



Class Ruling

Income tax: Thinksmart Limited. Off-market share buy-back

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	7
Scheme	8
Ruling	26
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	50
Appendix 2:	
Detailed contents list	95

① 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provisions

2. The relevant provisions dealt with in this Ruling are:
- subsection 44(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
 - section 45A of the ITAA 1936
 - section 45B of the ITAA 1936
 - section 45C of the ITAA 1936
 - section 90 of the ITAA 1936
 - subsection 95(1) of the ITAA 1936
 - section 128B of the ITAA 1936
 - Division 16K of Part III of the ITAA 1936
 - section 177EA of the ITAA 1936

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997
- section 104-165 of the ITAA 1997
- section 106-5 of the ITAA 1997
- section 116-20 of the ITAA 1997
- section 118-20 of the ITAA 1997
- section 118-25 of the ITAA 1997
- section 202-5 of the ITAA 1997
- section 202-40 of the ITAA 1997
- section 204-30 of the ITAA 1997
- Division 725 of the ITAA 1997
- Division 727 of the ITAA 1997
- Subdivision 802-A of the ITAA 1997
- section 855-10 of the ITAA 1997, and
- section 855-15 of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1936, unless otherwise indicated.

Class of entities

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

- disposed of their ordinary shares in Thinksmart under the Thinksmart off-market share buy-back described in paragraphs 8 to 25 of this Ruling (the 'Buy-Back'), and
- are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their Thinksmart shares.

(**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, these ordinary shareholders of Thinksmart are referred to as '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 8 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.

Date of effect

7. This Ruling applies from 1 July 2016 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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.

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. Thinksmart is a public company incorporated in Australia and listed on the Australian Securities Exchange (ASX).

10. Thinksmart is a resident of Australia for tax purposes under subsection 6(1) and the head company of the Thinksmart tax consolidated group.

11. The share capital of Thinksmart is comprised solely of fully paid ordinary shares. The audited Statement of Financial Position of Thinksmart as at 30 June 2016 showed share capital of approximately \$27.8 million and retained profits of approximately \$1.3 million.

12. Thinksmart's ordinary shareholders are a mix of individuals, companies, trusts, partnerships and superannuation funds, some of whom are non-residents.

13. On 30 August 2016, Thinksmart announced (First Announcement Date) its intention, subject to shareholder approval, to undertake an off-market buy-back of its own shares. Thinksmart proposed to buy back up to 10 million ordinary shares, representing approximately 10.5% of its issued capital at that time. Thinksmart retained the discretion to buy back a lesser number of shares, or no shares at all.

14. As required by section 257C of the Corporations Act 2001, the terms of the Buy-Back were approved by Thinksmart shareholders at an Extraordinary General Meeting held on 29 September 2016.

15. Thinksmart conducted the Buy-Back through a tender process during a specified tender period, open to all eligible shareholders (other than Directors of Thinksmart) who were registered on 6 September 2016 (Record Date).

16. The Buy-Back tender period opened on 4 October 2016 (Opening Date) and closed on 4 November 2016 (Closing Date).

17. Participation in the Buy-Back was voluntary. Eligible shareholders who did not want to participate were not required to do anything. Non-participating shareholders did not receive any property, dividends or distributions as compensation for not participating in the Buy-Back.

18. Under the tender process, eligible shareholders who chose to participate offered to sell some or all of the shares they held at the Record Date at the specified prices within the Tender Range and/or as a Final Price Tender. The Tender Range was 38 cents to 55 cents (inclusive), in 1 cent intervals.

19. Subject to any scale-back of offers, tenders at prices equal to or below the Buy-Back Price or as Final Price Tenders would be successful. Tenders at prices above the Buy-Back Price would not be accepted.

20. The Buy-Back Price was subject to the overriding limit that Thinksmart would not buy back shares at a discount greater than 14% to the volume weighted average price (VWAP) of Thinksmart shares over the five trading days up to and including the Closing Date.

21. Thinksmart did not frank the Dividend Component of the Buy-Back and did not declare the Dividend Component of the Buy-Back to be conduit foreign income (CFI).

22. On 7 and 8 November 2016 Thinksmart announced:

- it had successfully completed the buy-back of 9,999,178 Thinksmart shares
- the final price for the Buy-Back was 38 cents per share (Buy-Back Price), and

- Shareholders who tendered their shares at the Buy-Back Price of \$0.38 or as Final Price Tenders had 41.46% of their Shares that were tendered in excess of the priority allocation bought back.

23. Under the Buy-Back, 29 cents per share was debited to Thinksmart's untainted share capital account, and the balance of the Buy-Back Price was debited to Thinksmart's retained profits.

24. Thinksmart cancelled all shares bought back under the Buy-Back.

25. Thinksmart shares were not indirect Australian real property interests (as defined in section 855-25 of the ITAA 1997) at the time the Buy-Back triggered CGT Event A1.

Ruling

Off-market purchase

26. For the purposes of Division 16K of Part III, the Buy-Back is an off-market purchase within the meaning given by paragraph 159GZZZK(d).

The Dividend Component

27. Participating Shareholders are taken to have been paid a dividend of 9 cents (the Dividend Component) under section 159GZZZP for each share disposed of in the Buy-Back. The Dividend Component is taken to have been paid to Participating Shareholders on 7 November 2016.

28. The Dividend Component is a frankable distribution pursuant to section 202-40 of the ITAA 1997, and is capable of being franked in accordance with section 202-5 of the ITAA 1997. However, no franking credits will be allocated to the Dividend Component such that it will be an unfranked dividend.

29. No part of the Dividend Component includes CFI within the meaning given by Subdivision 802-A of the ITAA 1997.

30. The difference between the Buy-Back Price and the Dividend Component is not a dividend for income tax purposes.

Assessability of the Dividend Component

Direct distributions

31. The Dividend Component is included in the assessable income of Australian resident individual and corporate shareholders, and trustees of resident complying superannuation funds who participated in the Buy-Back in the income year in which the Buy-Back occurred (subsection 44(1)). For Participating Shareholders

who have not been granted leave to adopt a substituted accounting period, the Buy-Back occurred in the income year ending 30 June 2017.

Indirect distributions

Partnerships

32. The Dividend Component is included in the assessable income of a Participating Shareholder that is a partnership for the purposes of computing the net income of the partnership under section 90.

Trusts

33. The Dividend Component is included in the assessable income of a Participating Shareholder that is a trustee of a trust for the purposes of computing the net income of the trust under subsection 95(1).

Non-resident Participating Shareholders

34. As the Dividend Component of the Buy-Back Price is entirely unfranked, non-resident Participating Shareholders are liable to pay Australian withholding tax on the whole of the Dividend Component (subsections 128B(1) and (4)).

Sale Consideration

35. Participating Shareholders are taken to have received 29 cents as consideration in respect of each share bought back under the Buy-Back (Sale Consideration) on 7 November 2016 in accordance with section 159GZZZQ.

36. The treatment of the Sale Consideration will depend on whether the sale is on capital account or on revenue account.

Capital gains tax (CGT)

37. The Thinksmart shares are taken to have been disposed of for CGT purposes on 7 November 2016 pursuant to section 104-10 of the ITAA 1997 (CGT event A1).

38. The Sale Consideration of 29 cents represents the capital proceeds for CGT purposes pursuant to section 116-20 of the ITAA 1997.

39. A Participating Shareholder (other than a partnership) 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 Participating Shareholder (other than a partnership) will make a capital loss on a share if the Sale Consideration per share is less than the reduced cost base of the share (subsection 104-10(4) of the ITAA 1997).

40. Each partner in a partnership has a separate cost base and reduced cost base for the partner's interest in each Thinksmart share sold into the Buy-Back by the partnership (subsection 106-5(2) of the ITAA 1997). Each partner is allocated an appropriate share of the Sale Consideration received by the partnership for the disposal of Thinksmart shares into the Buy-Back.

Shares held as trading stock

41. Where shares were held as trading stock (as defined in subsection 995-1(1) of the ITAA 1997), the Sale Consideration of 29 cents per share is included in assessable income under section 6-5 of the ITAA 1997.

42. Under section 118-25 of the ITAA 1997 any capital gain or capital loss these Participating Shareholders make will be disregarded if at the time of the CGT event the shares are held by them as trading stock. There is a similar exemption for partners in partnerships (paragraph 118-25(1)(b) of the ITAA 1997).

Shares held as revenue assets

43. Where shares were held as revenue assets (as defined in section 977-50 of the ITAA 1997), but were not trading stock, the amount by which the Sale Consideration of 29 cents per share exceeds the cost of each share is included in the Participating Shareholder's assessable income pursuant to section 6-5 of the ITAA 1997. Similarly, the amount by which the cost of each Thinksmart share exceeds the Sale Consideration of 29 cents per share is an allowable deduction pursuant to section 8-1 of the ITAA 1997.

44. Any capital gain made by a Participating Shareholder that held shares on revenue account but not as trading stock will be reduced by the amount otherwise included in assessable income (section 118-20 of the ITAA 1997). The reduced cost base for the corresponding CGT outcome is reduced by the amount of the allowable deduction (subsection 110-55(9) of the ITAA 1997).

Foreign resident Participating Shareholders: CGT consequences

45. A Participating Shareholder who was a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1

happened to a Thinksmart share as a result of the Buy-Back will disregard a capital gain or capital loss made from CGT event A1, unless the Thinksmart share:

- has been used at any time by the Participating Shareholder 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
- is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

Value shifting rules

46. There will be no consequences for a Participating Shareholder under Divisions 725 and 727 of the ITAA 1997 as a result of participating in the Buy-Back.

The anti-avoidance provisions

47. The Commissioner will not make a determination under subsection 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the Capital Component of the Buy-Back Price received by Participating Shareholders.

48. Section 177EA does not apply to the Buy-Back as the dividend was not a franked distribution under subsection 177EA(3).

49. Subsection 204-30(1) of the ITAA 1997 does not apply to the Buy-Back as there were no imputation benefits received by Participating Shareholders.

Commissioner of Taxation

14 December 2016

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.*

Off-market purchase

50. For the purposes of Division 16K of Part III, where a company buys a share in itself from a shareholder the purchase is a 'buy-back' (paragraph 159GZZZK(a)).

51. Division 16K of Part III categorises a buy-back as either an 'on-market purchase' or an 'off-market purchase'.

52. A buy-back is an on-market purchase if the share bought back is listed for quotation in the official list of a stock exchange in Australia or elsewhere, and the buy-back is made in the ordinary course of trading on that stock exchange (paragraph 159GZZZK(c)). A buy-back that is not an on-market purchase is an off-market purchase (paragraph 159GZZZK(d)).

53. Although Thinksmart's ordinary shares are listed for quotation in the official list of the ASX, the Buy-Back was not made in the ordinary course of trading on the ASX. As a result, for the purposes of Division 16K of Part III, the Buy-Back is an off-market purchase within the meaning given by paragraph 159GZZZK(d).

The Dividend and Capital Components

54. The Buy-Back Price received by Participating Shareholders comprises two components:

- a Dividend Component, and
- a Capital Component.

55. The amount of each of these components is determined in accordance with sections 159GZZZP and 159GZZZQ, having regard to how Thinksmart accounted for the Buy-Back.

The Dividend Component

56. Section 159GZZZP provides that where the buy-back of a share is an off-market purchase the difference between the purchase price and the part (if any) of the purchase price which is debited against amounts standing to the credit of the share capital account is taken to be a dividend paid by the company to the seller on the day the buy-back occurs.

57. The Buy-Back Price of each Thinksmart share was 38 cents of which 29 cents per share was debited against amounts standing to the credit of Thinksmart's share capital account (Capital Component). As a result, the Dividend Component is taken to be 9 cents per share, and is taken to be paid to Participating Shareholders on 7 November 2016. The dividend was unfranked.

58. No part of the Dividend Component includes CFI within the meaning given by Subdivision 802-A of the ITAA 1997.

Assessability of the Dividend Component

Direct distributions

59. For Participating Shareholders who are Australian residents (other than a partnership or a trust) and who directly receive the Dividend Component, the Dividend Component is included in the assessable income of each Participating Shareholder under subsection 44(1).

Indirect distributions

Partnerships

60. Pursuant to subsection 44(1), the Dividend Component is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90

Trusts

61. Pursuant to subsection 44(1), the Dividend Component is included in the assessable income of the trustee for the purposes of computing the net income of the trust under subsection 95(1).

Non-resident Participating Shareholders

62. Subsection 128B(1) provides that dividends derived by a non-resident and paid by a resident company are subject to withholding tax.

63. As the Dividend Component of the Buy-Back Price is unfranked, non-resident Participating Shareholders are liable to pay Australian withholding tax on the Dividend Component (subsection 128B(1)).

64. The dividend withholding tax rate is 30%. This rate is generally reduced to 15% for countries which have a double tax agreement with Australia.

The Capital Component***Calculation of Sale Consideration***

65. For the purposes of determining the amount of a gain or loss (for Thinksmart shares held on capital or revenue account), the consideration in respect of the disposal of a share (the Sale Consideration) under an off-market share buy-back is determined in accordance with section 159GZZZQ.

66. Subsection 159GZZZQ(1) provides that a shareholder is taken to have received an amount equal to the purchase price (in this case the Buy-Back Price of 38 cents received for each Thinksmart share bought back) as consideration in respect of the sale of the share bought back. However, this amount is subject to certain adjustments in order to arrive at the Sale Consideration.

67. Subsection 159GZZZQ(2) is one of the adjusting provisions. It provides that if the purchase price is less than the market value of the share at the time of the buy-back (calculated as if the buy-back did not occur and was never proposed to occur) the shareholder is taken to have received an amount equal to the market value of the share as consideration in respect of the sale of the share bought back.

68. For the purposes of determining the application of subsection 159GZZZQ(2), the following methodology has been proposed by Thinksmart and accepted by the Commissioner in accordance with TD 2004/22. The market value of a Thinksmart share is the VWAP of a Thinksmart share over the last five trading days before the first announcement of the Buy-Back, adjusted for the percentage change in the S&P/ASX 200 Index from the commencement of trading on the First Announcement Date (30 August 2016) to the close of trading on the date the buy-back closed (4 November 2016).

69. Under this methodology, the market value of a Thinksmart share bought back was calculated to be 38 cents. As a result, Participating Shareholders are taken to have received 38 cents for the sale of each Thinksmart share. The Commissioner accepts that the market value of each Thinksmart share was 38 cents, which accorded with the buy-back price received by Participating Shareholders.

70. Pursuant to subsection 159GZZZQ(3), the deemed consideration of 38 cents is reduced by a 'Reduction Amount'. The Reduction Amount is an amount calculated under subsection 159GZZZQ(4). In the circumstances of the Buy-Back, the Reduction Amount is equivalent to the Dividend Component (9 cents). As a result, the Sale Consideration for each Thinksmart share disposed of under the Buy-Back is 29 cents (38 cents less 9 cents).

71. Participating Shareholders are taken to have disposed of their shares accepted under the Buy-Back on 7 November 2016 (CGT event A1). The disposal may have different taxation implications for Participating 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 and the CGT provisions.

Capital gains tax (CGT)

72. The Sale Consideration of 29 cents per share represents the capital proceeds for CGT purposes pursuant to section 116-20 of the ITAA 1997. A Participating Shareholder (other than a partnership) will make a capital gain in respect of the disposal of a share if the Sale Consideration per share exceeds the cost base of the share. The capital gain is the amount of the excess. Similarly, a Participating Shareholder (other than a partnership) will make a capital loss in respect of the disposal of a share if the Sale Consideration per share is less than the reduced cost base of the share (subsection 104-10(4) of the ITAA 1997).

73. Where the Participating Shareholder is a partnership, any capital gain or capital loss will be made by the partners individually (subsection 106-5(1) of the ITAA 1997). Each partner in a partnership has a separate cost base and reduced cost base for the partner's interest in each Thinksmart share sold into the Buy-Back by the partnership (subsection 106-5(2) of the ITAA 1997). Each partner is allocated an appropriate share of the Sale Consideration received by the partnership for the disposal of Thinksmart shares into the Buy-Back.

Shares held as trading stock

74. Where shares were held as trading stock, the Sale Consideration of 29 cents per share is included in assessable income under section 6-5 of the ITAA 1997. Participating Shareholders (other than partnerships) who disposed of shares held as trading stock will also make a capital gain or capital loss. However, as the shares were held as trading stock, the capital gain or loss is disregarded under section 118-25 of the ITAA 1997. There is a similar exemption for partners in partnerships (paragraph 118-25(1)(b) of the ITAA 1997) and for beneficiaries of a trust (paragraph 118-25(1)(c) of the ITAA 1997).

Shares held as revenue assets

75. Where shares were held as revenue assets, but were not trading stock, the amount by which the Sale Consideration of 29 cents per share exceeds the cost of each share is included in assessable income. Correspondingly, if the cost exceeds the Sale Consideration of 29 cents per share the difference is an allowable deduction. Where the Sale Consideration per share exceeds the cost base of the share these Participating Shareholders (other than partnerships) will also make a capital gain. However, Participating Shareholders who held their shares as revenue assets will have the amount of the capital gain reduced under the anti-overlap provisions contained in section 118-20 of the ITAA 1997. There is a similar reduction for partners in partnerships (paragraph 118-20(1)(b), paragraph 118-20(2)(b) and subsection 118-20(3) of the ITAA 1997).

Foreign resident Participating Shareholders: CGT consequences

76. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

77. Under subsection 855-10(1) of the ITAA 1997, a Participating Shareholder that was a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happened to a Thinksmart share as a result of the Buy-Back will disregard a capital gain or capital loss made from CGT event A1 unless:

- the Thinksmart share has been used at any time by the Participating Shareholder 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
- the Thinksmart share is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

Value shifting rules

78. Division 725 of the ITAA 1997 may apply where there is a direct value shift under a scheme involving equity interests in an entity. For Division 725 of the ITAA 1997 to have consequences, paragraph 725-50(b) of the ITAA 1997 requires, amongst other things, that the 'controlling entity test' be satisfied.

79. The 'controlling entity test' is satisfied if an entity (the controller) controls for value shifting purposes the 'target entity' at some time during the period starting when the scheme is entered into and ending when the scheme has been carried out (section 725-55 of the ITAA 1997). The target entity in this case is Thinksmart.

80. Subdivision 727-E of the ITAA 1997 sets out the circumstances in which an entity will be regarded as controlling another entity for value shifting purposes.

81. No entity, either alone or together with its associates, controlled Thinksmart for value shifting purposes under the tests in section 727-355 of the ITAA 1997 during the period starting when the scheme was entered into and ending when it had been carried out.

82. As the threshold requirement in paragraph 725-50(b) of the ITAA 1997 is not satisfied, Division 725 of the ITAA 1997 cannot have consequences for Participating Shareholders in respect of the scheme.

83. Division 727 of the ITAA 1997 also cannot have consequences for Participating Shareholders in respect of the scheme.

The anti-avoidance provisions

Sections 45A and 45B

84. Sections 45A and 45B are two 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 distribution of capital received by a Participating Shareholder under the Buy-Back is treated as an unfranked dividend. Accordingly, the application of these two provisions to the Buy-Back must be considered.

85. Section 45A 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.

86. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) 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. Under the Buy-Back, all Participating Shareholders received both a Capital Component as well as a Dividend Component in equal proportion based on the number of shares they sold into the Buy-Back. Accordingly, section 45A has no application to the Buy-Back.

87. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends. In broad terms, there needs to be a scheme in which, 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, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit.

88. While a Participating Shareholder may obtain a tax benefit in respect of the Buy-Back, the requisite purpose of enabling a Participating Shareholder to obtain a tax benefit by way of a dividend disguised as a capital distribution was not present.

89. Having regard to the 'relevant circumstances' (as set out in subsection 45B(8)) of the Buy-Back, it is particularly apparent that:

- the Capital Component of the Buy-Back Price is acceptable and cannot be said to be attributable to the profits of Thinksmart or of an associate of Thinksmart, and
- as a consequence of the Buy-Back, the distribution of share capital resulted in a reduction in ordinary shares in Thinksmart held by Participating Shareholders.

90. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to treat all or part of the Capital Component of the Buy-Back Price as an unfranked dividend paid by Thinksmart.

Section 177EA

91. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares. This would include a buy-back with a franked dividend component.

92. As the dividend was not a franked distribution under subsection 177EA(3), section 177EA does not apply to the Buy-Back.

Section 204-30 of the ITAA 1997

93. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that certain shareholders, referred to as favoured members, obtain imputation benefits, and other shareholders, referred to as disadvantaged members, obtain lesser or no imputation benefits, whether or not they receive other benefits. The favoured members are those that derive a greater benefit from imputation benefits than disadvantaged members.

94. A portion of Thinksmart's ordinary shares are held by non-resident shareholders who do not benefit from franking credits to the same extent as resident shareholders. As there were no imputation benefits received by Participating Shareholders because the dividend was not a franked distribution, subsection 204-30(1) of the ITAA 1997 does not apply to the Buy-Back.

Appendix 2 – Detailed contents list

95. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	7
Scheme	8
Ruling	26
Off-market purchase	26
The Dividend Component	27
Assessability of the Dividend Component	31
<i>Direct distributions</i>	31
<i>Indirect distributions</i>	32
<i>Partnerships</i>	32
<i>Trusts</i>	33
<i>Non-resident Participating Shareholders</i>	34
Sale Consideration	35
<i>Capital gains tax (CGT)</i>	37
<i>Shares held as trading stock</i>	41
<i>Shares held as revenue assets</i>	43
<i>Foreign resident Participating Shareholders: CGT consequences</i>	45
Value shifting rules	46
The anti-avoidance provisions	47
Appendix 1 – Explanation	50
Off-market purchase	50
The Dividend and Capital Components	54
The Dividend Component	56
Assessability of the Dividend Component	59
<i>Direct distributions</i>	59
<i>Indirect distributions</i>	60
<i>Partnerships</i>	60
<i>Trusts</i>	61

CR 2016/96

<i>Non-resident Participating Shareholders</i>	62
<i>The Capital Component</i>	65
<i>Calculation of Sale Consideration</i>	65
<i>Capital gains tax (CGT)</i>	72
<i>Shares held as trading stock</i>	74
<i>Shares held as revenue assets</i>	75
<i>Foreign resident Participating Shareholders: CGT consequences</i>	76
<i>Value shifting rules</i>	78
<i>The anti-avoidance provisions</i>	84
<i>Sections 45A and 45B</i>	84
<i>Section 177EA</i>	91
<i>Section 204-30 of the ITAA 1997</i>	93
Appendix 2 – Detailed contents list	95

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TD 2004/22

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ATOlaw topic: Income tax ~~ Assessable income ~~ Dividend, interest and royalties ~~ Dividend income
Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 - disposal of a CGT asset

Income tax ~~ Capital gains tax ~~ Exemptions ~~ Other
Income tax ~~ Capital management ~~ Income tax ~~
Capital management ~~ Share buy back
International issues ~~ Non-resident withholding tax
obligations

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