


CR 2006/123 - Income tax: Henderson Group plc - return of capital

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Class Ruling

Income tax: Henderson Group plc – return of capital

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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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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 dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) that applies to companies with par value shares;
- subsection 6(4) of the ITAA 1936 that applies to companies with par value shares;
- section 44 of the 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);
- Subdivision 115-A of the ITAA 1997;

- section 116-20 of the ITAA 1997; and
- section 116-30 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies are:
 - (a) Australian resident entities that held ordinary shares in Henderson Group plc (Henderson); and
 - (b) Australian resident entities that held Chess Depository Interests (CDIs) representing shares in Henderson,

who received a return of capital under the scheme described in paragraphs 14 to 29 of this Ruling. This Ruling does not apply to Australian resident entities that held their ordinary shares or CDIs (collectively referred to in this Ruling as 'shares') jointly or on revenue account.

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 14 to 29 of this Ruling.
6. This Ruling does not address the foreign exchange consequences that arise under forex realisation event 2 when the shareholders and CDI holders receive the return of capital under this scheme. This issue cannot be dealt with in this Ruling as the quantum and tax treatment of any forex realisation gain or loss may differ, depending on the individual circumstances of the shareholder or CDI holder.
7. 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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Date of effect

9. This Class Ruling applies to the income year (as defined in subsection 995-1(1) of the ITAA 1997) ending 30 June 2007. However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by *Gazette*; or
- the relevant provisions are not amended.

10. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

13. This Ruling is withdrawn and ceases to have effect after 30 June 2007. The Ruling continues to apply after its withdrawal, in respect of the relevant provisions ruled upon, to all entities within the specified class who enter into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

14. The scheme that is the subject of this Ruling is described below. This description is based on a number of documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- (a) Application letter from PricewaterhouseCoopers (the Applicant), requesting a Class Ruling dated 15 June 2006 and appendices attached thereto;
- (b) Documents which accompanied the request for Class Ruling:
 - the public announcement made by Henderson dated 24 August 2005 in relation to their 2005 Interim Results;
 - the Report lodged with the Australian Stock Exchange (ASX) on the 2005 Interim Results for the half year ended 30 June 2005; and
 - the Full Annual Financial Report and Accounts for Henderson for the years ended 31 December 2003, 31 December 2004 and 31 December 2005;
- (c) Letters to the ATO from the Applicant dated 3 July 2006, 7 July 2006, 7 August 2006, 17 August 2006, 7 November 2006, 9 November 2006 and 20 November 2006, providing further particulars; and
- (d) Copy of 'Circular to Shareholders' dated 27 July 2006.

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

15. Henderson is a company incorporated under the United Kingdom Companies Act and is listed on the London Stock Exchange (LSX) and the ASX. The company's listing followed its demerger from AMP Limited on 23 December 2003 (the Demerger). At the time of the Demerger, Henderson's business consisted of a life insurance business, an asset management business and a financial advisory business.

16. A key part of Henderson's stated strategy at the time of the Demerger was to improve the financial position and operational efficiency of the life insurance business by closing it to new business. This would result, over time, in the release of capital invested by shareholders in the business.

17. At the same time as the Demerger, Henderson raised additional share capital of approximately £190 million from institutional investors. Of the net proceeds raised, £50 million was used by Henderson to acquire a controlling interest in another company and £90 million was applied to subscribe for additional shares in that newly acquired company. The balance of £50 million was intended for general working capital purposes, but was never used and held in reserve.

18. On 13 April 2005, Henderson sold the life insurance business for a consideration of £1,102 million. The sale of that business was seen as a means of accelerating its stated strategy of releasing capital invested by shareholders in the business.

19. On 22 and 25 April 2005, Henderson returned approximately £871 million of the sale proceeds to shareholders and CDI holders under the Return of Cash and the Reduction of Investor Base. Class Ruling CR 2005/66 issued in relation to the Return of Cash and Reduction of Investor Base transactions. Henderson retained the balance of the sale proceeds to manage its day-to-day operations and meet regulatory requirements, as well as its future business needs. The sale proceeds intended to be employed in Henderson's day-to-day operations were never used for that purpose, but held in reserve.

20. Henderson determined that, as a result of its strengthening financial position, there was capital in excess of its capital requirements and a return of capital of £198.3 million was proposed, being:

- £156.5 million representing the balance of the proceeds from the sale of the life insurance business; and
- £41.8 million out of the proceeds remaining from the previous capital raisings.

Return of capital

21. The return of capital was approved by Henderson's shareholders and CDI holders at an Extraordinary General Meeting on 31 August 2006. The High Court of Justice in England and Wales approved the return of capital transaction and the associated share cancellation on 4 October 2006.

22. The Record Date for the return of capital was 13 October 2006, which was also the effective date for the cancellation of the shares.

23. All shareholders and CDI holders registered on the Record Date were entitled to the return of capital.

24. The return of capital was made possible through a share cancellation, with 22 shares being cancelled out of every 100 shares held on the Record Date. Henderson, at its discretion, rounded up or down to a whole share any fraction of a share which would otherwise be cancelled. Following the cancellation, shareholders and CDI holders, as far as practicable, retained their proportionate interest in the then issued share capital of Henderson.

25. For each share cancelled, shareholders and CDI holders received a distribution of 78 pence, based on the average of the closing price for Henderson shares on the LSX over the last five trading days before 18 July 2006. CDI holders were paid \$1.931787 (being the Australian Dollar equivalent of 78 pence based on an exchange rate determined by Henderson) for each CDI cancelled. Shareholders, on the other hand, who held shares on the LSX were legally entitled to British pounds (GBP) on the cancellation of their shares and received a cheque for the GBP value of their cancelled shares at 78 pence per share.

26. The return of capital was accounted for by debiting Henderson's Issued Share Capital Account to the extent of the par value amount of each cancelled share (10 pence) with the balance of 68 pence per cancelled share debited to its Share Premium Account.

Payment of dividends

27. Henderson paid its first dividend on 26 June 2006. The dividend paid was 1.39 pence per share (3.2894 cents per share for CDI holders). A further dividend of 0.88 pence per share was declared in respect of the six months ended 30 June 2006 and was paid together with the return of capital.

Share capital account

28. Henderson is a United Kingdom incorporated company with shares that have a par value. Henderson has confirmed that there have not been any transfers to the Share Premium Account. The amount standing to the credit of Henderson's Share Premium Account reflects shares issued by Henderson as part of the Demerger and the ensuing capital raisings.

29. Shareholders' equity disclosed in Henderson's audited Balance Sheet as at 31 December 2005 was as follows:

Shareholders' Equity Consolidated Group	(£ million)
Share capital	115.5
Share premium reserve	367.2
Own shares	(4.1)
Revaluation reserve	(3.0)
Translation reserve	(3.4)
Profit and loss account	<u>174.9</u>
Total Equity	647.1

Ruling

Is the return of capital a dividend as defined in subsection 6(1) of the ITAA 1936?

30. The return of capital is not a 'dividend' within the meaning of subsection 6(1) of the ITAA 1936 and does not trigger the application of subsection 6(4) of the ITAA 1936.

The application of sections 45A, 45B and 45C of the ITAA 1936 to the return of capital

31. The Commissioner will not make a determination under either section 45A or section 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the return of capital. Accordingly, no part of the return of capital is taken to be an unfranked dividend paid out of profits.

Capital gains tax issues

32. The cancellation of the shares under the scheme constitutes a CGT event C2 (section 104-25 of the ITAA 1997).

33. Shareholders and CDI holders are taken to have received \$2.38 as the capital proceeds in respect of the cancellation of each of their shares on 13 October 2006 (see subsection 116-30(2) of the ITAA 1997).

34. To the extent that the capital proceeds received by each shareholder or CDI holder exceeded the cost base of the cancelled shares, a capital gain resulted. To the extent that the reduced cost base of each cancelled share exceeded that capital proceeds amount, a capital loss arose (subsection 104-25(3) of the ITAA 1997).

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35. If the share to which the payment relates was originally acquired by the shareholder or CDI holder at least 12 months before the share was cancelled, a capital gain from CGT event C2 happening to the share may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided that the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

Commissioner of Taxation

13 December 2006

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.*

Return of capital is not a dividend for income tax purposes

36. A distribution is included in a shareholder's assessable income under subsection 44(1) of the ITAA 1936 if it falls within the definition of 'dividend' in subsection 6(1) of the ITAA 1936, subject to subsection 6(4) of the ITAA 1936. Henderson is a non-resident company incorporated in the United Kingdom with shares that have a par value. The definition of 'dividend' in subsection 6(1), as presently enacted, only applies to dividends paid on or after 1 July 1998 by a company with shares with no par value, as provided by the *Taxation Laws Amendment (Company Law Review) Act 1998* (Act No. 63 of 1998). However, this Act also continued in force the previously enacted definition of 'dividend' in subsections 6(1) and 6(4) for companies with shares that have a par value. As Henderson is a company with shares that have a par value, the provisions of the income tax law that apply to the distributions made under the return of capital are those as enacted before the amendments. In this Ruling, those previously enacted provisions are referred to as the 'par value provisions'.

37. The entire amount of the return of capital was debited, firstly, against the Share Capital Account of Henderson (to the extent of the par value of each cancelled share (10 pence)) and then against the Share Premium Account (for the balance of 68 pence per cancelled share). Under the par value provisions, money paid by a company which is debited against the amount standing to the credit of the share premium account is excluded from the definition of 'dividend' in subsection 6(1) of the ITAA 1936, subject to subsection 6(4) of the ITAA 1936. In these circumstances, subsection 6(4) does not apply as the amount standing to the credit of Henderson's Share Premium Account is due to shares that were issued by Henderson as part of the Demerger. Accordingly, it cannot be said that there has been an agreement or scheme under which Henderson issued shares at a premium thereby enabling it to debit amounts to return capital out of Share Premium Account (paragraph (d) of the definition of 'dividend' in subsection 6(1)).

38. Further, under the par value provisions, an account will not be a 'share premium account' where amounts that are not in respect of premiums received from shares issued by a company were transferred to that account (definition of 'share premium account' in subsection 6(1) of the ITAA 1936). Henderson confirms that there have not been any transfers to the Share Premium Account. That is, the Share Premium Account only includes premiums received by Henderson from the issue of shares and therefore satisfies the definition of 'share premium account' in subsection 6(1).

39. As a result, the return of capital is not a dividend and the distribution is not to be included in a shareholder's or CDI holder's assessable income under subsection 44(1) of the ITAA 1936.

Specific anti-avoidance provisions

40. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow the Commissioner to determine that all or part of the distribution is treated as an unfranked dividend that is paid by the company out of profits to the shareholders and CDI holders.

Section 45A of the ITAA 1936 – streaming of dividends and capital benefits

41. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who would, in the year of income in which the capital benefits are provided, derive a greater benefit from the receipt of capital than the other shareholders (the disadvantaged shareholders) who have received or would receive dividends.

42. Henderson has provided shareholders and CDI holders with a 'capital benefit' (as defined in subsection 45A(3) of the ITAA 1936); the capital benefit has been provided to all shareholders and CDI holders in direct proportion to their individual holding. As all shareholders and CDI holders benefit equally from the return of capital, there is no indication of 'streaming' of capital benefits to advantaged shareholders and dividends to disadvantaged shareholders. Accordingly, section 45A of the ITAA 1936 will not apply to the return of capital, and the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the return of capital.

Section 45B of the ITAA 1936 – schemes to provide capital benefits in substitution for dividends

43. Section 45B of the ITAA 1936 applies where certain amounts of a capital nature are provided to shareholders in substitution for dividends. 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) of the ITAA 1936);
- under the scheme a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); 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 the scheme or carried out the scheme or any part of the scheme did so for a purpose (other than an incidental purpose) of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

44. The condition in paragraph 45B(2)(a) of the ITAA 1936 is satisfied as the return of capital is a 'scheme' within the broad meaning of that term.

45. The condition in paragraph 45B(2)(b) of the ITAA 1936 is also satisfied as the return of capital has provided shareholders and CDI holders with a capital benefit (as defined in subsection 45B(5) of the ITAA 1936). Shareholders and CDI holders have obtained a tax benefit (as defined under subsection 45B(9) of the ITAA 1936) as they would generally pay less tax on the distribution received under the return of capital than they would if Henderson had instead paid an equivalent amount as dividend.

46. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the 'relevant circumstances' set out under subsection 45B(8) of the ITAA 1936 to determine whether any part of the scheme has been entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

47. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. The requisite purpose does not have to be the most influential or prevailing purpose, but it must be more than an incidental purpose.

48. The relevant circumstances under subsection 45B(8) of the ITAA 1936 cover the circumstances of the company and the tax profile of the shareholders. In this instance, as the capital return is made to all shareholders and CDI holders regardless of individual circumstances, paragraphs 45B(8)(c) to (h) of the ITAA 1936 do not incline for or against a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and (j) of the ITAA 1936 pertaining to the provision of ownership interests and demerger respectively are not relevant. In this case, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k) of the ITAA 1936.

49. Paragraph 45B(8)(a) of the ITAA 1936 refers to the extent to which the capital benefit is attributable to capital or profits (realised and unrealised) of the company or an associate (within the meaning of section 318 of the ITAA 1936) of the company. In this case, Henderson has returned to shareholders and CDI holders capital that it realised upon the disposal of its life insurance business which was not previously returned to shareholders and CDI holders under the Return of Cash and Reduction of Investor Base in April 2005, and part of the proceeds raised from previous capital raisings. The Commissioner has already ruled that the proceeds received by Henderson on the disposal of the life insurance business represented capital previously invested in the business (refer to CR 2005/66). Therefore, the purpose of the recent return of capital was to return capital that was in excess of Henderson's capital requirements. In these circumstances, it is accepted that the distribution under the return of capital is attributable to capital and is not in substitution for dividends.

50. Paragraph 45B(8)(b) of the ITAA 1936 refers to the pattern of distributions made by a company or an associate (within the meaning of section 318 of the ITAA 1936) of the company. Henderson has made two payments of dividend so far in 2006. Henderson's dividend policy is to maintain a sustainable flow of dividends into the future. In these circumstances, there exists no indication that the return of capital was made in substitution for a dividend.

51. Paragraph 45B(8)(k) of the ITAA 1936 refers to the matters in subparagraphs 177D(b)(i) to (viii) of the ITAA 1936. 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, its form and substance, and its financial and other implications for the parties involved. In this case, the practical implications of the scheme for Henderson and its shareholders and CDI holders are consistent with it being, in form and substance, a distribution of share capital.

52. Having regard to all the relevant circumstances, it could not be concluded that the parties who entered into or carried out the scheme have done so for a more than incidental purpose of enabling the shareholders and CDI holders to obtain a tax benefit. 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 respect of the return of capital.

Section 45C of the ITAA 1936 – deeming dividends to be paid where determinations under section 45A or 45B of the ITAA 1936 are made

53. As the Commissioner will not make a determination under either subsection 45A(2) or subsection 45B(3) of the ITAA 1936 in relation to the scheme described, section 45C of the ITAA 1936 will not apply.

Capital gains tax issues

54. Shareholders and CDI holders had their shares cancelled under the return of capital on the share cancellation date, being 13 October 2006. CGT event C2 (section 104-25 of the ITAA 1997) happened on the cancellation of the shares in Henderson under the return of capital.

55. Shareholders and CDI holders made a capital gain under subsection 104-25(3) of the ITAA 1997 if the capital proceeds for the cancellation were more than the cost base of the shares that were cancelled. Conversely, shareholders and CDI holders made a capital loss if the capital proceeds in respect of the shares cancelled were less than the reduced cost base of those shares.

56. If the share to which the distribution relates was originally acquired by the shareholder or CDI holder at least 12 months before the share was cancelled, a capital gain from CGT event C2 happening to the share may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided that the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

57. For the purposes of determining the capital proceeds from the cancellation of each ordinary share sections 116-20 and 116-30 of the ITAA 1997 require that the market value of each Henderson share on the date of cancellation be compared with the amount paid to the shareholder or CDI holder in respect of the cancellation of each share. In this case, the Commissioner has determined that the market value of each cancelled Henderson share is the market value adjusted price of \$2.38 on the day of cancellation.

Appendix 2 – Detailed contents list

58. The following is a detailed contents list for this Ruling:

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References

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- ITAA 1936 45B(8)(e)
 - ITAA 1936 45B(8)(f)
- Not previously issued as a draft
- ITAA 1936 45B(8)(g)
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- Related Rulings/Determinations:*
- CR 2005/66
- ITAA 1936 45B(8)(i)
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- capital reduction
 - CGT event
 - dividend
 - return of capital on shares
 - share cancellation
- ITAA 1936 45B(9)
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 - ITAA 1936 177D(b)(i)
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 C3 - end of a CGT asset