

# ***CR 2022/112 - BNK Banking Corporation Limited - special dividend and return of capital***



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## Class Ruling

# BNK Banking Corporation Limited – special dividend and return of capital

### **① Relying on this Ruling**

This publication 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 of:
  - the fully franked special dividend paid by BNK Banking Corporation Limited (BNK) of \$0.34 per share on 26 July 2022 for each share held on 19 July 2022 (Special Dividend), and
  - the return of share capital paid by BNK of \$0.16 per share on 21 November 2022 for each share held on 14 November 2022 (Capital Return).
2. Details of this scheme are set out in paragraphs 32 to 52 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

**Note:** By issuing this Ruling, the ATO is not endorsing this scheme. Potential users must form their own view about the scheme.

### **Who this Ruling applies to**

4. This Ruling applies to you if you:
  - were registered on the BNK share register on 14 November 2022 (Capital Return Record Date) as a holder of ordinary shares in BNK (BNK shares) and continued to hold your BNK shares up to and including 21 November 2022 (Capital Return Payment Date)
  - received the Special Dividend, and

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- held your BNK shares on capital account; that is, you did not hold your BNK shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)).

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 32 to 52 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**

### **Special dividend paid by BNK Banking Corporation Limited**

7. The Special Dividend is a 'dividend' as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

8. The Special Dividend is a frankable distribution pursuant to section 202-40 as it is not unfrankable under section 202-45.

### **Assessable income of Australian-resident shareholders includes the special dividend**

9. 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 (subparagraph 44(1)(a)(i) of the ITAA 1936).

10. If you satisfy the residency requirements in subsection 207-75(1), you include the franking credits attached to the Special Dividend in your assessable income and you are entitled to a tax offset equal to the amount of those franking credits (section 207-20), provided you are a 'qualified person' (as defined in Division 1A of former Part IIIA of the ITAA 1936).

11. If you received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership and you are not a corporate tax entity, the franking credits attached to the Special Dividend are included in your assessable income, provided you are a 'qualified person' (subsection 207-35(1)).

12. If you are a partner in a partnership or a beneficiary of a trust that is an entity covered by section 207-45 and the Special Dividend flows indirectly through the partnership or trust to you, you include your share of the Special Dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credit attached to the Special Dividend, provided both you and the partnership or trust (as relevant) are each a qualified person (section 207-45 and former subsection 160APHU(1) of the ITAA 1936).

13. The franking credit tax offset is refundable, subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25.

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***Non-resident shareholders carrying on a business at or through a permanent establishment in Australia***

14. If you are a non-resident and the Special Dividend is attributable to a permanent establishment in Australia, you include the Special Dividend in your assessable income (subparagraphs 44(1)(b)(i) and (c)(i) of the ITAA 1936) and you are not liable to pay withholding tax in respect of the Special Dividend if you receive the Special Dividend otherwise than in your capacity as a trustee (subsection 128B(3E)(c) of the ITAA 1936).

15. If you are also a qualified person (as defined in Division 1A of former Part IIIAA of the ITAA 1936), you include the amount of the franking credits attached to the Special Dividend in your assessable income and you are entitled to a tax offset equal to the amount of those credits (section 207-20), provided the residency requirements in subsection 207-75(2) are satisfied).

16. The franking credit tax offset is not refundable (subsection 67-25(1DA)).

***Non-resident shareholders not carrying on a business at or through a permanent establishment in Australia***

17. If you are a non-resident and the Special Dividend is not attributable to a permanent establishment in Australia, the Special Dividend is not included in your assessable income (section 128D of the ITAA 1936) and you are not liable to withholding tax in respect of the Special Dividend (paragraph 128B(3)(ga) of the ITAA 1936).

18. You do not include the amount of the franking credits attached to the Special Dividend in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-70 and 207-75).

***Qualified persons***

19. The Special Dividend you received does not constitute a 'related payment' for the purposes of paragraph 207-145(1)(a) and former section 160APHN of the ITAA 1936 and the primary qualification period therefore applies.

20. You will be a qualified person in relation to the Special Dividend if, during the period from the day after the day you acquired your BNK shares up to and including the 45th day after 20 July 2022 (being 3 September 2022), you held your BNK shares for a continuous period of at least 45 days during which you did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of the shares (former sections 160APHD, 160APHE and 160APHO of the ITAA 1936).

***Return of capital is not a dividend***

21. No part of the Capital Return is a dividend as defined in subsection 6(1) of the ITAA 1936 as the entire amount of the Capital Return has been debited to BNK's share capital account.

22. No part of the Capital Return is included in your assessable income as a dividend under subsection 44(1) of the ITAA 1936.

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**Capital gains tax consequences****CGT event G1**

23. CGT event G1 happened on the Capital Return Payment Date when BNK paid you the Capital Return in respect of each of your BNK shares (section 104-135).
24. You made a capital gain under CGT event G1 happening if the Capital Return you received for your BNK share was more than the cost base of that share (subsection 104-135(3)).
25. If you made a capital gain from CGT event G1 happening to your BNK share, the cost base and reduced cost base of that share is reduced to nil (subsection 104-135(3)).
26. If the amount of the Capital Return you received for your BNK share was equal to or less than the cost base of that share, the cost base and reduced cost base of that share is reduced by the amount of the Capital Return received in respect of that share (subsection 104-135(4)). No capital loss can be made from CGT event G1 (subsection 104-135(3)).
27. You can treat a capital gain from CGT event G1 as a 'discount capital gain' if you acquired your BNK share at least 12 months before the Capital Return Payment Date and the other conditions in Subdivision 115-A are satisfied.

**Foreign-resident shareholders**

28. If you were a foreign resident or the trustee of a foreign trust for CGT purposes as defined in subsection 995-1(1) just before the Capital Return Payment Date, you disregard a capital gain from CGT event G1 happening to your BNK shares, pursuant to section 855-10, unless you:
- have used your BNK shares at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
  - are an individual and your BNK shares were covered by subsection 104-165(3) (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident) (table item 5 of section 855-15).

**Anti-avoidance provisions**

29. As there is no streaming of distributions, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or a part, of the imputation benefit received by you in relation to the Special Dividend.
30. The Commissioner will not make a determination that section 45C of the ITAA 1936 applies to any part of the Capital Return you received under:
- subsection 45A(2) of the ITAA 1936 – because there was no streaming of capital benefits to some BNK shareholders and dividends to other BNK shareholders as required by subsection 45A(1) of the ITAA 1936, or
  - paragraph 45B(3)(b) of the ITAA 1936 – because the requirements of subsection 45B(2) of the ITAA 1936 were not satisfied.
31. Therefore, no part of the Capital Return is taken to be an unfranked dividend that was paid from BNK to you under those provisions.

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## **Scheme**

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32. 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.

### **BNK Banking Corporation Limited**

33. BNK is a company incorporated in Australia that has been listed on the Australian Securities Exchange since 22 May 2012.

34. BNK provides banking and other financial services and is the head company of an income tax consolidated group pursuant to Part 3-90.

35. On 11 August 2022, BNK had 118,702,738 ordinary shares on issue, being the only class of shares on issue. Approximately 9.04% of those shares were held by foreign residents.

### **Disposal of Finsure Holding Pty. Ltd.**

36. Finsure Holding Pty. Ltd. (Finsure) is a company incorporated in Australia and was a wholly-owned subsidiary of BNK.

37. Finsure was acquired by BNK in 2018. BNK funded the acquisition by issuing BNK shares.

38. On 7 February 2022, BNK disposed of all of its shareholding in Finsure for cash consideration of approximately \$152 million.

39. The cash proceeds from the sale of Finsure were in excess of BNK's business requirements.

40. On 6 June 2022, the directors of BNK proposed to distribute \$60 million in proceeds from the sale of Finsure to BNK shareholders by way of a special dividend and a return of capital.

### **Special dividend**

41. On 13 July 2022, the Special Dividend was announced.

42. On 26 July 2022, BNK shareholders received \$0.34 for each BNK share they held on 19 July 2022 (Special Dividend Record Date).

43. The Special Dividend was fully franked.

44. The total amount of the special dividend paid of \$40,358,930.92 was debited against BNK's retained earnings account.

### **Return of capital**

45. On 5 October 2022, BNK announced the Capital Return.

46. The Capital Return, being an equal reduction of share capital under section 256B of the *Corporations Act 2001*, was approved by BNK shareholders in the BNK Annual General Meeting held on 2 November 2022.

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47. On the Capital Return Payment Date, BNK shareholders received \$0.16 for each BNK share they held on the 14 November 2022.

48. The total amount of the capital return paid of \$18,995,104.80 was debited against BNK's share capital account.

#### **Other information**

49. The Special Dividend and Capital Return were paid from BNK's available cash balance.

50. All BNK shares were issued after 20 September 1985.

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

52. The market value of BNK's assets that are taxable Australian real property (within the meaning of section 855-20) is less than the market value of BNK's other assets for the purposes of section 855-30.

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**Commissioner of Taxation**

14 December 2022

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## References

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### *Legislative references:*

- ITAA 1936 6(1)
  - ITAA 1936 44(1)
  - ITAA 1936 44(1)(a)(i)
  - ITAA 1936 44(1)(b)(i)
  - ITAA 1936 44(1)(c)(i)
  - ITAA 1936 45A
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  - ITAA 1936 45B
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  - ITAA 1936 45C
  - ITAA 1936 128B(3)(ga)
  - ITAA 1936 128B(3E)(c)
  - ITAA 1936 128D
  - ITAA 1936 former Pt IIIAA Div 1A
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  - ITAA 1997 995-1(1)
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### ATO references

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