


CR 2023/21 - Cardno Limited - return of capital and special dividends

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Status: **legally binding**

Class Ruling

Cardno Limited – return of capital and special dividends

❶ Relying on this Ruling

This publication (excluding appendix) 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 Cardno Limited (Cardno) who received the following payments:
 - return of capital of 24c per ordinary Cardno share and unfranked special dividend of 78c per ordinary Cardno share on 14 July 2022 (the Payment Date)
 - unfranked special dividend of 44c per ordinary Cardno share on 22 August 2022, and
 - unfranked special dividend of 30.7c per ordinary Cardno share on 31 January 2023.
2. Details of this scheme are set out in paragraphs 19 to 50 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you are:
 - were registered on the Cardno share register on 7 July 2022 (the Record Date)

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- held your Cardno shares on capital account on the Record Date; that is, you did not hold your Cardno shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1))
- received the return of capital payment of 24c per Cardno share and the unfranked special dividend of 78c per Cardno share on the Payment Date, and
- received further unfranked special dividends of 44c on 22 August 2022 and 30.7c on 31 January 2023 per Cardno share.

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 19 to 50 of 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 dividends and the assessability of the special dividends

7. The special dividends of 78c, 44c and 30.7c per Cardno share are each a 'dividend' as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

8. If you are a resident of Australia as defined in subsection 6(1) of the ITAA 1936, you include each special dividend in your assessable income under paragraph 44(1)(a) of the ITAA 1936.

9. If you are a non-resident, the special dividends are each non-assessable non-exempt income and not included in your assessable income, as the distribution statement associated with the special dividends declared 100% of the special dividends to be conduit foreign income (paragraph 802-15(1)(a)). You are also not liable to pay withholding tax in respect of each special dividend (paragraph 802-15(1)(b)).

Return of capital is not a dividend

10. No part of the return of capital paid to you by Cardno on the Payment Date is a dividend as defined in subsection 6(1) of the ITAA 1936.

11. No part of the return of capital is included in your assessable income as a dividend under section 44 of the ITAA 1936.

Sections 45A, 45B and 45C of the ITAA 1936 do not apply

12. The Commissioner will not make a determination under either subsection 45A(2) of the ITAA 1936 or paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to any part of the return of capital of 24c per Cardno share you received on the Payment Date.

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Capital gains tax consequences**CGT event G1**

13. CGT event G1 happened on the Payment Date when Cardno paid you the return of capital of 24c for each Cardno share you owned at the Record Date and continued to own at the Payment Date (section 104-135).

14. You made a capital gain when CGT event G1 happened if the return of capital of 24c per Cardno share you received was more than the shares cost base (subsection 104-135(3)).

15. If the return of capital of 24c per Cardno share you received was equal to or less than the cost base of the share, the cost base and reduced cost base of each share is reduced by the amount of the return of capital (subsection 104-135(4)).

CGT event C2

16. CGT event C2 happened on the Payment Date when Cardno paid the amount of the return of capital of 24c per share to you in respect of Cardno shares that you owned at the Record Date but ceased to own before the Payment Date (section 104-25).

Discount capital gain

17. You can treat a capital gain made when CGT event G1 or CGT event C2 happened as a discount capital gain under Subdivision 115-A if you acquired the Cardno share at least 12 months before the Payment Date (subsection 115-25(1)) and the other conditions in Subdivision 115-A are satisfied.

Foreign resident shareholders are able to disregard any capital gain or capital loss

18. If you were a foreign resident or the trustee of a foreign-resident trust for CGT purposes you disregard any capital gain made from CGT event G1 or any capital gain or capital loss from CGT event C2 under subsection 855-10(1) as a Cardno share is not an indirect Australian real property interest (table item 2 of section 855-15), provided that:

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

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.

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Background

20. Cardno is an Australian tax resident public company listed on the Australian Securities Exchange (ASX). It is the head company of the Cardno Australian tax consolidated group.
21. Cardno is a multinational professional engineering and environmental services business, delivering engineering and environmental, social and governance services in Australia and overseas.
22. Cardno was established in 1945. It has been listed on the ASX since 2004.
23. On 9 December 2021, Cardno announced the completion of the sale of its Americas and Asia Pacific Consulting businesses to Stantec Inc. for a total aggregate cash consideration of US\$500 million. A distribution of approximately A\$582 million was made to shareholders on 22 December 2021, comprising both a capital return of 92c per share and an unfranked special dividend of 57c per share on its 390,596,497 fully-paid ordinary shares. Cardno obtained a Class Ruling (Class Ruling CR 2022/14 *Cardno Limited – return of capital and special dividend*) in respect of the income tax consequences of the distribution for its shareholders.
24. On 31 December 2021, Cardno completed a share consolidation through the conversion of every 10 shares held by a shareholder to one share (10:1). Post this consolidation, Cardno had 39,060,663 ordinary shares on issue as at 31 December 2021.

The Sale

25. On 28 March 2022, Cardno announced by way of an ASX announcement that it had entered into a share sale agreement for the sale of its shares in Cardno Emerging Markets (Australia) Pty Ltd, Cardno UK Limited and Cardno Emerging Markets USA Ltd (the Sale) for a total aggregate cash consideration of approximately A\$56.5 million, on a cash-free, debt-free basis and subject to usual net working capital and net debt adjustment mechanisms.
26. On 28 March 2022, Cardno announced that proceeds of the Sale were proposed to be used by Cardno to make a return of capital and pay a special dividend to Cardno shareholders.
27. The Sale constituted a disposal of Cardno's main undertaking and required shareholder approval by way of an ordinary resolution at a general meeting.
28. Shareholder approval for the Sale was received at the Extraordinary General Meeting held on 24 May 2022. On 24 May 2022, Cardno shareholders also approved a return of capital following the Sale of 24c per share pursuant to section 256C of the *Corporations Act 2001*.

The return of capital and special dividends

29. On 1 July 2022, Cardno advised by way of an ASX announcement, the completion of the Sale pursuant to the share sale agreement that was announced on 28 March 2022. Cardno also advised that after including the estimated net debt and working capital adjustment amounts required to be paid to Cardno under the terms of the Sale, it would distribute \$75.8 million in aggregate to Cardno shareholders (equivalent to \$1.94 per share) comprising approximately \$9.4 million (24c per share) as a return of capital and the balance of approximately \$66.4 million (\$1.70 per share) as an unfranked special dividend. As the full Sale proceeds were not received by Cardno on completion, Cardno identified

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that the special dividend would be paid in separate tranches as the proceeds were received.

30. On 14 July 2022, Cardno distributed the net proceeds it had received as at completion (less transaction costs and other amounts associated with the disposed business) to its shareholders that held shares on the Record Date by way of a capital reduction of approximately \$9.4 million (24c per share) and a first special dividend of approximately \$30.5 million (78c per share).

31. On 22 August 2022, Cardno distributed a second special dividend of approximately \$17 million (44c per share) to its shareholders that held shares on the Record Date.

32. On 31 January 2023, Cardno distributed a third special dividend of approximately \$12 million (30.7c per share) to its shareholders that held shares on the Record Date.

33. Cardno expects to distribute the balance of proceeds to its shareholders that held shares on the Record Date by way of a fourth special dividend of approximately \$6.9 million (17.7c per share), as soon as practicable after the outstanding proceeds are received by Cardno.

34. The return of capital constituted an equal reduction of Cardno's share capital for the purposes of the *Corporations Act 2001*.

35. All Cardno shareholders received the return of capital and special dividends on the same terms irrespective of their tax profile.

36. No shares were cancelled in connection with the equal capital reduction and no fractional entitlements arose.

37. Cardno did not raise share capital as part of the return of capital.

38. Cardno did not provide ownership interests as part of the return of capital to Cardno shareholders.

39. The return of capital was debited against the share capital account of Cardno. The total amount of share capital paid was \$9,374,559.

40. The special dividends were not debited against the share capital account of Cardno. The special dividends were debited against Cardno's current period earnings. The total amount of current period earnings paid for the special dividends was \$59,645,632.

41. The distribution statement associated with the special dividends declared 100% of the special dividends to be conduit foreign income pursuant to section 802-15. Further, the special dividends were not franked (that is, the franking percentage was 0%).

Other matters

42. At the Record Date, Cardno had 39,060,663 fully-paid ordinary shares on issue. Cardno had only ordinary shares on issue.

43. At the Record Date, Cardno had a share capital account balance of \$10,730,000.

44. As of 31 December 2022, Cardno had a consolidated retained loss balance of approximately \$97.886 million.

45. Cardno's share capital account is a share capital account for income tax purposes in accordance with subsection 975-300(1). Further, Cardno confirmed that its share capital account is not tainted within the meaning of section 197-50.

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46. Cardno did not pay a dividend for the years ended 30 June 2017 to 30 June 2020.
47. For the year ended 30 June 2021, Cardno paid an interim dividend of 1.5c per share (60% franked) and a full year dividend of 4c per share (unfranked).
48. For the period from 1 July 2021 to 31 December 2021, Cardno declared and paid a special dividend of 57c per share (unfranked) following the completion of its sale of the Americas and Asia Pacific Consulting businesses.
49. As of 7 June 2022, Cardno's total share ownership consisted of approximately 97.6% held by Australian shareholders and 2.4% held by overseas shareholders.
50. On the Record date, the sum of the market values of the assets of Cardno 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.

Commissioner of Taxation

26 April 2023

Status: **not legally binding**

Appendix – 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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Return of capital is not a dividend

51. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends paid to the shareholder out of profits derived by the company from any source if the shareholder is a resident of Australia and from sources in Australia if the shareholder is a non-resident.

52. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of dividend excludes a distribution from the meaning of dividend if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

53. The term 'share capital account' is defined in section 975-300 as an account which the 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.

54. Subsection 975-300(3) provides that an account is generally taken not to be a share capital account if it is tainted. Cardno confirmed that its share capital account is not tainted within the meaning of Division 197.

55. The return of capital was recorded as a debit to Cardno's untainted share capital account. As such, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies and the return of capital is not a dividend.

56. As the return of capital does not constitute a dividend within the meaning of subsection 6(1) of the ITAA 1936, no part of the return of capital is included in your assessable income as a Cardno shareholder under subsection 44(1) of the ITAA 1936.

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Anti-avoidance provisions

Sections 45A, 45B and 45C of the ITAA 1936 do not apply

57. Sections 45A and 45B of the ITAA 1936 are 2 anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies. The effect of such a determination is that all or part of the return of capital received by Cardno shareholders is treated as an unfranked dividend paid by Cardno out of profits.

Section 45A – streaming of dividends and capital benefits

58. Section 45A of the ITAA 1936 generally applies where:

- a company streams capital benefits to some shareholders, who would derive a greater benefit from the receipt of capital than other shareholders (disadvantaged shareholders), and
- it is reasonable to assume that the disadvantaged shareholders have received, or are likely to receive, dividends.

59. Paragraph 45A(3)(b) of the ITAA 1936 provides that capital benefits include the distribution of share capital.

60. A capital benefit was provided to Cardno shareholders. However, the circumstances of the return of capital indicate that there was no streaming of capital benefits to some Cardno shareholders and dividends to other Cardno shareholders.

61. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the return of capital.

Section 45B – scheme to provide capital benefits

62. Section 45B of the ITAA 1936 applies where certain capital payments are made to shareholders in substitution for dividends. In broad terms, section 45B of the ITAA 1936 applies where:

- there is a scheme under which a person is provided with a capital benefit by a company
- under the scheme a taxpayer (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 a relevant taxpayer to obtain a tax benefit.

63. The return of capital satisfies the first 2 conditions referred to in paragraph 62 of this Ruling. However, having regard to the relevant circumstances of the scheme, it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling Cardno shareholders to obtain a tax benefit.

64. 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 relation to the whole, or a part, of the return of capital Cardno shareholders received.

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Capital gains tax consequences

CGT event G1

65. 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 of the ITAA 1936, and
- the payment is not included in the shareholder's assessable income (section 104-135).

66. CGT event G1 happened when Cardno made the return of capital to you in respect of Cardno shares you owned at the Record Date and continued to own at the Payment Date (section 104-135).

67. You made a capital gain from CGT event G1 happening if the amount of the return of capital of 24c per Cardno share you received was more than the cost base of your Cardno share. The capital gain is equal to the amount of the excess, and you reduce both the cost base and reduced cost base of the Cardno share to nil (subsection 104-135(3)). No capital loss can be made when CGT event G1 happens (Note 1 to subsection 104-135(3)).

68. If the amount of the return of capital of 24c you received per Cardno share was not more than the cost base of your Cardno share, you reduce both the cost base and reduced cost base of your share (but not below nil) by the amount of the return of capital (subsection 104-135(4)).

CGT event C2

69. If, after the Record Date but before the Payment Date, you ceased to own a Cardno share in respect of which the return of capital was payable, the right to receive the return of capital in respect of that share is retained by you and is a separate CGT asset from the Cardno share.

70. CGT event C2 happened when the return of capital was made. The right to receive the return of capital, being an intangible asset, ended by the right being discharged or satisfied when the return of capital was made (section 104-25).

71. 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 amount of the excess. You will make a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right. The capital loss is equal to the amount of the difference (subsection 104-25(3)).

72. In working out the capital gain or capital loss when CGT event C2 happens, the capital proceeds are equal to the amount of the return of capital (24c per Cardno share) (subsection 116-20(1)).

73. 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 share previously owned by you to the extent that it was applied in working out a capital gain or capital loss made when a 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 the cost base or reduced cost base of the

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share previously owned by you has been fully applied in working out a capital gain or capital loss on the share, the right to receive the return of capital will have a nil cost base. As a result, you will, in those circumstances, make a capital gain equal to the capital proceeds, being 24c per Cardno share owned at the Record Date.

74. For the purposes of Subdivision 109-A, you are considered to have acquired the right at the time when you acquired your Cardno share. Therefore, you can treat a capital gain made when CGT event C2 happened to your right to the payment of the return of capital as a discount capital gain under Subdivision 115-A if you acquired your Cardno 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 able to disregard any capital gain or capital loss

75. You disregard a capital gain or capital loss you made from a CGT event if:

- just before the CGT event happened, you are a foreign resident or the trustee of a foreign trust for CGT purposes, and
- the CGT event happens in relation to a CGT asset that is not taxable Australian property (subsection 855-10(1)).

76. The table in section 855-15 sets out the categories of CGT assets that are taxable Australian property:

Table 1: Summary of CGT assets that are taxable Australian property

Item	Description
1	Taxable Australian real property
2	An indirect Australian real property interest not covered by item 5
3	A CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by items 1, 2, or 5
4	An option or right to acquire a CGT asset covered by items 1, 2 or 3
5	A CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident)

77. The only relevant category of taxable Australian property is table item 2 of section 855-15. Shares in Cardno will be ‘an indirect Australian real property interest’ if (among other things) they pass the principal asset test in section 855-30. The principal asset test is passed in the case of shares in a company if the sum of the market values of the company’s assets that are taxable Australian real property exceed the sum of the market values of the company’s other assets.

78. Cardno advised that the total market value of its assets that are not taxable Australian real property is greater than the market value of its taxable Australian real property assets. Accordingly, the principal asset test in section 855-30 will not be satisfied.

79. Therefore, if you were a foreign resident or the trustee of a foreign-resident trust for CGT purposes, you disregard a capital gain made if CGT event G1 happened or disregard a capital gain or capital loss if CGT event C2 happened in relation to your Cardno share under subsection 855-10(1) because your Cardno share was not an indirect Australian real

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property interest (table item 2 of section 855-15), provided also that your Cardno share or your right to receive the return of capital:

- had not been used at any time by you in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- was not covered by subsection 104-165(3) (table item 5 of section 855-15, about individuals choosing to disregard capital gains upon ceasing to be Australian residents).

Status: **not legally binding**

References

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(1)(a)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(3)
- ITAA 1936 45B(3)(b)
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1997 104-25
- ITAA 1997 104-25(3)
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 104-165(3)
- ITAA 1997 Subdiv 109-A
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 197
- ITAA 1997 197-50
- ITAA 1997 Div 230
- ITAA 1997 802-15
- ITAA 1997 802-15(1)(a)
- ITAA 1997 802-15(1)(b)
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 855-30
- ITAA 1997 975-300
- ITAA 1997 975-300(1)
- ITAA 1997 975-300(3)
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- Corporations Act 2001 256C

ATO references

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