Class Ruling

Viva Energy Group Limited – return of capital and share consolidation

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.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

Table of Contents **Paragraph**

What this Ruling is about

1. This Ruling sets out the tax consequences for shareholders of Viva Energy Group Limited (VEA) who received the return of capital payment of 21.46 cents per ordinary VEA share on 13 October 2020 (Payment Date) and for the consolidation of their shares.

2. Full details of this return of capital arrangement and share consolidation are set out in paragraphs 19 to 45 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) unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:

- were registered on the VEA share register on 6 October 2020 (Record Date)

- held your VEA shares on capital account, that is, your VEA shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) on the Record Date, and
- received the return of capital of 21.46 cents per VEA share.

5. This Ruling also applies to you if you were registered on the VEA share register on 9 October 2020 as the VEA shares you held were consolidated.

6. This Ruling does not apply to you if you are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 19 to 45 of this Ruling.

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

7. The return of capital in this Ruling is based on the VEA shares you held prior to their consolidation.

When this Ruling applies

8. This Ruling applies from 1 July 2020 to 30 June 2021.

Ruling

Return of capital is not a dividend

9. The return of capital is not a dividend as defined in subsection 6(1).

The application of sections 45A, 45B and 45C

10. The Commissioner will not make a determination under either subsection 45A(2) or paragraph 45B(3)(b) that section 45C applies to the whole, or any part, of the return of capital.

Capital gains tax consequences

CGT event G1

11. CGT event G1 happened to you when VEA made the return of capital to you in respect of the VEA shares you owned, and you continued to hold, on the Payment Date (section 104-135).

12. You made a capital gain when CGT event G1 happened in respect of your VEA shares if the return of capital of 21.46 cents per VEA share you received is more than the cost base of the share. The capital gain is equal to the difference, and the cost base and reduced cost base of your VEA share is reduced to nil (subsection 104-135(3)). You cannot make a capital loss from CGT event G1 happening (Note 1 to subsection 104-135(3)).

13. If the return of capital payment of 21.46 cents per VEA share you received is not more than the cost base of the share, the cost base and reduced cost base of each share is reduced by the amount of the payment (but not below nil) (subsection 104-135(4)).

CGT event C2

14. CGT event C2 happened to you when VEA made the return of capital to you in respect of VEA shares that you owned at the Record Date but ceased to own before the Payment Date (section 104-25).

Discount capital gain

15. You can treat a capital gain you made when CGT event G1 or CGT event C2 happened in respect of your VEA share as a discount capital gain if you acquired the VEA share on or before 13 October 2019 (subsection 115-25(1)) provided the other conditions in Subdivision 115-A are satisfied.

Foreign resident shareholders

16. If you were a foreign-resident VEA shareholder just before CGT event G1 or CGT event C2 happened in respect of your VEA shares, disregard any capital gain you made from the CGT event happening where your VEA shares or right to receive the relevant return of capital were not 'taxable Australian property' under section 855-10.

Share consolidation

17. No CGT event happened as a result of the VEA share consolidation (section 112-25).

18. Each element of the cost base and reduced cost base of your consolidated VEA shares is the sum of the corresponding element of each original VEA share you held before the share consolidation (subsection 112-25(4)).

Scheme

19. 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

20. VEA is an Australian resident company which is listed on the Australian Securities Exchange.

21. VEA is an integrated downstream petroleum company. VEA and its subsidiaries operate across the following business segments:

- retail, fuels and marketing
- refining, and
- supply, corporate and overheads.

22. On 21 February 2020, VEA sold its 35.5% stake in Viva Energy REIT Limited (the REIT Divestment) in exchange for total cash proceeds of $734.3 million.

23. The proceeds of the REIT Divestment remained surplus to the ongoing capital structure of VEA's business. VEA considered its financial performance and position, project capital requirements, and excess capital funds available in determining to proceed with the return of capital and special dividend. VEA considered that the most efficient

means of distributing the after-tax proceeds of the REIT Divestment to its shareholders was via the equal return of capital and special dividend in conjunction with the on-market share buy-back.

24. VEA plans to return $680 million in after-tax proceeds from the REIT Divestment to its shareholders through a combination of on-market share buy-backs, the return of capital, and an unfranked special dividend.

25. VEA returned $530 million to its shareholders on 13 October 2020. This comprised a return of capital of $415.1 million, at 21.46 cents per share, and an unfranked special dividend of $114.9 million, at 5.94 cents per share.

26. VEA also returned approximately $18 million from the REIT Divestment by way of an on-market share buy-back program which it commenced on 18 June 2020. VEA intends to return a further $32 million under this program.

27. VEA intends to return the remaining $100 million of the REIT Divestment to shareholders in due course.

Return of capital

28. On 31 August 2020, VEA sent a notice of general meeting to its shareholders for the proposed return of capital of 21.46 cents per VEA share.

29. VEA also announced in the notice of general meeting that it would pay an unfranked special dividend of 5.94 cents per share to its shareholders. VEA shareholders were not required to approve the special dividend.

30. VEA shareholders approved the return of capital by way of ordinary resolution at the extraordinary general meeting held on 30 September 2020.

31. All VEA shareholders that held their VEA shares at the Record Date were entitled to participate equally in the return of capital and the special dividend.

32. The entire return of capital of $415.1 million was debited against VEA's share capital account.

33. VEA made the return of capital of 21.46 cents per VEA share on the Payment Date to shareholders who held their VEA shares on the Record Date.

Share consolidation

34. VEA shareholders also approved a share consolidation at the extraordinary general meeting held on 30 September 2020. Each VEA share you held on 9 October 2020 was converted into 0.84 of a fully-paid ordinary VEA share. Where the share consolidation resulted in an entitlement to a fraction of a VEA share, the fraction was rounded up to the nearest whole number of shares.

35. The share consolidation resulted in the 1,934,386,182 VEA shares on issue before the consolidation decreasing to 1,624,887,508 after the consolidation.

36. The share consolidation was undertaken in accordance with section 254H of the *Corporations Act 2001* (Corporations Act).

37. The on-market share buy-back program will further decrease the number of shares on issue.

38. VEA undertook the share consolidation to counteract the impact on the trading price of VEA shares of implementing the return of capital payment and special dividend.

39. Following the return of capital, special dividend and share consolidation, each VEA shareholder maintained the same proportionate ownership interest in VEA (other than any shares which were bought or sold in the interim).

Other matters

40. VEA's half-year results for the period to 30 June 2020 disclosed:

- contributed equity of $4,840.7 million
- retained earnings of $2,084.0 million
- reserves of ($4,246.8 million)
- pre-tax gain of $122.2 million on the REIT Divestment, and
- total loss before income tax of $134.2 million.

41. To date, VEA has paid shareholders fully franked dividends twice per year. VEA's dividend policy is to distribute between 50% and 70% of underlying net profit after tax as dividends. VEA expects to continue paying dividends in line with this policy as fully franked dividends as long as franking credits are available.

42. On the Payment Date, VEA's share capital account was not tainted within the meaning of section 197-50.

43. VEA only has ordinary shares on issue.

44. On the Payment Date, the sum of the market values of the assets of VEA 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.

45. As at the Payment Date, a significant percentage of VEA shares were held by foreign residents. VEA withheld 15% dividend withholding tax from the amount of the unfranked special dividend paid to foreign residents.

Commissioner of Taxation
28 October 2020

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.

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Return of capital is not a dividend

46. The term 'dividend' is defined in subsection 6(1) to include any distribution made by a company to any of its shareholders but excludes a distribution debited against an amount standing to the credit of the company's share capital account.

47. As the return of capital payment was recorded as a debit to VEA's share capital account (which is not tainted), the payment was not a dividend.

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

48. Sections 45A and 45B are 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 is treated as an unfranked dividend.

Section 45A – streaming of capital benefits

49. Section 45A generally applies when a company streams the provision of capital benefits (such as the distribution of share capital by way of the return of capital) to shareholders who would derive a greater benefit from the capital benefits than other shareholders while those other shareholders have received, or are likely to receive, dividends.

50. As all VEA shareholders received the return of capital, there was no streaming of capital benefits to some shareholders. Accordingly, section 45A does not apply.

Section 45B – scheme to provide capital benefits

51. Section 45B applies where, having regard to the relevant circumstances of the scheme as set out in subsection 45B(8), a company provided certain capital payments to its shareholders for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit.

52. Having regard to the relevant circumstances of the scheme, including the concurrent special dividend, the Commissioner considers that it cannot be concluded that the return of capital was entered into or carried out for a more than incidental purpose of enabling VEA shareholders to obtain a tax benefit. Accordingly, section 45B does not apply.

Capital gains tax consequences

CGT event G1

53. 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 which is not a dividend and is not otherwise included in the shareholder's assessable income (section 104-135).

54. CGT event G1 happened when VEA made the return of capital to you on the VEA shares you owned on the Record Date and continued to hold on the Payment Date.

55. You made a capital gain when CGT event G1 happened if the amount of the return of capital of 21.46 cents per VEA share is more than the cost base of the share. The capital gain is equal to the difference and you reduce both the cost base and reduced cost base of the VEA 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)).

56. If the amount of the return of capital of 21.46 cents per VEA share is not more than the cost base of your share, you reduce both the cost base and reduced cost base of the VEA share by the amount of the return of capital (but not below nil) (subsection 104-135(4)).

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

CGT event C2

58. If you received the return of capital payment on a VEA share which you owned on the Record Date but ceased to own on the Payment Date, you retained the right to receive the payment in respect of the share and the right is a separate capital gains tax (CGT) asset to the VEA share.

59. CGT event C2 happened to you when you received the return of capital payment. The right to receive the payment is an intangible CGT asset which ended when it was discharged or satisfied by way of receipt of the payment (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 difference (subsection 104-25(3)).

61. In working out the capital gain when CGT event C2 happens, the capital proceeds is equal to the amount of the return of capital you received of 21.46 cents per VEA 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 VEA share you previously owned where you applied the cost base or reduced cost base in working out the capital gain or capital loss you made when the earlier 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 you fully applied the cost base or reduced cost base of the share in working out a capital gain or capital loss on disposing of your share, the right to receive the return of capital has a nil cost base. Therefore, you made a capital gain which is equal to the capital proceeds, of 21.46 cents per VEA share you owned at the Record Date and ceased to own at the Payment Date.

63. For the purposes of Subdivision 109-A, you are considered to have acquired the right at the time when you acquired your VEA share. Therefore, you can treat a capital gain you made when CGT event C2 happened to your right if you acquired the share at least 12 months before the Payment Date (subsection 115-25(1)) provided the other conditions in Subdivision 115-A are satisfied.

Foreign residents

64. If you were a foreign resident VEA shareholder, or the trustee of a foreign resident trust for CGT purposes, you disregard a capital gain you made when under subsection 855-10(1) as your VEA share (or your right to receive the return of capital payment if CGT event C2 happened) is not an indirect Australian real property interest (table item 2 of section 855-15), provided that:

- you did not use the VEA share (if CGT event G1 happened) or the right to receive the payment (if CGT event C2 happened) at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- the VEA share (if CGT event G1 happened) or the right to receive the payment (if CGT event C2 happened) 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).

Share consolidation

No CGT event

65. No CGT event happened to your VEA shares pursuant to section 112-25 as a result of the share consolidation as:

- VEA did not cancel or redeem its shares pursuant to the Corporations Act
- VEA converted its shares into a smaller number of shares pursuant to section 254H of the Corporations Act
- there is no change to VEA's share capital account, and
- the proportion of equity which each shareholder owns in VEA's share capital account is maintained.

66. The Commissioner accepts that while there is a change in the form of the original shares, there is no change in their beneficial ownership.

67. The VEA shares after the share consolidation will have the same date of acquisition for CGT purposes as the VEA shares held before the share consolidation to which they relate.[1]

Cost base and reduced cost base of your VEA shares

68. When shares are consolidated into a smaller number, the cost base and reduced cost base of the original shares respectively, as adjusted for CGT event G1 for the return of capital payment, need to be apportioned over the new shares.

[1] See Taxation Determination TD2000/10 *Income tax*: *capital gains: what are the CGT consequences for a shareholder if a company converts its shares into a larger or smaller number of shares?*

Appendix 2 – Legislative provisions

69. 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 45A
Income Tax Assessment Act 1936	subsection 45A(2)
Income Tax Assessment Act 1936	section 45B
Income Tax Assessment Act 1936	subsection 45B(3)
Income Tax Assessment Act 1936	paragraph 45B(3)(b)
Income Tax Assessment Act 1936	subsection 45B(8)
Income Tax Assessment Act 1936	section 45C
Income Tax Assessment Act 1997	section 104-25
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	section 112-25
Income Tax Assessment Act 1997	subsection 112-25(4)
Income Tax Assessment Act 1997	Subdivision 115-A
Income Tax Assessment Act 1997	subsection 115-25(1)
Income Tax Assessment Act 1997	Division 197
Income Tax Assessment Act 1997	section 197-50
Income Tax Assessment Act 1997	Division 230
Income Tax Assessment Act 1997	section 855-10
Income Tax Assessment Act 1997	subsection 855-10(1)
Income Tax Assessment Act 1997	section 855-15
Income Tax Assessment Act 1997	section 855-30
Income Tax Assessment Act 1997	section 977-50
Income Tax Assessment Act 1997	subsection 995-1(1)
Corporations Act 2001	section 254H

References

Previous draft:
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Related Rulings/Determinations:
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ATO references

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