



# ***CR 2005/66 - Income tax: HHG PLC: return of capital***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2004*



## Class Ruling

### Income tax: HHG PLC: return of capital

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#### **Preamble**

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

#### **What this Class Ruling is about**

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates.

#### **Tax law(s)**

2. The tax laws dealt with in this Class Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 6(4) 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);
- section 112-25 of the ITAA 1997;
- section 116-20 of the ITAA 1997; and
- section 116-30 of the ITAA 1997.

#### **Class of persons**

3. The class of persons to whom this Ruling applies are the Australian resident entities that held Chess Depositary Interests (CDIs) representing ordinary shares in Henderson Group plc (formerly HHG PLC and referred to hereafter as 'HHG') (CDI Holders) and received a return of capital under the Arrangement described in paragraphs 10 to 32 of this Ruling. This Ruling does not apply to

Australian resident entities that held their CDIs jointly or on revenue account.

## Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 10 to 32 is carried out in accordance with the details of the arrangement provided in this Ruling.
6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:
  - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
  - (b) this Ruling may be withdrawn or modified.
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## Date of effect

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8. This Class Ruling applies to the year of income (as defined in subsection 995-1(1) of the ITAA 1997) for a participating CDI Holder in which the CDI Holder received a payment representing a return of capital. For participating CDI Holders that do not have a substituted accounting period this will be the income year ending 30 June 2005. 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 this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore, this Ruling only applies to the extent:

- it is not later withdrawn by *Gazette*;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- that the relevant tax laws are not amended.

## Withdrawal

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9. This Class Ruling is withdrawn and ceases to have effect after 30 June 2005. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## Arrangement

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10. The arrangement 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 arrangement are:

- (a) The application letter from PricewaterhouseCoopers (PWC) requesting a Class Ruling, dated 14 April 2005;
- (b) The following documents which accompanied the application letter:
  - Notice of Extraordinary General Meeting and Circular, dated 22 December 2004, detailing Proposals for Shareholders and CDI Holders regarding the sale of the life insurance business, to return cash to shareholders (the 'Return of Cash') and to reduce HHG's investor base (the 'Reduction of Investor Base');
  - Relevant extracts of UK Corporation law;
  - The full Annual Financial Report and Accounts for HHG for the year ended 31 December 2004;
  - HHG Shareholder information as at October 2004; and
  - Various public announcements made by HHG in relation to the sale of the life insurance business, the Return of Cash and the Reduction of Investor Base;
- (c) Correspondence dated 7 February 2005 from PWC in response to a request for further information from the Australian Taxation Office (ATO) in respect of a previous Application for Class Ruling, since withdrawn; and

- (d) Correspondence dated 1 June to 21 June 2005 from PWC providing further particulars.

**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.

11. HHG is a company incorporated under the United Kingdom Companies Act and is listed on the London Stock Exchange and the Australian Stock Exchange. HHG was demerged from AMP Limited on 23 December 2003 (the Demerger). HHG's business consisted of the life insurance business, an asset management business and a financial advisory business.

12. A key part of HHG'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.

13. Subsequently, a prospective buyer offered to buy the life insurance business. The sale was seen by HHG as a means of accelerating its stated strategy of releasing capital invested by shareholders in the business.

14. On 21 February 2005, HHG shareholders voted in favour of the sale of the insurance business. The shareholders also voted in favour of the Return of Cash proposal and the Reduction of Investor Base proposal (collectively referred to as the 'Capital Return'). The life insurance business was sold at a loss on 13 April 2005 for a consideration of £1.070 billion.

15. Approximately £775 million of the sale proceeds was returned to shareholders under the Return of Cash which involved a pro-rata cancellation of the ordinary shares (the Return of Cash) on issue at 22 April 2005 (the Record Date and the Return of Cash Date).

16. In addition, HHG used approximately £96 million of the sale proceeds to cash out shareholders with unmarketable parcels by consolidating the remaining holdings following the completion of the Return of Cash and cancelling fractional entitlements to Consolidated Shares (the Reduction of Investor Base). The stated purpose of the Reduction of Investor Base was to ensure that the shareholder base of HHG is consistent with its market capitalisation.

17. The effective consequence was that HHG distributed over 60% of its estimated market value under the Capital Return.

18. The Capital Return was implemented in four steps.

**Step 1 – The Return of Cash**

19. This step involved the cancellation of 52 out of every 100 ordinary shares on issue as at the Record Date. The ordinary shares were cancelled on 22 April 2005. The consideration for the cancellation was debited entirely to HHG's Called Up Share Capital Account and Share Premium Account. As far as practicable, shareholders were to retain their proportionate interests in the share capital of HHG.

20. For each CDI cancelled following the cancellation of the ordinary shares, CDI Holders received A\$1.345850 (being the Australian Dollar equivalent of 55 pence as determined by the conversion rate at the Record Date).

**Step 2 – The Consolidation**

21. At midnight on the second day after the Return of Cash took effect, every parcel of 500 ordinary shares (of 10 pence each) held by a shareholder at that time was consolidated into one Consolidated Share (of £50 each). This included the ordinary shares held by Chess Depository Nominees Pty Limited (CDN) on behalf of CDI Holders. This step did not involve any cancellation of the ordinary shares in HHG.

22. The Consolidation reorganised HHG's share capital with no change to the balance of the company's Called Up Share Capital Account or Share Premium Account. There was no change to the proportionate interests in HHG held by each CDI Holder.

**Step 3 – The Reduction of Investor Base**

23. The CDI Holders could elect to retain the CDIs that they held after the Return of Cash that represented fractional entitlements to Consolidated Shares rather than have their interest cashed out. The remaining CDIs representing fractional entitlements to the Consolidated Shares in respect of which no such election was made were cancelled on 25 April 2005.

24. The consideration for the cancellation was debited to HHG's Called Up Share Capital Account and Share Premium Account.

25. CDI Holders received A\$1.566080 for each CDI cancelled (being the Australian dollar equivalent of the Reduction of Investor Base price of 64 pence as determined by the conversion rate at the Record Date). The Reduction of the Investor Base price was determined by using the average closing price for an ordinary share traded on the London Stock Exchange's main market over the 20 business days immediately before the Record Date plus a premium of 5% of the average price.

**Step 4 – The Subdivision**

26. Each Consolidated Share which remained after Step 3 was subdivided and redesignated as 500 ordinary shares of 10 pence each. This included the Consolidated Shares held by CDN on behalf of CDI Holders. This step did not involve the issue of new shares in HHG.

27. The Subdivision reorganised HHG's share capital with no change to the balance of the company's Called Up Share Capital Account or Share Premium Account. There was no change to the proportionate interests in HHG held by each CDI Holder immediately after Step 3.

**Payment of Dividends**

28. There was no dividend paid in either the 2003 or the 2004 years. However, HHG has announced that, after the sale of the life insurance business, the remaining companies within the group were expected to declare dividends, in early 2006, in respect of the 2005 year.

**Share Capital Account**

29. The capital reduction in respect of the Return of Cash was accounted for by debiting HHG's Called Up Share Capital Account to the extent of the par value amount of each cancelled ordinary share (10 pence) with the balance of 45 pence per cancelled ordinary share debited to HHG's Share Premium Account.

30. The capital reduction in respect of the Reduction of Investor Base was accounted for by debiting HHG's Called Up Share Capital account to the extent of the par value amount of each cancelled ordinary share (10 pence) with the balance of 54 pence per cancelled ordinary share debited to HHG's Share Premium Account.

31. HHG confirmed that there have not been any transfers to the Share Premium Account. That is, the Share Premium Account only contains premiums received by HHG on the issue of its shares. The amount standing to the credit of the Share Premium Account is due to the shares issued by HHG as part of the Demerger.

32. Shareholders' equity disclosed in HHG's audited Balance Sheet as at 31 December 2004 was as follows:

<b>Shareholders' Equity [£ million]</b>	<b>Company</b>	<b>Group</b>
Called up share capital	271	271
Share premium	1,081	1,081
Own shares held	(2)	(4)
Capital reserve	—	2
Profit and loss account	<u>329</u>	<u>488</u>
Total equity	1,679	1,838

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## **Ruling**

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### **Step 1 – The Return of Cash**

33. The payment received by the CDI Holders under the Return of Cash in consideration for the cancellation of 52 out of every 100 ordinary shares held at the Record Date 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.

34. The Commissioner will not make a determination under either sections 45A or 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to deem any part of the payment to be an unfranked dividend paid out of profits.

35. The cancellation of the ordinary shares constitutes a CGT event C2 under section 104-25 of the ITAA 1997 for each CDI Holder.

### **Step 2 – The Consolidation**

36. Paragraph 112-25(4)(a) of the ITAA 1997 provides that, if two or more CGT assets are merged into a single asset and the owner of the new asset is the owner of the original assets, the merger does not give rise to a CGT event. The consolidation of the ordinary shares did not give rise to a CGT event. The consequences of that Consolidation flowed to the CDI Holders. Accordingly, CDI Holders should not recognise a capital gain or loss as a result of the Consolidation.

37. As the Consolidated Shares have the same dates of acquisition as the original ordinary shares to which they relate, the CDIs retained their original dates of acquisition.

38. The cost base (or reduced cost base) of each of the Consolidated Shares (at the time of the merging) is the sum of the cost bases (or reduced cost bases) of the original ordinary shares to which they relate, as provided for in paragraph 112-25(4)(b) of the ITAA 1997. This is also reflected in the CDIs held by CDI Holders.

### **Step 3 – The Reduction of Investor Base**

39. The payment received under the Reduction of Investor Base 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.

40. The Commissioner will not make a determination under either sections 45A or 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to deem any part of the payment to be an unfranked dividend paid out of profits.

41. The cancellation of the Consolidated Shares constitutes a CGT event C2 under section 104-25 of the ITAA 1997 for each CDI Holder to the extent that they did not elect to retain the CDIs they held immediately after the Return of Cash.



## Step 4 – The Subdivision

42. Subsection 112-25(2) of the ITAA 1997 provides that when a CGT asset is split into two or more assets the splitting is not a CGT event. The subdivision of the Consolidated Shares does not give rise to a CGT event.

43. The subdivided ordinary shares have the same date of acquisition as the Consolidated Shares to which they relate. The CDI Holders retain their original dates of acquisition.

44. The cost base and reduced cost base of each Consolidated Share is apportioned to each of the subdivided ordinary shares, as provided for in subsection 112-25(3) of the ITAA 1997. This is also reflected in the CDIs held by CDI Holders.

## Explanation

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### Distribution is not a dividend for income tax purposes

45. A distribution will be included in a CDI Holder'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). HHG 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) of the ITAA 1936, 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 subsection 6(1) and subsection 6(4) of the ITAA 1936 for companies with shares that have a par value. As HHG 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 Capital Return are those as enacted before the amendments. In this Ruling, these previously enacted provisions are referred to as the 'par value provisions'.

46. Under the Return of Cash, the whole of the return of capital by HHG was debited, firstly, against its Called Up Share Capital Account to the extent of the par value amount of each cancelled ordinary share (10 pence) and the balance of 45 pence per cancelled ordinary share debited to HHG's Share Premium Account. Where a CDI representing a fractional entitlement to a Consolidated Share was cancelled as part of the Reduction Investor Base, HHG's Called Up Share Capital Account was debited to the extent of the par value amount of each cancelled ordinary share (10 pence) and the balance of 54 pence per cancelled ordinary share was debited to HHG's Share Premium account.

47. Under the par value provisions, money paid by a company by way of repayment of moneys paid up on a share is excluded from the definition of 'dividend' in subsection 6(1) of the ITAA 1936, subject to certain exceptions. The exception at subparagraph 6(1)(e)(i), which applies when a share is cancelled, does not apply in this case as the payment from HHG's Called Up Share Capital Account was not greater than the amount to which a share was paid up immediately before the cancellations took place (paragraph (e) of the definition of 'dividend' in subsection 6(1)).

48. Further, under the par value provisions, money paid by a company to a shareholder which is debited against an 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). In the circumstances of the Capital Return, subsection 6(4) does not apply as the amount standing to the credit of HHG's Share Premium Account is due to the shares that were issued by HHG as part of the Demerger. Accordingly, it cannot be said that there has been an agreement or arrangement under which HHG issued shares at a premium thereby enabling it to debit amounts paid under the Capital Return to its Share Premium Account (paragraph (d) of the definition of 'dividend').

49. As a result, the payments received by a CDI Holder from the Capital Return will not be a dividend. Therefore, the payments will not be included in a CDI Holder's assessable income under subsection 44(1) of the ITAA 1936.

### **Specific anti-avoidance provisions**

50. However, sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies in relation to the distribution of capital received by CDI Holders under the Capital Return with the result that either the whole or part of the distribution is taken to be an unfranked dividend paid out of the profits of HHG. Accordingly, the application of those two provisions to the Capital Return must be considered.

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

51. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

52. Although HHG has provided its shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936), the capital benefit was provided to all of the shareholders in HHG. The circumstances of the Capital Return do not indicate that there is a

'streaming' of capital benefits to advantaged shareholders and dividends to disadvantaged shareholders. Accordingly, section 45A of the ITAA 1936 has no application to the Capital Return.

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

53. Section 45B of the ITAA 1936 applies where certain capital payments are made to shareholders in substitution for dividends. Specifically, the provision applies where:

- (a) 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);
- (b) 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
- (c) 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, (whether or not the dominant purpose but not including an incidental purpose), of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

54. In the circumstances of the Capital Return, the conditions of paragraphs 45B(2)(a) and (b) of the ITAA 1936 are satisfied. The distributions under the Capital Return provided shareholders with a capital benefit (as defined in subsection 45B(5) of the ITAA 1936) and the shareholders would generally pay less tax on the payments received under the Capital Return than they would on an equivalent amount of dividend (a 'tax benefit' as defined in subsection 45B(9) of the ITAA 1936).

55. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the circumstances set out under subsection 45B(8) of the ITAA 1936 to determine whether any part of the Capital Return would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit.

56. The test of purpose is an objective one. The question is whether, objectively, 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 purpose does not have to be the most influential or prevailing purpose, but it must be more than an incidental purpose.

57. In this regard, the relevant taxpayers are the shareholders (including CDI Holders) of HHG. After consideration of all relevant circumstances, the requisite purpose for section 45B of the ITAA 1936 to apply is considered not to be present in this case.

58. HHG funded the Capital Return from the release of capital following the disposal of its life insurance business. HHG has not paid dividends since it demerged from AMP. It is accepted that the purpose of the Capital Return was to return excess equity capital realised on the sale of the life insurance business to the company's shareholders. In these circumstances, it is accepted that the distributions under the Capital Return are not in substitution for dividends.

59. Accordingly, the Commissioner will not make a determination pursuant to subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the distributions made under the Capital Return.

60. As the Commissioner will not make a determination pursuant to subsection 45B(3) of the ITAA 1936 in relation to the arrangement as described, section 45C of the ITAA 1936 will not deem the distributions made under the Capital Return to be an unfranked dividend for income tax purposes.

### **Capital gains tax implications**

#### ***CGT event C2***

61. CGT event C2 (section 104-25 of the ITAA 1997) happened on the cancellation of the ordinary shares in HHG under the Return of Cash. The consequences of this event are attributed to the CDI holders (section 106-50 of the ITAA 1997).

62. CGT event C2 happened to those Consolidated Shares that were cancelled under the Reduction of Investor Base. The consequences of this event are attributed to the CDI holders (section 106-50 of the ITAA 1997).

63. The CDI holders made a capital gain under subsection 104-25(3) of the ITAA 1997 if the capital proceeds for the cancellation exceeded the cost base of the HHG Shares that were cancelled. Conversely, they made a capital loss if the reduced cost base exceeded the capital proceeds.

64. If the CDI to which the payment related was originally acquired by the shareholder at least 12 months before the share was cancelled, a capital gain from CGT event C2 happening to the ordinary share to which the CDI related 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).

65. 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 are relevant. In this case, the Commissioner accepts that the capital proceeds are the amount received in respect of each cancellation (see paragraphs 20 and 25).

**The Consolidation**

66. This step did not change the total amount of HHG's share capital. Further, there was no change to the proportionate interests in HHG held by each CDI Holder.

67. Accordingly, there is no CGT event as a result of this step. The Consolidated Shares should have the same dates of acquisition as the ordinary shares to which they relate and the cost base (and reduced cost base) of each Consolidated Share will be the sum of the cost bases (and reduced cost bases) of each ordinary share to which they relate, in accordance with subsection 112-25(4) of the ITAA 1997. This is also reflected in the CDIs held by CDI Holders.

**The Subdivision**

68. This step did not change the total amount of HHG's share capital. Further, there was no change to the proportionate interests in HHG held by each CDI Holder.

69. Accordingly, no CGT event happens to the shares because of the Subdivision. The subdivided ordinary shares have the same dates of acquisition as the Consolidated Shares to which they relate, and the cost base of each Consolidated Share is apportioned to each of the subdivided shares, in accordance with subsection 112-25(3) of the ITAA 1997. This is also reflected in the CDIs held by CDI Holders.

**Detailed contents list**

70. Below is a detailed contents list for this Class Ruling:

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**Commissioner of Taxation**

13 July 2005

<i>Previous draft:</i>	- ITAA 1936 6(4)
Not previously issued as a draft	- ITAA 1936 44(1)
	- ITAA 1936 45A
<i>Related Rulings/Determinations:</i>	- ITAA 1936 45B
CR 2001/1; TR 92/1; TR 97/16	- ITAA 1936 45B(2)
	- ITAA 1936 45B(3)
<i>Subject references:</i>	- ITAA 1936 45C
- capital reduction	- ITAA 1997 104-25
- CGT event	- ITAA 1997 104-25(3)
- demerger	- ITAA 1997 106-50
- dividend	- ITAA 1997 112-25(2)
- return of capital on shares	- ITAA 1997 112-25(3)
	- ITAA 1997 112-25(4)
<i>Legislative references:</i>	- ITAA 1997 116-20
- Copyright Act 1968	- ITAA 1997 116-30
- TAA 1953 Pt IVA	- ITAA 1997 995-1(1)
- ITAA 1936 6(1)	

## ATO references

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