date.

45. The return of capital was recorded as a debit to Horizon'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.

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

46. Sections 45A and 45B of the ITAA 1936 are 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 a capital return received by shareholders is treated as an unfranked dividend paid out of profits of the company.

47. Section 45A of the ITAA 1936 generally applies where a company streams capital benefits to some shareholders who would benefit more from them than other shareholders, and dividends to those other shareholders. As the return of capital was paid to all Horizon shareholders that held Horizon shares on the Record Date, no such streaming occurred under the scheme.

48. Section 45B of the ITAA 1936 generally applies where, having regard to the relevant circumstances of the scheme as set out in subsection 45B(8) of the ITAA 1936, a company provided certain capital payments to its shareholders for a more than incidental purpose of enabling a taxpayer to obtain a demerger benefit or a tax benefit. Having had regard to the relevant circumstances of the scheme the Commissioner has not concluded that the scheme was entered into for a more than incidental purpose to enable a taxpayer to obtain a tax benefit.

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49. Therefore, the Commissioner will not make a determination under either subsection 45A(2) or paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the return of capital received by Horizon shareholders.

Status: **not legally binding**

References

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44(1)(a)(i)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45B
- ITAA 1936 45B(3)(b)
- ITAA 1936 45B(8)
- ITAA 1936 45C
- ITAA 1997 104-25
- ITAA 1997 104-25(5)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104-135(5)
- ITAA 1997 104-165(3)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 Div 197
- ITAA 1997 202-40
- ITAA 1997 Div 230
- ITAA 1997 802-15
- ITAA 1997 855-10
- ITAA 1997 855-15
- ITAA 1997 855-20
- ITAA 1997 855-30
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- Corporations Act 2001 256B
- Corporations Act 2001 256C

ATO references

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