



Class Ruling

Income tax: off market share buy-back – Tower 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 6 of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subsection 159GZZZP(1) of the ITAA 1936
- section 159GZZZQ of the ITAA 1936
- section 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 45C of the ITAA 1936
- section 104-10 of the *Income tax Assessment Act 1997* (ITAA 1997)
- section 108-5 of the ITAA 1997, and
- section 116-20 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1936 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is the holders of ordinary shares in TOWER Limited (TOWER) who:

- (a) are residents of Australia as defined in subsection (6)(1) on Record Date (that is 6 December 2013), being the date for determining the entitlements under the off market share buy-back
- (b) registered on the TOWER share registry on the Record Date
- (c) hold their ordinary shares in TOWER (TOWER shares) on capital account
- (d) are not subject to the taxation of financial arrangement rules in Division 230 of the ITAA 1997 in relation to gains and losses on their TOWER shares
- (e) participated in the Arrangement such that TOWER shares were purchased by TOWER, and
- (f) are not 'temporary residents' as defined in subsection 995-1(1) of the ITAA 1997.

(Note – Division 230 of the ITAA 1997 will generally not apply to individuals unless they have made an election for it to apply to them).

In this Ruling, a person belonging to this class of entities is referred to as a 'Participating Australian TOWER shareholder'.

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 8 to 24 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.

Date of effect

7. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

8. 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:

- Class Ruling application dated 11 June 2014.
- Additional information received between 19 May 2014 and 24 June 2014.
- Offer document (and covering letter) dated 10 December 2013 provided to TOWER shareholders in relation to the off market share buy-back.
- Announcements to the ASX and NZX regarding the buy-back between 26 November 2013 and 31 January 2014.
- TOWER Annual Report for the year ended 30 September 2013 and half year results for the period ended 31 March 2014.

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

9. During 2012 and 2013, TOWER sold a number of business units (including various health insurance, investment businesses and life insurance), with the intention of focussing on its general insurance business.

10. On 17 September 2013, TOWER announced its intention to return approximately NZ\$70 million of capital to shareholders realised from the sale of the majority of its non-participating life insurance businesses.

11. In TOWER's recent annual report for the year ended 30 September 2013, TOWER advised that it was marketing its remaining participating life insurance business for sale.

Shareholder Profile

12. The ownership of TOWER is widely distributed with the largest shareholding being approximately 13.62%, held by a non-Australian resident. The majority of TOWER shares are held by New Zealand residents (approximately 73%). Australian shareholders hold approximately 6.7% of TOWER shares, and none of those shareholders hold more than 5%.

13. TOWER has one class of ordinary shares, which rank equally in all respects.

- as at 30 November 2013, TOWER had 207,193,438 fully paid ordinary shares on issue
- as at 30 November 2013, there were 49,887 shareholders of TOWER. Of this number, approximately 84% of shareholders by number held 1,000 shares or fewer
- TOWER has paid dividends each year since 2007. On 3 February 2014, TOWER paid a final dividend for the year ended 30 September 2013 of NZ\$0.06 per share. A Participating TOWER shareholder that held TOWER shares on the Record Date which participated in the Arrangement received the final dividend in respect of the TOWER shares sold.

The Arrangement: pro-rata off market voluntary share buy-back

14. On 26 November 2013, TOWER announced that a pro-rata off market voluntary buy-back (capital-only) of TOWER shares would be conducted.

15. The Arrangement did not require shareholder approval and was authorised by a resolution of the TOWER board.

16. The offer to participate in the Arrangement was made to all TOWER shareholders, however only those TOWER shareholders that elected to participate in the Arrangement (Participating TOWER Shareholders) had TOWER shares bought back. Under the Arrangement, one in every five ordinary TOWER shares registered in the name of each Participating TOWER Shareholder on the Record Date was bought back, and subsequently cancelled. Where a TOWER shareholder did not take part in the Arrangement, their shareholding was unaffected except to the extent that the relative percentage of TOWER shares that the shareholder holds increased when the other shares were cancelled.

17. The Arrangement was conditional on, inter alia, TOWER receiving valid acceptances representing, in aggregate, at least 19,460,166 shares (being at least 10% of TOWER's market capitalisation, on 26 November 2013).

18. TOWER announced on 24 January 2014 that the acceptance level of the buy-back had exceeded the minimum 10% requirement and that the capital-only off market share buy-back would proceed.

19. The Australian shareholders held small holdings of shares, such that only 1,180,453 (approximately 4%) of the 29,048,308 shares bought back were acquired from Participating Australian TOWER shareholders.
20. In total, NZ\$52,577,437 was returned to Participating TOWER Shareholders, representing 29,048,308 shares. Some minimal rounding occurred where the number of shares held by a TOWER shareholder was not divisible by five.
21. Of the total 12,775 Participating TOWER shareholders, 3,708 (29%) were Australian residents, the class of entities to which this Class Ruling applies.
22. The Arrangement has been completed and payment was made to participating shareholders on 31 January 2014.
23. TOWER paid each Participating TOWER Shareholder NZ\$1.81 for each purchased share, being the volume weighted average price for the five trading days prior to 17 September 2013, being the date on which a return of capital was announced by TOWER. Participating TOWER Australian shareholders were paid the Australian dollar equivalent of NZ\$1.81, which was A\$1.63805 per share being converted at the NZD/AUD exchange rate of 0.9050, being the exchange rate applicable on the Record Date.
24. Accounting entries for the Arrangement resulted in a reduction of contributed equity. The journal entry to give effect to the Arrangement was as follows:

DR Contributed equity	NZ\$52,577,437	
CR Cash		NZ\$52,577,437

Ruling

Distribution is not a dividend

25. The purchase price is not a dividend under subsection 159GZZP(1) or under subsection 6(1).

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

26. The Commissioner will not make a determination under subsection 45A(2) that section 45C applied to the whole or any part of the distribution to Participating Australian TOWER Shareholders.
27. The Commissioner will not make a determination under subsection 45B(3) that section 45C applied to the whole or any part of the distribution to Participating Australian TOWER Shareholders.

Capital gains tax (CGT) consequences

28. CGT event A1 happens to Participating Australian TOWER Shareholders as a result of the capital-only off market voluntary share buy-back on 31 January 2014.

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29. The sale consideration of A\$1.63805 per share (equivalent to NZ\$1.81 at the conversion rate applicable on the Record Date) represents the capital proceeds for CGT purposes pursuant to section 116-20 of the ITAA 1997.

Commissioner of Taxation

30 July 2014

Appendix 1 – Explanation

ⓘ *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.*

Distribution is not a dividend

30. The Arrangement was an 'off-market buy-back' as defined in paragraph 159GZZZK(d), as the buy-back was not made in the ordinary course of trading in TOWER shares on the NZX or ASX.

31. The purchase price for Participating Australian TOWER Shareholders under paragraph 159GZZZM(a) was the Australian dollar equivalent of NZ\$1.81 at the conversion rate applicable on the Record Date.

32. The buy-back price was debited entirely against TOWER's contributed equity account. Therefore, no part of the purchase price is taken to be a dividend for income tax purposes under section 159GZZZP.

33. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

34. The term 'dividend' is defined in subsection 6(1) 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.

35. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 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.

36. As mentioned above, the distribution was recorded as a debit to TOWER's share capital account. Paragraph (d) of the definition of 'dividend' in subsection 6(1) will apply. Accordingly, no part of the buy-back price is a dividend, as defined in subsection 6(1).

Section 45A – streaming of dividends and capital benefits

37. Although a ‘capital benefit’ (as defined in paragraph 45A(3)(b)) has been provided to Participating Australian TOWER Shareholders, the circumstances of the Arrangement indicate that there is no ‘streaming’ of capital benefits to some shareholders and dividends to other shareholders. All TOWER shareholders were eligible to participate in the Arrangement, and all TOWER shareholders received, and continue to be eligible to receive, dividends. This is not a case where some TOWER shareholders were eligible to participate in the Arrangement and those TOWER shareholders that did not participate received dividends in substitution.

38. Accordingly, the Commissioner will not make a determination under subsection 45A(2) that section 45C applied to the Arrangement.

Section 45B – schemes to provide capital benefits

39. Section 45B applies where certain capital payments are paid to shareholders. Subsection 45B(2) sets out the conditions under which the Commissioner may make a determination under subsection 45B(3) that section 45C applies. These conditions are that:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- 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 (paragraph 45B(2)(b)); 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 the purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

Scheme

40. A ‘scheme’ for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal.

41. The distribution of share capital by TOWER will constitute a scheme for the purposes of paragraph 45B(2)(a).

Capital benefit

42. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). It states that a person is provided with a capital benefit if:

- (a) an ownership interest in a company is issued to the person;
- (b) there is a distribution to the person of share capital; or
- (c) the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.

43. Therefore, distribution of share capital by TOWER will constitute the provision of a capital benefit under paragraph 45B(5)(b).

Tax benefit

44. A taxpayer 'obtains a tax benefit', as defined in subsection 45B(9) if the amount of tax payable any other amount payable under the ITAA 1936 or the ITAA 1997 would, apart from the operation of section 45 be less than the amount that would have been payable, or would be payable at a later time than it would have been payable if the capital benefit had instead been a dividend.

45. On the basis of the information provided by TOWER it is likely that its shareholders will obtain a tax benefit from the distribution of share capital. A dividend would generally be included in the assessable income of a resident shareholder.

Relevant circumstances

46. Under paragraph 45B(2)(c) the Commissioner is required to consider the 'relevant circumstances' of the scheme as set out in subsection 45B(8) to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit.

47. The test is objective, based on the facts of each case. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. This purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

48. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance the offer to participate in the capital-only off market share buy-back is to be made to all shareholders of TOWER regardless of individual shareholder circumstances. As such, paragraphs 45B(8)(c) to 45B(8)(h) do not incline for or against a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and 45B(8)(j) pertaining to the provision of ownership interests and demerger respectively are also not relevant. In this case, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k).

49. On the basis that the Arrangement was a scheme under which Participating Australian TOWER Shareholders were provided with a capital benefit and there were Participating Australian TOWER Shareholders that obtained a tax benefit, the application of section 45B depends on whether the purpose (whether or not the dominant purpose, but not including an incidental purpose) of any relevant person in connection with the Arrangement was to enable relevant Participating Australian TOWER Shareholders to obtain a tax benefit.

50. The purpose which causes section 45B to apply may be the purpose of any party to the scheme. It is not possible to ascertain the purposes of TOWER's numerous shareholders, all of whom were eligible to participate in the Arrangement. Nevertheless, an objective conclusion as to the purpose of the company should, generally speaking, not be inconsistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who participated in the Arrangement.

51. Section 45B requires that the purpose be determined objectively. In determining the objective purpose, the 'relevant circumstances' specified in subsection 45B(8) of the ITAA 1936 must be considered, although this list is inclusive rather than exhaustive.

52. In the present case the following factors demonstrate that in the context of the Arrangement overall, any purpose of obtaining an Australian tax benefit was no more than incidental.

53. Most TOWER shareholders are New Zealand residents, and it is the consequences to these shareholders that were of primary concern to TOWER in entering into the Arrangement. Prior to the completion of the Arrangement, Australian shareholders owned only 6.7% of TOWER.

54. TOWER has continued to pay dividends in line with historic levels.

55. The TOWER directors' view that the company had excess capital. After careful consideration, TOWER's board decided that a share buy-back was the method that best met TOWER's objectives.

56. All TOWER shareholders were invited to participate in the Arrangement.

57. Having regard to the relevant circumstances of the scheme, TOWER should not be considered to have had a more than incidental purpose of enabling Participating Australian TOWER Shareholders to obtain Australian tax benefits. Any such purpose was incidental as it merely followed from the purpose of returning capital to TOWER shareholders (most of whom reside in New Zealand) in a way that provided appropriate commercial outcomes for TOWER and its shareholders.

58. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applied to the Arrangement.

Section 45C – deeming dividends to be paid where determinations under sections 45A or 45B are made

59. As the Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) in relation to the scheme as described, section 45C will not deem any part of the distribution of share capital to be an unfranked dividend for the purposes of the ITAA 1936 or the ITAA 1997.

Capital gains tax

CGT event A1 – section 104-10 of the ITAA 1997

60. Under the Arrangement, TOWER purchased TOWER shares from Participating Australian TOWER Shareholders (that is Participating Australian TOWER Shareholders disposed of TOWER shares, which were CGT assets as defined in section 108-5 of the ITAA 1997). The disposal of the shares was a CGT event A1.

61. The date on which the capital-only off market share buy-back was completed is the relevant date of disposal for CGT event A1. This occurred on 31 January 2014.

62. Section 159GZZZQ provides that a shareholder is taken to have received an amount equal to the purchase price received for each share bought back as consideration in respect of the sale of the share bought back. The purchase price for Participating Australian TOWER shareholders was the Australian dollar equivalent of NZ\$1.81 at the conversion rate applicable on the Record Date which was A\$1.63805. This amount represents the capital proceeds for CGT purposes under section 116-20 of the ITAA 1997.

63. Accordingly, a Participating Australian TOWER Shareholder makes a capital gain (or capital loss) if the amount received from TOWER for the share is more than (or less than) the cost base (or reduced cost base) of those shares.

Appendix 2 – Detailed contents list

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References

<i>Previous draft:</i>	- ITAA 1936 159GZZZQ
Not previously issued as a draft	- ITAA 1936 45A
	- ITAA 1936 45B
<i>Related Rulings/Determinations:</i>	- ITAA 1936 45C
TR 2006/10	- ITAA 1997 104-10
	- ITAA 1997 108-5
<i>Subject references:</i>	- ITAA 1997 116-20
- share buy backs	- TAA 1953
	- Copyright Act 1968
<i>Legislative references:</i>	<i>Other references:</i>
- ITAA 1936 6(1)	- PS LA 2007/9
- ITAA 1936 159GZZZP(1)	

ATO references

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