


# ***CR 2021/76 - Viva Energy Group Limited - return of capital and share consolidation***

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## **Class Ruling**

# **Viva Energy Group Limited – return of capital and share consolidation**

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### **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.

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

1. This Ruling sets out the income tax consequences for shareholders of Viva Energy Group Limited (VEA) who received the return of capital payment of 6.2 cents per ordinary VEA share on 22 October 2021 (Payment Date) and for the consolidation of their shares.
2. Full details of this scheme are set out in paragraphs 19 to 42 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 15 October 2021 (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 6.2 cents per VEA share.

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5. This Ruling also applies to you if you were registered on the VEA share register on 20 October 2021. This is the date 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 42 of this Ruling.

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

7. The income tax consequences in respect of the return of capital described in this Ruling are based on the number of VEA shares you held prior to their consolidation.

### **When this Ruling applies**

8. This Ruling applies from 1 July 2021 to 30 June 2022.

## **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 6.2 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 6.2 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).

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### ***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 21 October 2020 (subsection 115-25(1)), provided the other conditions in Subdivision 115-A are satisfied.

### ***Foreign-resident shareholders***

16. If you were a foreign-resident 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 Waypoint REIT Limited (formerly known as Viva Energy REIT) (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 the most efficient means of distributing the after tax proceeds of the REIT Divestment to its shareholders.

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

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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 conducted an on-market share buy-back program where VEA bought back approximately \$50 million of shares.

### **Return of capital**

27. On 24 August 2021, VEA sent a notice of general meeting to its shareholders for the proposed return of capital of 6.2 cents per VEA share. This constituted an aggregate return of capital of the \$100 million that VEA had not yet distributed from the REIT Divestment.

28. VEA shareholders approved the return of capital by way of ordinary resolution at the extraordinary general meeting held on 11 October 2021.

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

30. The entire return of capital of \$100 million was debited against VEA's share capital account.

31. VEA made the return of capital of 6.2 cents per VEA share on the Payment Date to shareholders who held their VEA shares on the Record Date.

### **Share consolidation**

32. VEA shareholders also approved a share consolidation at the extraordinary general meeting held on 11 October 2021. Each VEA share you held on 20 October 2021 was converted into 0.97 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.

33. The share consolidation resulted in the 1,607,638,647 VEA shares on issue before the consolidation decreasing to 1,559,415,178 after the consolidation.

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

35. VEA undertook the share consolidation to counteract the impact the return of capital payment had on the trading price of VEA shares.

36. Following the return of capital and share consolidation, each VEA shareholder maintained the same proportionate ownership interest in VEA (other than any shares that they bought or sold in the interim).

### **Other matters**

37. VEA's half-year results for the period ended 30 June 2021 were:

- contributed equity of \$4.3739 billion
- retained earnings of \$2.0367 billion
- reserves of -\$4.2099 billion, and
- net profit after tax of \$130.1 million.

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38. VEA's dividend policy is to distribute between 50% and 70% of underlying net profit after tax as dividends. VEA generally pays shareholders fully franked dividends twice per year, however a 2020 final dividend was not paid due to the negative impact of COVID-19 on VEA's business. VEA paid an interim 2021 dividend on 23 September 2021 and expects to continue paying fully franked dividends in line with its dividend policy as long as franking credits are available.

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

40. VEA only has ordinary shares on issue.

41. 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.

42. As at the Payment Date, a significant percentage of VEA shares were held by foreign residents.

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**Commissioner of Taxation**

17 November 2021

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## Appendix 1 – Explanation

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**ⓘ** *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**

43. 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.

44. 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**

45. 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**

46. 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.

47. 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.

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**Section 45B – scheme to provide capital benefits**

48. 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.

49. Having regard to the relevant circumstances of the scheme, 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**

50. 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).

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

52. You made a capital gain when CGT event G1 happened if the amount of the return of capital of 6.2 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)).

53. If the amount of the return of capital of 6.2 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)).

54. 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**

55. 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, with the right being a separate capital gains tax asset to the VEA share.

56. 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).

57. 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)).



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58. 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 6.2 cents per VEA share (subsection 116-20(1)).

59. 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. Furthermore, you made a capital gain which is equal to the capital proceeds of 6.2 cents per VEA share you owned at the Record Date and had ceased to own at the Payment Date.

60. 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 under CGT event C2 as a discount capital gain 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-resident shareholders***

61. If you were a foreign-resident shareholder, or the trustee of a foreign-resident trust for CGT purposes, you disregard a capital gain you made 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***

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

- 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.

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

64. 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 (see Taxation Determination TD 2000/10 *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?*).

#### **Cost base and reduced cost base of your VEA shares**

65. When shares are consolidated, 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 to establish the the cost base and reduced cost base of the consolidated parcel of shares.

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## Appendix 2 – Legislative provisions

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66. This paragraph 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 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>	paragraph 45B(3)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(8)
<i>Income Tax Assessment Act 1936</i>	section 45C
<i>Income Tax Assessment Act 1997</i>	section 104-25
<i>Income Tax Assessment Act 1997</i>	subsection 104-25(3)
<i>Income Tax Assessment Act 1997</i>	section 104-135
<i>Income Tax Assessment Act 1997</i>	subsection 104-135(3)
<i>Income Tax Assessment Act 1997</i>	subsection 104-135(4)
<i>Income Tax Assessment Act 1997</i>	subsection 104-165(3)
<i>Income Tax Assessment Act 1997</i>	Subdivision 109-A
<i>Income Tax Assessment Act 1997</i>	Division 110
<i>Income Tax Assessment Act 1997</i>	Division 112
<i>Income Tax Assessment Act 1997</i>	section 112-25
<i>Income Tax Assessment Act 1997</i>	subsection 112-25(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>	subsection 116-20(1)
<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 855-10(1)
<i>Income Tax Assessment Act 1997</i>	section 855-15
<i>Income Tax Assessment Act 1997</i>	section 855-30
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TD 2000/10; TR 2006/10; CR 2020/57

*Legislative References:*

- TAA 1953
- Corporations Act 2001 254H

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ATO references

NO: 1-QWC1P2E

ISSN: 2205 5517

BSL: PGI

ATOlaw topic: Income tax ~~ Assessable income ~~ Dividend income ~~ Dividend income  
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events C1 to C3 – end  
of a CGT asset  
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events G1 to G3 –  
shares  
Income tax ~~ Capital gains tax ~~ Capital proceeds  
Income tax ~~ Capital gains tax ~~ Discount capital gains  
Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45A  
Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45B  
Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45C  
Income tax ~~ Capital management ~~ Returning capital ~~ Share capital return

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