



CR 2002/16 - Income tax: Share Buy-Back: TAB Limited

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Class Ruling

Income tax: Share Buy-Back: TAB Limited

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a **Ruling** is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law(s)’ identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax laws

2. The tax laws dealt with in this Ruling are:
- sections 44, 46 and 46A of the *Income Tax Assessment Act 1936* (‘ITAA 1936’);
 - sections 45A, 45B and 45C of the ITAA 1936;
 - section 128B of the ITAA 1936;
 - sections 159GZZZP and 159GZZZQ of the ITAA 1936;
 - sections 160APA, 160APP, 160AQF, 160AQT and 160AQU of the ITAA 1936;
 - section 160APHO of the ITAA 1936;
 - section 160AQCBA of the ITAA 1936; and
 - section 177EA of the ITAA 1936.

Class of persons

3. The class of persons to whom this Ruling applies is the shareholders in TAB Limited (“TAB”) who dispose of shares under

the TAB off-market share buy-back (“the Buy-back”) announced on 21 March 2002 and described in the Arrangement part of this Ruling.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is the same as the arrangement described below at paragraphs 11 to 22.
6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:
 - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - (b) this Ruling may be withdrawn or modified.
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Date of effect

9. This Ruling applies from 21 March 2002. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Withdrawal

10. This Class Ruling is withdrawn and ceases to have effect after the earlier of the date on which shareholders receive the proceeds of disposal of the shares, which they dispose of under the Buy-back and 30 June 2002. The Ruling continues to apply, in respect of the tax

laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

11. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents:

- Ruling request from TAB dated 20 November 2001;
- Letter from TAB dated 7 February 2002;
- Correspondence from TAB dated 20 February 2002; and
- Application for Class Ruling dated 13 March 2002 from TAB (amending the amount to be debited against the share capital account and the retained earnings account).

These documents, or relevant parts of them form part of and are to be read with this description.

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

12. On 21 March 2002, TAB announced an equal access off-market share buy-back. At that date there were approximately 500,100,000 fully paid ordinary shares on issue. There are no other classes of shares on issue.

13. Shareholders' funds on TAB's balance sheet as at 31 December 2001 total \$511,935,000, consisting of \$431,364,000 contributed share capital and \$80,571,000 retained profits. The franking account balance at 31 December 2001 was \$42,110,000.

14. TAB has stated that its reasons for undertaking the Buy-back include:

- to return surplus capital to shareholders;
- to reduce TAB's cost of capital;
- to increase earnings per share and the return on shareholders' equity;

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- to provide shareholders (especially smaller shareholders) with a convenient, cost effective way of selling their shares; and
- the cost benefits associated with reducing the number of small shareholders.

15. Under the Buy-back, TAB will acquire up to 12% of the total shares on issue.

16. TAB intends that \$2.35 of the Buy-back price will be debited to its share capital account, with the remainder being debited to retained earnings. The proportion of share capital and retained earnings comprising the Buy-back price was determined having regard to the proportion of share capital and retained earnings on TAB's balance sheet as at 31 December 2001.

17. The Buy-back price will be determined by adjusting \$2.74 (which is the volume weighted average price of shares traded on the Australian Stock Exchange over the 20 trading days immediately before the Buy-back was announced and adjusted to an ex-dividend basis) as follows:

- to reflect the movement in the All Industrials Index on the Australian Stock Exchange over the offer period specified in the final TAB Offer Document; and
- at the Directors' discretion, to ensure the Buy-back price reflects market value.

18. TAB will invite each of its shareholders to nominate some or all of their shares for sale in the Buy-back. TAB will offer to purchase all shares nominated, unless the total of all of those nominated shares exceeds 12% of total shares on issue. Where this occurs, the offer to certain shareholders will be scaled back to ensure that no more than 12% of total shares are acquired by TAB. The offer will not be scaled back in respect of:

- an accepting shareholder holding an unmarketable parcel (a parcel of shares worth less than \$500 based on the Buy-back price); and
- an accepting shareholder which, after any scale back, would be left holding an unmarketable parcel.

In each of these cases accepting shareholders will be taken to have accepted the Buy-back Offer for all of their nominated shares.

19. TAB has ascertained that most of its shares are held by Australian residents. In particular, it has 246,205 Australian resident shareholders and 789 non-resident shareholders. Many of its shareholders are individuals and hold less than 300 shares.

20. As a result of the Buy-back, control of TAB will not change.

Ruling

The Dividend Component

21. Shareholders will receive a dividend equal to the Buy-back price less \$2.35 (“the dividend component”). This will comprise:

- a *frankable dividend* in terms of 160APA (only to the extent that the Buy-back price does not exceed the market value of the TAB shares at the time of the Buy-back, that market value being determined on the assumption that the Buy-back did not occur and was never proposed to occur); and
- an *unfrankable dividend* to the extent that the Buy-back price exceeds the market value of the TAB shares at the time of the Buy-back.

The Capital Component

22. Participating shareholders will receive \$2.35 as consideration in respect of the sale of each of their TAB shares for the purposes of section 159GZZZQ (unless the shareholder is an Australian resident corporation to which subsection 159GZZZQ(9) applies). The treatment of this consideration amount for tax purposes will depend on whether the sale is on capital account (ordinary share investors) or on revenue account (such as share traders, banks and insurers). In general, the relevant treatment will be as follows:

(a) Shares held on capital account

The amount by which the capital proceeds of \$2.35 exceeds the cost base of each share will be a capital gain to the shareholder. If the share’s reduced cost base exceeds \$2.35 the difference will be a capital loss.

(b) Shares held on revenue account

The amount by which the consideration on disposal of \$2.35 exceeds the cost of each share will be included in the shareholder’s assessable income. Correspondingly, if the cost exceeds \$2.35 the difference will be an allowable deduction.

Examples of how the dividend and capital component may be treated for tax purposes are described in the EXAMPLES part of this ruling

The Anti Avoidance Provisions

23. The Commissioner will not make a determination under paragraph 160AQCBA(3)(b) to deny the whole, or any part, of the franking credit benefits received in relation to the dividend component by participating shareholders.

24. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the franking credit benefits received in relation to the dividend component by participating shareholders.

25. The Commissioner will not make a determination (under section 45A or 45B) that section 45C applies to the whole, or any part, of the capital component of the Buy-back price received by participating shareholders.

Explanations

A. The Dividend and Capital Components

26. The purchase price received by participating shareholders is comprised of two components:

- a dividend component; and
- a capital component.

The amount of each of these components is determined in accordance with sections 159GZZZP and 159GZZZQ having regard to how the company accounts for the Buy-back as detailed below.

The Dividend Component – section 159GZZZP

27. 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 to the share capital account of the company is taken to be a dividend paid by the company on the day the buy-back occurs. In this case TAB proposes to debit \$2.35 per share to its share capital account. Thus the dividend component will be the difference between the purchase price and \$2.35.

28. TAB expects that this dividend amount will be fully franked. Paragraph (ba) of the definition of “frankable dividend” in section 160APA provides that this amount is a frankable dividend for the purposes of Part IIIAA to the extent that the purchase price does not

exceed the market value (based on certain assumptions) of the share at the time of the buy-back. If the price exceeds that market value, the excess cannot be a frankable dividend under section 160APA.

29. For Australian resident individual shareholders, the amount of the dividend (grossed up for any franking credits attached to the dividend under section 160AQT), will be included in assessable income under subsection 44(1). Resident individual shareholders will also be entitled to a franking rebate under section 160AQU reflecting the franking credits attached to the dividend.

30. For Australian resident corporate shareholders, the dividend will be included in assessable income under subsection 44(1). However, resident corporate shareholders may be eligible for the inter-corporate dividend rebate under section 46. Resident corporate shareholders may also be eligible to receive franking credits under section 160APP.

31. To the extent that the dividend component received under the Buy-back is fully franked, a non-resident shareholder is not liable to Australian withholding tax on the dividend component (paragraph 128B(3)(ga)).

32. It should be noted that there are provisions which may deny a franking credit, a franking rebate or the inter-corporate dividend rebate in certain circumstances. For instance, section 160APHO requires that a taxpayer receiving a franked dividend be a “qualified person” in order to be entitled to a franking credit, franking rebate or intercorporate dividend rebate. Broadly speaking, to be a qualified person in relation to a dividend, a taxpayer must satisfy both the holding period rule (or certain alternative rules) and the related payments rule.

33. Sections 160AQCBA and 177EA are also anti-avoidance provisions concerned with striking down arrangements which inappropriately provide franking credit benefits to a relevant taxpayer. These provisions allow the Commissioner to make a determination cancelling all or a part of a shareholder’s entitlement to a franking credit, franking rebate, intercorporate dividend rebate or other such benefits. In this case, no determination will be made to cancel franking credit benefits received by participating shareholders under the Buy-back. A discussion of these provisions appears later in this Class Ruling.

The Capital Component – section 159GZZZQ

34. Shareholders who participate in the Buy-back dispose of their shares when the Buy-back occurs. The disposal may have different taxation implications for shareholders depending on how the shares were held, for instance:

- an investor holding their shares on capital account will be subject to the capital gains tax provisions; and
- a share trader holding their shares on revenue account will also be subject to the ordinary income provisions.

It should be noted that share traders who have both an income tax and a capital gains tax liability will generally have the amount of the capital gain reduced under the anti-overlap provisions in section 118-20 of the ITAA 1997.

35. For the purposes of determining the capital gain or ordinary income amount in these cases, the consideration in respect of the disposal of a share under a buy-back is determined in accordance with section 159GZZZQ.

36. The consideration determined under section 159GZZZQ is:

- the buy-back price; less
- the reduction amount (within the meaning of subsection 159GZZZQ(4)).

Accordingly, for the purposes of calculating the profit or loss on disposal of the shares for income tax or capital gains tax purposes, in most cases the participating shareholder is taken to have received \$2.35 per share as consideration on disposal (“the Disposal Consideration”).

37. However, it should be noted that where the participating shareholder is entitled to the inter-corporate dividend rebate under sections 46 or 46A in respect of the dividend component of the purchase price, an adjustment may be made to the Disposal Consideration. Under subsection 159GZZZQ(8) if that shareholder would incur a capital loss, or a loss in respect of which the shareholder would be entitled to a deduction, the Disposal Consideration is increased by a “rebtable amount” calculated under subsection 159GZZZQ(9).

B. The Anti Avoidance Provisions

Section 160AQCBA

38. Section 160AQCBA applies where a company streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its shareholders in such a way that:

- (a) franking credit benefits are, or apart from this section would be, received by shareholders (“advantaged shareholders”) who would, in the year of income in which the dividends are paid, derive a greater benefit

from franking credits than other shareholders (paragraph 160AQCBA(2)(a)); and

- (b) the other shareholders (“disadvantaged shareholders”) will receive lesser franking credit benefits or will not receive any franking credit benefits, whether or not they receive any other benefits (paragraph 160AQCBA(2)(b)).

39. If section 160AQCBA applies the Commissioner may make a determination under subsection 160AQCBA(3) that either:

- the company will incur an additional franking debit in respect of each dividend paid or other benefit received by a shareholder; or
- no franking credit benefit will arise in respect of any dividends paid to a shareholder.

For the section to apply, shareholders to whom dividends are streamed must derive a greater benefit from franking credits than the shareholders who do not participate in the buy-back. The words “derive a greater benefit from franking credits” are defined in subsection 160AQCBA(17) by reference to the ability of shareholders to fully utilise franking credits.

40. In the case of the TAB Buy-back, it cannot be said that there are any particular types of shareholders to whom dividends have been streamed, who have a greater ability to use franking credits. Accordingly, section 160AQCBA does not apply to the dividend component of the Buy-back.

Section 177EA

41. Section 177EA is a general anti-avoidance provision which applies to a wide range of schemes to obtain a tax advantage in relation to franking credits. In essence, it applies to schemes for the disposition of shares, or an interest in shares where a franked dividend is paid or payable in respect of the shares. This would include a buy-back with a franked dividend component.

42. Specifically, subsection 177EA(3) provides that the section applies where:

- (a) there is a scheme for a disposition of shares (or an interest in shares) in a company;
- (b) a frankable dividend has been paid or is payable or expected to be payable in respect of the shares;
- (c) the dividend or distribution was, or is expected to be, franked;

- (d) a person would receive, or could reasonably be expected to receive, franking credit benefits as a result of the dividend or distribution; and
- (e) 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 franking credit benefit.

43. As TAB is a party to the scheme, if section 177EA applies the Commissioner has a choice as to whether to make a determination to post a debit to TAB's franking account (under paragraph 177EA(5)(a)) or to cancel franking credit benefits received by participating shareholders (under paragraph 177EA(5)(b)).

44. In the present case, it would appear that the conditions of paragraphs 177EA(3)(a) to (d) are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(19)), it would be concluded that, on the part of TAB, its shareholders or any other relevant party, there is a purpose more than merely an incidental purpose of conferring a franking credit benefit under the scheme. Under this arrangement the relevant taxpayer is the participating shareholder and the scheme comprises the circumstances surrounding the Buy-back of ordinary shares.

45. In arriving at a conclusion, the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(19). The relevant circumstances listed in subsection 177EA(19) encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose.

46. Having regard to the objectives and the relevant circumstances of the scheme, in particular the capital component of the Buy-back which reflects the substance of the arrangement, it cannot be concluded that TAB or the shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a franking credit benefit. Therefore, the Commissioner's view is that section 177EA has no application in these circumstances.

47. Accordingly, the Commissioner will not make a determination under paragraph 177EA(5)(b) to deny franking credit benefits received by participating shareholders under the Buy-back.

Sections 45A and 45B

48. As discussed earlier, part of the proceeds received by a shareholder in return for participating in a buy-back will be taken not to be a dividend for the purposes of the ITAA 1936. This part instead is treated as a distribution of share capital by the company to the shareholder.

49. Sections 45A and 45B are two anti-avoidance provisions which allow the Commissioner to make a determination under section 45C that all or part of the distribution of capital received by the shareholder under the buy-back is treated as an unfranked and non-rebatable dividend.

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

51. Although a “capital benefit” (as defined in paragraph 45A(3)(b)) is provided to the participating shareholders the circumstances of the Buy-back indicate that there is no streaming of capital benefits to advantaged shareholders, and dividends to disadvantaged shareholders. Accordingly, section 45A has no application to the Buy-back.

52. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends. Specifically, the provision applies where:

- (a) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- (b) 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)); and
- (c) 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)).

53. In the circumstances of this case, it is considered that the conditions of paragraphs 45B(2)(a) and (b) are satisfied, as under the Buy-back participating shareholders will be provided with a capital benefit and would generally pay less tax on the returned capital than they would on an equivalent amount of dividend.

54. However, having regard to the relevant circumstances of the scheme (see subsection 45B(5)), it cannot be concluded that either TAB or the shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a tax benefit. The view that section 45B will not apply is based on the conclusion that in substance, part of the transaction is a matter of capital. In this case, the proposed allocation of \$2.35 per share as share capital is considered appropriate and reflects the participating shareholders' interests in shareholders' equity and the objectives of the Buy-back. Furthermore, the capital component of the Buy-back is not attributable to the profits of the company, nor does the pattern of distributions indicate that it is being paid in substitution for a dividend. Accordingly, section 45B will not apply to the Buy-back.

Examples

55. In the following examples it is assumed that:

- the shareholder is an individual resident shareholder, holding the shares on capital account; and
- the Buy-back price is \$2.80 which is the relevant market value of the share at the Buy-back time, assuming that the Buy-back did not occur and was never proposed to occur.

Example 1

56. Karen bought 300 TAB shares in June 1998 (in the public float of TAB's shares) at \$2.05 each. She applied to participate in the Buy-back. TAB approved the Buy-back of her 300 shares and on 13 May 2002 Karen was paid \$840 (300 x \$2.80). This amount comprised a franked dividend of \$135 (with an attached franking credit of \$57.86) and capital proceeds of \$705 from disposal of the shares.

In the 2001-2002 year of income, Karen includes in her assessable income the franked dividend of \$135 and the imputation credit of \$57.86. The imputation credit is allowed as a rebate.

Karen's disposal of the TAB shares will be a discount capital gain under Division 115 of the ITAA 1997. She chooses the discount method because it gives her a lesser capital gain than the indexation method affords her. Therefore the capital gain is calculated as follows:

Capital proceeds from disposal	(300 x \$2.35)	\$705
Less cost base (purchase price)	(300 x \$2.05)	<u>\$615</u>
Capital gain		\$90
Less discount percentage	(50% x \$90)	<u>\$45</u>
DISCOUNT CAPITAL GAIN		\$45

Example 2

57. Steve bought 10,000 TAB shares in October 2001 at \$2.70 each and paid brokerage fees of \$550. Steve applied to participate in the Buy-back. TAB approved the buy-back of 2000 shares and on 13 May 2002 Steve was paid \$5600 (2000 x \$2.80). This amount comprised a franked dividend of \$900 (with an attached franking credit of \$385.71) and capital proceeds of \$4700 from disposal of the shares.

In the 2001-2002 year of income, Steve includes in his assessable income the franked dividend of \$900 and the imputation credit of \$385.71. The imputation credit is allowed as a rebate.

Steve makes a capital loss on the sale of his TAB shares, which is calculated as follows:

Capital proceeds from disposal	(\$2.35 x 2000)	\$4700
Less reduced cost base		
- Purchase price	(\$2.70 x 2000)	5400
- Brokerage fees	20% of 550	110
Reduced cost base		<u>\$5510</u>
CAPITAL LOSS		\$810

Steve can only offset this capital loss against capital gains in the 2001-2002 or a future year of income.

Detailed contents list

58. Below is a detailed contents list for this Class Ruling:

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Previous draft:

Not previously issued as a draft

*Related Rulings/Determinations:*CR 2001/1; TR 92/1; TR 92/20;
TR 97/16*Subject references:*

- dividend streaming arrangements
- franking credits
- share buy backs

Legislative references:

- ITAA 1936 44
- ITAA 1936 44(1)
- ITAA 1936 45A
- 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(5)
- ITAA 1936 45C
- ITAA 1936 46
- ITAA 1936 46A
- ITAA 1936 128B
- ITAA 1936 128B(3)(ga)
- ITAA 1936 159GZZZP
- ITAA 1936 159GZZZQ
- ITAA 1936 159GZZZQ(4)
- ITAA 1936 159GZZZQ(8)

- ITAA 1936 159GZZZQ(9)
- ITAA 1936 160APA
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- ITAA 1936 160AQCBA(17)
- ITAA 1936 177EA
- ITAA 1936 177EA(3)
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- ITAA 1936 177EA(3)(d)
- ITAA 1936 177EA(5)
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- ITAA 1936 177EA(5)(b)
- ITAA 1936 177EA(19)
- ITAA 1936 Pt IIIAA
- TAA 1953 Pt IVAAA
- ITAA 1997 Div 115
- ITAA 1997 118-20

ATO References

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