


CR 2020/45 - SIV Capital Limited - return of capital

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Class Ruling

SIV Capital Limited – return of capital

❶ 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.

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What this Ruling is about

1. This Ruling sets out the tax consequences for shareholders of SIV Capital Limited (SIV) who received the return of capital payment of 30c per ordinary share on 18 June 2020 (Payment Date).
2. Full details of the return of capital are set out in paragraphs 14 to 34 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1997* or the *Income Tax Assessment Act 1936* (as detailed in the table in Appendix 2 to this Ruling), unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:
 - were registered on the SIV share register on 11 June 2020 (Record Date)
 - held your SIV shares on capital account on the Record Date; that is, you did not hold your SIV shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)), and
 - received the return of capital payment of 30c per SIV share on the Payment Date for SIV shares which you continued to hold on that date.

5. 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 14 to 34 of this Ruling.

Note: Division 230 does 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 2019 to 30 June 2020.

Ruling

Return of capital is not a dividend

7. You do not include any part of the return of capital payment you received in your assessable income as a dividend for the purposes of section 44.

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

8. The Commissioner will not make a determination under either subsection 45A(2) or paragraph 45B(3)(b) that section 45C applies to treat any part of the return of capital payment which SIV made to you on the Payment Date as a dividend.

Capital gains tax (CGT) consequences

CGT event G1

9. CGT event G1 (section 104-135) happened to your SIV shares when SIV made the return of capital payment of 30c per share to you for the SIV shares you held at the Record Date and continued to hold at the Payment Date.

10. You made a capital gain when CGT event G1 happened to your SIV shares if the amount of the return of capital payment of 30c per SIV share you received (multiplied by the number of SIV shares held) exceeded the total cost base of the shares. The capital gain is equal to the difference. You are also required to reduce the cost base and reduced cost base of your SIV shares to nil (subsection 104-135(3)). You cannot make a capital loss when CGT event G1 happened (Note 1 to subsection 104-135(3)).

11. If the amount of the return of capital payment of 30c per SIV share you received (multiplied by the number of SIV shares held) is less than the cost base of the shares, the cost base and reduced cost base of your SIV shares are reduced by the total amount of the return of capital payment you received (subsection 104-153(4)).

CGT discount

12. You are entitled to treat a capital gain made when CGT event G1 happened to your SIV shares as a 'discount capital gain' under Subdivision 115-A, provided that you acquired your SIV shares on or before 18 June 2019 (subsection 115-25(1)) and the other conditions in that Subdivision are satisfied.

Non-resident shareholders

13. If you were a non-resident SIV shareholder just before CGT event G1 happened to your SIV shares, disregard any capital gain or capital loss you made from the CGT event happening where your SIV ordinary shares were not 'taxable Australian property' under section 855-10.

Scheme

14. 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

15. SIV is an Australian-resident company. It was established on 6 June 1990 and has been listed on the Australian Securities Exchange since 3 June 2005.

16. SIV is the holding company of the Silver Chef Group, which operated two main businesses prior to 3 December 2019. It:

- leased assets to hospitality businesses by way of a 'Rent-Try-Buy' business model (Hospitality Business), and
- offered financing and commercial equipment leasing to small and medium sized businesses in industries other than hospitality (GoGetta).

17. On 30 September 2019, SIV entered into a share purchase agreement with Next Capital to sell the Hospitality Business for \$18.25 million.

18. In SIV's half-year results to 31 December 2019, SIV disclosed that the net loss on the sale of the Hospitality Business totalled \$17.59 million.

19. After transaction costs, the net sale proceeds were \$14.2 million.

Return of capital

20. On 1 May 2020, a notice of meeting was sent to SIV's shareholders for the purpose of voting on whether an amount of \$11,780,374.80 should be paid to shareholders as a return of capital.

21. The return of capital was approved by way of ordinary resolution at SIV's general shareholder meeting held on 4 June 2020.

22. The funds were sourced from both the sale proceeds and working capital earmarked for the Hospitality Business. The funds were considered in excess of SIV's business needs given GoGetta is being wound down, operates with minimal investment and no longer seeks new customers.

23. The return of capital payment equated to 30c per SIV share. SIV only has ordinary shares on issue.

24. SIV debited the entire return of capital of \$11,780,374.80 against its share capital account. There was no change in either the number of SIV shares on issue or the proportionate interest of each shareholder in SIV.

25. On the Payment Date, SIV made the return of capital payment of 30c per share to SIV shareholders who held their SIV shares on the Record Date.

Other matters

26. SIV's consolidated statement of financial position as at 31 December 2019 disclosed:

- assets of \$30.89 million
- liabilities of \$11.59 million
- share capital of \$120.74 million, and
- accumulated losses of \$88.61 million.

27. SIV also disclosed in its half-year results to 31 December 2019 that it made a consolidated interim trading loss after income tax of \$12.83 million for the half year. The interim trading loss incorporated the net profit of \$3.9 million generated by the Hospitality Business during the period prior to its sale.

28. At 31 December 2019, SIV had accumulated losses of \$38.03 million. This amount increased to approximately \$99 million by 30 June 2020.

29. SIV has no material debt.

30. From 2016 to 2018, SIV paid shareholders fully franked dividends ranging from \$3.9 million to \$8.8 million every six months. SIV has not paid or declared a dividend to its shareholders since 30 June 2018.

31. At the time SIV made the return of capital, its share capital account was not tainted within the meaning of section 197-50.

32. SIV and its subsidiaries do not hold any assets which constitute Australian real property.

33. At the Record Date, SIV had 39,267,916 ordinary shares on issue.

34. SIV's shareholder profile includes a mix of shareholder types and a relatively small percentage of non-resident shareholders.

Appendix 1 – 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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The return of capital is not a dividend

35. Subsection 6(1) provides that a dividend includes any distribution made by a company to any of its shareholders but does not include a distribution that is debited against an amount standing to the credit of the company's share capital account.

36. Subsection 975-300 provides that a share capital account is an account which a 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. An account is generally taken not to be a share capital account if it is tainted. SIV's share capital account was not tainted at the time it made the return of capital within the meaning of Division 197.

37. SIV recorded the return of capital payment as a debit to its untainted share capital account. As such, the distribution of capital is not a dividend as defined in subsection 6(1).

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

38. Sections 45A and 45B are two 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 dividends and capital benefits

39. Section 45A applies when a company:

- streams the provision of 'capital benefits' (such as the distribution of share capital by way of the return of capital payment) to shareholders who would derive a greater benefit from the capital benefits than other shareholders, and
- it is reasonable to assume that the other shareholders have received, or are likely to receive, dividends.

40. Although a capital benefit was provided to SIV shareholders, the circumstances of the return of capital indicate that there was no streaming of capital benefits to some SIV shareholders as all SIV shareholders received the return of capital payment of 30c per share.

41. Accordingly, the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the return of capital.

Section 45B – scheme to provide capital benefits.

42. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. In broad terms, section 45B applies where:

- there is a scheme under which a person is provided with a capital benefit by a company
- under the scheme, a taxpayer (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit, 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 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 the relevant taxpayer to obtain a tax benefit.

43. The return of capital satisfies the first two conditions listed in paragraph 42 of this Ruling. However, having regard to the relevant circumstances of SIV's return of capital payment, the Commissioner considers that it cannot be concluded that the payment was entered into or carried out for a more than incidental purpose of enabling SIV shareholders to obtain a tax benefit.

44. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies in relation to the whole, or a part, of the return of capital.

Capital gains tax

CGT event G1

45. Section 104-135 states that 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 the payment (the non-assessable part) is not a dividend, or an amount that is taken to be a dividend under section 47, and
- the payment is not included in the shareholder's assessable income.

46. CGT event G1 happened to your SIV shares when you received the return of capital payment on the SIV shares which you continued to hold at the Payment Date.

47. You made a capital gain when CGT event G1 happened, where the amount of the return of capital payment of 30c per SIV share exceeded the cost base of the share. The capital gain is equal to the excess, and the cost base and reduced cost base of the SIV share is reduced to nil (subsection 104-135(3)). You cannot make a capital loss when CGT event G1 happens (Note 1 to subsection 104-135(3)).

48. If the amount of the return of capital of 30c per share is less than the cost base of your SIV share, you reduce both the cost base and reduced cost base of the share (but not below nil) by the amount of the return of capital (subsection 104-135(4)).

Foreign residents

49. If you were a foreign resident SIV shareholder, or the trustee of a foreign resident trust for CGT purposes, you are entitled to disregard a capital gain you made when CGT event G1 happened to your SIV share under subsection 855-10(1) as a SIV share is not an indirect Australian real property interest (table item 2 of section 855-15), provided also that:

- you did not use the SIV share at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- the SIV share 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).

Appendix 2 – Legislative provisions

50. This table sets out the details of the provisions ruled upon or referenced in this Ruling.

<i>Income Tax Assessment Act 1936</i>	subsection 6(1)
<i>Income Tax Assessment Act 1936</i>	section 44
<i>Income Tax Assessment Act 1936</i>	section 45A
<i>Income Tax Assessment Act 1936</i>	subsection 45A(2)
<i>Income Tax Assessment Act 1936</i>	section 45B
<i>Income Tax Assessment Act 1936</i>	subsection 45B(3)
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(3)(b)
<i>Income Tax Assessment Act 1936</i>	section 45C
<i>Income Tax Assessment Act 1936</i>	section 47
<i>Income Tax Assessment Act 1997</i>	section 104-135
<i>Income Tax Assessment Act 1997</i>	section 104-135(3)
<i>Income Tax Assessment Act 1997</i>	section 104-135(4)
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-A
<i>Income Tax Assessment Act 1997</i>	subsection 115-25(1)
<i>Income Tax Assessment Act 1997</i>	Division 197
<i>Income Tax Assessment Act 1997</i>	section 197-50
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	section 855-10
<i>Income Tax Assessment Act 1997</i>	subsection 975-300
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)

References*Previous draft:*Not previously issued as a draft

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