Status: **legally binding**

Class Ruling

Wesfarmers Limited – return of capital

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.

Table of Contents	**Paragraph**

What this Ruling is about

1. This Ruling sets out the income tax consequences for shareholders of Wesfarmers Limited (Wesfarmers) who received the return of capital payment of $2.00 per ordinary share on 2 December 2021 (Payment Date).

2. Full details of this scheme are set out in paragraphs 15 to 38 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:

- were registered on the Wesfarmers share register on 19 November 2021 (Record Date)
- held your Wesfarmers shares on capital account on the Record Date; that is, you did not hold your Wesfarmers 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 $2.00 per Wesfarmers share on the Payment Date.

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 15 to 38 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 2021 to 30 June 2022.

Ruling

Return of capital is not a dividend

7. No part of the return of capital paid to you by Wesfarmers on the Payment Date is a dividend as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

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

8. 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 $2.00 per Wesfarmers share you received on the Payment Date.

Capital gains tax consequences

CGT event G1

9. CGT event G1 happened on the Payment Date when Wesfarmers paid you the return of capital of $2.00 for each Wesfarmers share you owned at the Record Date and continued to own at the Payment Date (section 104-135).

10. You made a capital gain when CGT event G1 happened if the return of capital of $2.00 per Wesfarmers share you received was more than the share’s cost base (subsection 104-135(3)).

11. If the return of capital of $2.00 per Wesfarmers share you received was 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 return of capital (subsection 104-135(4)).

CGT event C2

12. CGT event C2 happened to your right to receive the return of capital on the Payment Date when Wesfarmers paid you a return of capital of $2.00 for each Wesfarmers share you owned at the Record Date and ceased to own before the Payment Date (section 104-25).

Discount capital gain

13. You can treat a capital gain made when CGT event G1 or CGT event C2 happened as a discount capital gain if you acquired your Wesfarmers shares 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

14. A Wesfarmers shareholder who is a foreign resident or the trustee of a foreign-resident trust for capital gains tax (CGT) purposes, and received the return of capital, can disregard any capital gain made if CGT event G1 happened or disregard any capital gain or capital loss if CGT event C2 happened under section 855-10, provided also that your Wesfarmers share or your right to receive the return of capital on the Wesfarmers shares:

- 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).

Scheme

15. 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

Wesfarmers Limited

16. Wesfarmers is an Australian-resident company listed on the Australian Securities Exchange since 1984.

17. Wesfarmers operates a diverse business which covers home improvement, office supplies, department stores and an industrials division with businesses in chemicals, energy and fertilisers, and industrial and safety products.

18. As at 30 June 2021, Wesfarmers' share capital was $15.818 billion.

19. Wesfarmers' retained earnings (on a stand-alone basis) for the year ended 30 June 2021 was $697 million post-payment of the final dividend for the year.

Disposal of assets

20. During the years ended 30 June 2018 to 30 June 2020, Wesfarmers disposed of a number of assets and received sale proceeds totalling $4.3 billion.

21. The assets disposed of were Wesfarmers' interests in Wesfarmers Bengalla Pty Ltd, Wesfarmers Curragh Pty Ltd, Tyre & Auto Pty Ltd and Quadrant Energy

Holdings Pty Ltd, as well as 10.1% of Wesfarmers' 15% shareholding in Coles Group Limited.

22. Wesfarmers derived a net profit after tax of $1.335 billion from the disposal of the assets, which was paid to shareholders as special dividends in April 2019 and October 2020.

23. Following the payment of the special dividends, Wesfarmers determined that $2.3 billion of the remaining balance of the proceeds from the asset disposals of approximately $2.925 billion was surplus to its capital requirements.

Return of capital payment

24. On 27 August 2021, Wesfarmers announced that it will return share capital to Wesfarmers shareholders of $2.00 per Wesfarmers share totalling $2.3 billion (return of capital).

25. Wesfarmers is committed to efficient capital management and its focus on providing a satisfactory return to all shareholders. In particular:

- the return of capital reflected the strength of Wesfarmers' balance sheet as set out in the 2021 Annual Report, its ability to generate cash flow and the availability of well-established funding sources, and
- upon completion of the return of capital, Wesfarmers expects it will maintain current strong credit ratings and the balance sheet capacity to take advantage of value-accretive opportunities should they arise.

26. The return of capital was debited to Wesfarmers' share capital account and the following accounting entry was recorded:

DR share capital	$2.3 billion
CR cash	$2.3 billion

27. The return of capital was an equal reduction of capital under section 256B of the *Corporations Act 2001* and required shareholder approval by ordinary resolution under section 256C of the *Corporations Act 2001*.

28. At the Annual General Meeting, held on 21 October 2021, Wesfarmers shareholders approved the return of capital.

29. The return of capital was paid to each holder of a Wesfarmers share registered on the Wesfarmers share register on the Record Date.

30. The return of capital was funded by a combination of Wesfarmers' available cash balances and existing debt facilities.

31. The return of capital was in addition to the interim dividend of 88 cents per Wesfarmers share paid on 31 March 2021 and a final dividend of 90 cents per share for the year ended 30 June 2021 paid by Wesfarmers on 7 October 2021.

Other matters

32. Wesfarmers has consistently maintained a high dividend payout ratio, with an average payout ratio of approximately 90% since 2009, and has also paid special dividends where it has disposed of assets.

33. Wesfarmers has paid franked dividends to its shareholders to the maximum extent available based on its franking account balance.

34. Wesfarmers expects that dividends will continue to be paid in the future on a regular and sustainable basis in line with its dividend policy.

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

36. A maximum of approximately 9.57% of Wesfarmers shares are pre-CGT assets.

37. As at March 2020, approximately 26.15% of Wesfarmers' shareholders are foreign residents (as defined in subsection 995-1(1)).

38. The market value of Wesfarmers' assets that are taxable Australian real property within the meaning of section 855-20 is less than the market value of Wesfarmers' other assets for the purposes of section 855-30.

Commissioner of Taxation
8 December 2021

Status: **not legally binding**

Appendix – Explanation

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.

Table of Contents **Paragraph**

Return of capital is not a dividend

39. 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.

40. 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.

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

42. The return of capital was recorded as a debit to Wesfarmers 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.

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

43. 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. The effect of such a determination is that all or part of the return of capital received by Wesfarmers shareholders is treated as an unfranked dividend paid by Wesfarmers out of profits.

Section 45A – streaming of dividends and capital benefits

44. 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.

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

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

47. 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

48. 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 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.

49. The return of capital satisfies the first two conditions. 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 Wesfarmers shareholders to obtain a tax benefit.

50. 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.

Capital gains tax consequences

CGT event G1

51. 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).

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

53. You will make a capital gain from CGT event G1 happening if the amount of the return of capital of $2.00 per Wesfarmers share is more than the cost base of your Wesfarmers share. If so, the capital gain is equal to the amount of the excess and the cost base and reduced cost base of the Wesfarmers share is reduced to nil (subsection 104-135(3)). No capital loss can be made from CGT event G1 (Note 1 to subsection 104- 135(3)).

54. If the amount of the return of capital of $2.00 per Wesfarmers share is not more than the cost base of your Wesfarmers share, the cost base and reduced cost base of the share are reduced (but not below nil) by the amount of the return of capital (subsection 104-135(4)).

CGT event C2

55. If, after the Record Date but before the Payment Date, you ceased to own a Wesfarmers 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 Wesfarmers share.

56. 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).

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 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)).

58. 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 ($2.00 per Wesfarmers 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 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 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 $2.00 per Wesfarmers share owned at the Record Date.

60. For the purposes of Subdivision 109-A, you are considered to have acquired the right at the time when you acquired your Wesfarmers 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 Wesfarmers 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 capital gains tax

61. 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)).

62. Section 855-15 sets out the categories of CGT assets that are taxable Australian property:

Item 1	Taxable Australian real property
Item 2	An indirect Australian real property interest not covered by item 5
Item 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
Item 4	An option or right to acquire a CGT asset covered by items 1, 2 or 3
Item 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).

63. The only relevant category of taxable Australian property is table item 2 of section 855-15. Shares in Wesfarmers 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.

64. Wesfarmers has advised 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.

65. Therefore, a Wesfarmers shareholder who is a foreign resident or the trustee of a foreign-resident trust for CGT purposes, and who received the return of capital, can disregard any capital gain made if CGT event G1 happened or disregard any capital gain or capital loss if CGT event C2 happened, provided also that your Wesfarmers share or your right to receive the return of capital on the Wesfarmers shares:

- 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

Previous draft:

Not previously issued as a draft

Legislative references:

- ITAA 1936 6(1)
- 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 Div 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 Div 230
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 855-20
- ITAA 1997 855-30
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953
- Corporations Act 2001 256B
- Corporations Act 2001 256C

ATO references

NO:	1-PVCWOSF
ISSN:	2205-5517
BSL	PGI
ATOlaw topic:	Income tax ~~ Returning capital ~~ Share capital return Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45A Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45B 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