



Class Ruling

Income tax: off-market share buy-back: Aconex Limited

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ⓘ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 45A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 159GZZZP of the ITAA 1936;
- section 159GZZZQ of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997;
- section 116-20 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of Aconex Limited (Aconex) who:

- held ordinary and/or convertible preference shares (Shares); and
- disposed of those Shares under the Aconex fixed price off-market share buy-back (Buy-Back) under the scheme described in paragraphs 9 to 25 of this Ruling.

In this Ruling, the persons belonging to this class of entities are referred to as 'shareholders' or 'participating shareholders'.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 25 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2008 to 30 June 2009. The Ruling continues to apply after 30 June 2009 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- the application for a Class Ruling dated 9 September 2008;
- an Independent Expert's Report, dated 22 August 2008, prepared by Grant Thornton;
- the notice of Meetings and Explanatory Memorandum provided to shareholders dated 26 August 2008; and
- correspondence from Allens Arthur Robinson dated 3 November 2008, 23 December 2008, 12 January 2009 and 27 January 2009.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

10. Aconex is an unlisted public company and is a resident for Australian tax purposes. Aconex provides online project management, document management and web collaboration systems for the construction, engineering and facilities management industries.

11. As at 2 September 2008, Aconex had 119,241,260 shares on issue with total paid up capital of \$32,953,011. These shares were made up of 41,020,600 ordinary shares and 78,220,660 convertible preference shares.

12. Aconex's accounts for the year ended 30 June 2008 disclosed that Aconex, as a standalone entity, had total losses of \$5,784,314, comprising of retained losses of \$3,225,966 and current year losses of \$2,558,348. Aconex has never paid a dividend to its shareholders.

13. The shareholders in Aconex are a mixture of individuals, companies, trusts and superannuation funds, some of whom are foreign residents.

14. On 26 August 2008, as part of a major capital management initiative, Aconex announced its intention to undertake a fixed price off-market share buy-back of its Shares.

15. The capital management initiative involved the subscription by a new investor for the issue of class A preference shares (being a new class of shares) in Aconex. The issue of class A preference shares was planned to occur in two stages over a 24 month period and would raise up to \$107.5 million of committed capital.

16. On 3 October 2008, Aconex issued 32,857,143 class A preference shares (Initial Tranche) raising \$57.5 million in capital, Aconex used part of the capital raised to fund the Buy-Back.

17. The Buy-Back was approved at a meeting of Aconex's shareholders held on 19 September 2008.

18. In relation to the Buy-Back, Aconex announced that it would buy-back up to a total value of \$25 million (Buy-Back Limit) of its ordinary and convertible preference shares.

19. The Buy-Back was conducted through a fixed price tender process and was open to all eligible shareholders who were registered as such on the Record Date, (11 November 2008), for the Buy-Back.

20. Each eligible Aconex shareholder was offered the opportunity to sell some or all of their Aconex Shares back to Aconex, at a fixed price of \$1.42 per Share (Purchase Price).

21. Participation in the Buy-Back was voluntary. Hence eligible shareholders who did not wish to participate were not required to do anything.

22. No minimum threshold applied to the Buy-Back. The exact number of Shares bought back depended on the level of shareholder participation. However, to the extent that shareholder participation in the Buy-Back would otherwise exceed the Buy-Back Limit, a scale back would apply on a pro-rata basis such that the maximum value of all shares bought back did not exceed \$25 million.

23. All Shares bought back under the Buy-Back were cancelled.

24. Under the Buy-Back, \$1.42 per share was debited to Aconex's untainted share capital account.

25. On 3 December 2008, Aconex accepted the offers made by participating shareholders. Aconex announced on 11 December 2008 that:

- it had successfully completed the off-market share Buy-Back of 17,605,595 Aconex Shares, representing approximately 11.57% of the issued capital of Aconex;
- the total amount of capital repurchased under the Buy-Back was \$24,999,944.90; and
- a scale-back mechanism was applied.

Ruling

Purchase price in respect of each share bought back

26. As the entire purchase price in respect of the shares acquired through the Buy-Back is debited against Aconex's share capital account, participating shareholders will not be taken to have been paid a dividend under section 159GZZZP of the ITAA 1936.

Consideration in respect of the sale of each share bought back

27. Participating shareholders are taken to have received \$1.42 as consideration in respect of the sale of each of their Shares bought back under the Buy-Back (Sale Consideration) pursuant to section 159GZZZQ of the ITAA 1936.

28. The treatment of the Sale Consideration amount for tax purposes will depend on whether the sale is on capital account (where the Shares are held for investment) or on revenue account.

Shares held on capital account

29. The Sale Consideration of \$1.42 represents the capital proceeds for capital gains tax (CGT) purposes under section 116-20 of the ITAA 1997. A shareholder will make a capital gain on a share if the Sale Consideration per share exceeds the cost base of that share. The capital gain is the amount of the excess. Similarly, a shareholder will make a capital loss if the Sale Consideration per share is less than the reduced cost base of that share.

30. The Shares are taken to have been disposed of for CGT purposes on 3 December 2008 under subsection 104-10(3) of the ITAA 1997.

Shares held on revenue account

31. Where the Shares are held as trading stock, the Sale Consideration of \$1.42 is included in assessable income under section 6-5 of the ITAA 1997. Where the Shares are held as revenue assets, the amount by which the Sale Consideration of \$1.42 per share exceeds the cost of each share is included in the shareholder's assessable income. Correspondingly, if the cost exceeds the Sale Consideration of \$1.42 per share the difference is an allowable deduction.

Foreign resident shareholders

32. Under section 855-10 of the ITAA 1997, foreign resident shareholders that participated in the Buy-Back will only have CGT consequences if their shares bought back under the Buy-Back are 'taxable Australian property'.

The anti-avoidance provisions

33. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the distribution.

Commissioner of Taxation

18 February 2009

Appendix 1 – Explanation

❶ *This Appendix 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.*

Purchase price in respect of each share bought back

34. Under section 159GZZZM of the ITAA 1936, the purchase price in respect of shares acquired through the Buy-Back is the amount of money the participating shareholder received as a result of or in respect of the Buy-Back.

35. Under section 159GZZZP of the ITAA 1936, the purchase price of each share bought back contains a dividend component only if the Buy-Back price exceeds the amount debited against the company's share capital account. As the Buy-Back price of \$1.42 will be debited entirely against Aconex's untainted share capital account, no part of the purchase price will be taken to be a dividend for income tax purposes.

Consideration in respect of the sale of each share bought back

36. Participating shareholders are taken to have disposed of those Shares accepted under the Buy-Back on 3 December 2008. The disposal may have different taxation implications for shareholders depending on how the Shares were held, for instance:

- an investor who held their Shares on capital account will be subject to the CGT provisions; and
- a share trader who held their Shares on revenue account will be subject to the ordinary income provisions.

37. It should be noted that participating shareholders who have both an income tax and CGT liability will have the amount of the capital gain reduced under the anti-overlap provisions contained in section 118-20 of the ITAA 1997. If the Shares are held as trading stock the capital gain or loss is disregarded under section 118-25 of the ITAA 1997.

38. For the purpose of computing the amount of the gain or loss (on capital or revenue account) in these cases, the consideration in respect of the disposal of a share under a buy-back is determined in accordance with section 159GZZZQ of the ITAA 1936.

39. Subsection 159GZZZQ(1) of the ITAA 1936 provides that the shareholder is taken to have received an amount equal to the purchase price (in this case the \$1.42 received for each share bought back) as consideration in respect of the sale of the share bought back.

Foreign resident shareholders

40. A foreign resident shareholder that participated in the Buy-Back disregards any capital gain or capital loss made in respect of a share bought back under the Buy-Back if the share is not 'taxable Australian property' under the tests in section 855-15 of the ITAA 1997.

41. An Aconex share that was disposed into the Buy-Back will only be taxable Australian property if:

- it is an indirect Australian real property interest (item 2 of the table in section 855-15 of the ITAA 1997);
- it has been used by the foreign resident in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997); or
- it is a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident – item 5 of the table in section 855-15 of the ITAA 1997).

The anti-avoidance provisions

42. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if either applies, 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 distribution of capital received by the shareholder under the Buy-Back is treated as an unfranked dividend that is paid by the company. Accordingly, the application of these two provisions to the Buy-Back must be considered.

Section 45A

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

44. Although a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936) is provided to participating shareholders under the Buy-Back, the circumstances of the Buy-Back indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly, section 45A of the ITAA 1936 has no application to the Buy-Back.

Section 45B

45. Section 45B of the ITAA 1936 applies where certain amounts of a capital nature are provided to shareholders in substitution for dividends. Specifically, the provision applies where:

- 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);
- 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
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

46. In the case of the Buy-Back, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 have been met, having regard to the relevant circumstances of the scheme as set out in subsection 45B(8) of the ITAA 1936, it could not 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, other than a merely incidental purpose of enabling a taxpayer to obtain a tax benefit.

47. Consequently, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the distribution.

Section 45C

48. As neither of sections 45A nor 45B of the ITAA 1936 apply to the Buy-Back, the Commissioner will not make a determination under either of those sections that section 45C of the ITAA 1936 will apply to deem any part of the Buy-Back consideration to be an unfranked dividend.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- schemes
- share capital
- share buy-backs

Legislative references:

- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)

- ITAA 1936 45B(3)
 - ITAA 1936 45B(8)
 - ITAA 1936 45C
 - ITAA 1936 159GZZZM
 - ITAA 1936 159GZZZP
 - ITAA 1936 159GZZZQ
 - ITAA 1936 159GZZZQ(1)
 - ITAA 1997 6-5
 - ITAA 1997 104-10(3)
 - ITAA 1997 104-165(3)
 - ITAA 1997 116-20
 - ITAA 1997 118-20
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 - ITAA 1997 855-10
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 - TAA 1953
 - Copyright Act 1968
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ATO references

NO: 2009/1493

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Entity specific matters ~~ share buy-backs