



CR 2004/13 - Income tax: Share buy-back: Seven Network Limited

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Class Ruling

Income tax: Share buy-back: Seven Network 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**, **Withdrawal**, **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 law(s)

2. The tax laws 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;
 - Paragraph 128B(3)(ga) of the ITAA 1936;
 - Division 16K of the ITAA 1936;
 - Section 177EA of the ITAA 1936;
 - Section 202-40 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
 - Section 204-30 of the ITAA 1997.

Class of persons

3. The class of persons to which this Ruling applies is the ordinary shareholders of Seven Network Limited ('SNL') who dispose of shares under the SNL ordinary share off-market buy-back announced on 24 October 2003 ('the Buy-Back') and conducted during the period 24 November 2003 to 12 December 2003, and described in the Arrangement part of this Ruling.

4. The class of persons to which this Ruling applies does not include SNL. The Ruling does not deal with how the taxation law applies to SNL in relation to the Buy-Back. Furthermore, it should be noted that certain information which relates to the affairs of SNL, but is not in the public domain, has been taken into account in determining the application of certain anti-avoidance provisions in this Ruling. This information cannot be disclosed in the Ruling.

Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

6. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is in accordance with the arrangement described in paragraphs 11 to 24.

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

- 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
- this Ruling may be withdrawn or modified.

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Date of effect

9. This Ruling applies to the year ended 30 June 2004. 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). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by Gazette;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

Withdrawal

10. This Ruling is withdrawn and ceases to have effect after 30 June 2004. However, the Ruling continues to apply after its withdrawal in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement during the term of the Ruling, subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Arrangement

11. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- The application for a Class Ruling dated 7 November 2003;
- Letter from Ernst & Young dated 10 November 2003;
- Letter from Ernst & Young dated 28 November 2003;
- Letter from Ernst & Young dated 9 January 2004; and
- The Buy-Back tender booklet issued by SNL to shareholders.

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

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

12. On 24 October 2003, SNL announced the Buy-Back under which it intended to buy back up to 50 million of its ordinary shares and up to the value of \$275 million (although it could choose to buy back a lesser amount or none at all if it wished). The exact number of shares that SNL would buy back was dependent on various factors, including the ability of SNL to commercially fund the acquisition price and the tenders lodged by shareholders.

13. As at the record date for participation in the Buy-Back, being 6 November 2003, SNL had approximately 249 million ordinary shares on issue and 3,239,197 TELYS, a type of reset preference share which it issued in two tranches in 2002 and 2003. The shareholders in SNL are a mix of individuals, companies, superannuation funds and a small portion of non-residents.

14. At the time that the Buy-Back was proposed the Consolidated Balance Sheet, as at 30 June 2003, disclosed total shareholders' equity of \$1,183.2 million, consisting of: \$720.1 million contributed share capital; \$2.2 million reserves; \$457.9 million retained profits; and minorities of \$2.9 million. The franking account balance as at 30 June 2003 was approximately \$72 million.

15. The Buy-Back formed part of SNL's capital management program. The aim of that program is to maintain a more efficient capital structure and reduce SNL's cost of capital. SNL has undertaken previous off-market buy-backs in 1999 and 2002. It has also raised additional funds by issuing TELYS (a form of hybrid capital) in 2002 and 2003. The current Buy-Back is another part of this continuing program. By executing the Buy-Back SNL hoped to achieve a more appropriate mix of debt and equity and by this reduce its weighted cost of capital. In essence, the Buy-Back was funded from currently available cash resources. These cash resources arose essentially from the proceeds of prior asset sales, the previous TELYS issues and the results of SNL's on-going profitable business operations.

16. The Buy-Back constituted a pro-rata invitation to all SNL ordinary shareholders to offer for sale to SNL up to 100% of their ordinary shares as registered on the record date for the Buy-Back, subject to the Buy-Back limit, and was to be implemented through a tender process. Participation by shareholders was voluntary. Shareholders not wishing to participate in the Buy-Back were not required to do anything.

17. The tender period opened on 24 November 2003 and closed on 12 December 2003. Under the tender process shareholders were invited to tender up to 100% of their shareholding at specified prices within a price range of \$5.00 to \$6.10 per share. In doing so, shareholders could also submit tenders to sell different parcels of shares at different prices. Alternatively, shareholders could submit a 'Final Price Tender' under which they offered to sell their shares for the price as determined by the tender process. All Final Price Tenders would be accepted in priority to other tenders at nominated prices above the lowest price in the specified buy-back price range. Shareholders could withdraw offers to tender shares at any time up to the close of the tender period but not thereafter.

18. Tenders at prices below the Buy-Back Price would be accepted in full. Tenders at prices above the Buy-Back Price would not be accepted. All successful tenderers would receive the Buy-Back Price for each share bought back, even if they tendered shares at a lower price.

19. The Buy-Back Price would be the lowest price, within the price range, that would allow SNL to purchase the number of shares that it actually decides to buy back. As noted above, the number of shares that SNL buys back depends on a range of factors, including the price level of tenders received and the impact of the Buy-Back on its foreign ownership limit.

20. In the event that the number of shares tendered at or below the Buy-Back Price (including Final Price Tenders) exceeded the number of shares that SNL decided to buy back, the number of shares to be bought back from the shareholders would be scaled back on the following bases:

- all shares tendered at a price less than the Buy-Back Price would be bought back in full and not be scaled back;
- all Final Price Tenders would be accepted in priority to shares tendered at the Buy-Back Price and accordingly, would be bought back in full and not scaled back; and
- all shares tendered at the buy-back price would be scaled back on a pro-rata basis.

21. However, if the Buy-Back Price was determined to be the lowest specified price in the price range, all tenders, whether nominated or Final Price Tenders, would be scaled back on a pro-rata basis. Furthermore, if a shareholder tendered all of their shares at or below the Buy-Back Price and would be left with 400 or less shares as a result of any scale back, all of their shares would be bought back.

22. Also, the acceptance of tenders was subject to a further mechanism to ensure that the limits on foreign ownership provided for in the Broadcasting Services Act were not breached.
23. SNL debited 60% of the Buy-Back Price for each share bought back to its share capital account and the remaining 40% to retained profits.
24. On 15 December 2003 SNL announced that:
- SNL had completed the Buy-Back of 33.42 million ordinary shares, representing 13.4% of the ordinary shares on issue to the value of \$193.9 million;
 - all shareholders who tendered shares into the Buy-Back at any of the specified prices from \$5.00 to \$5.80 inclusive would receive \$5.80 per share;
 - shares tendered into the Buy-Back at the specified price of \$5.90 or above would not be bought back; and
 - the Buy-Back Price consisted of a fully franked dividend of \$2.32 per share and a capital component of \$3.48 per share.

Ruling

The Dividend Component

25. Participating shareholders are taken to have been paid a dividend of \$2.32 for each share bought back on the date the Buy-Back occurred ('the Dividend Component') under section 159GZZZP of the ITAA 1936.

Non-Resident Shareholders

26. Participating non-resident shareholders are not liable for withholding tax on the Dividend Component under paragraph 128B(3)(ga) of the ITAA 1936 because the Dividend Component is a frankable distribution pursuant to section 202-40 of the ITAA 1997, and was fully franked by SNL.

The Capital Component

27. Participating shareholders are taken to have received \$3.48 as consideration in respect of the sale of each of their shares for the purposes of section 159GZZZQ of the ITAA 1936. The treatment of this 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 (where the shares are turned over in the course of business). In general, the relevant treatment should be as follows:

Shares held on capital account

28. The amount by which the capital proceeds of \$3.48 exceed the cost base of each share is a capital gain to the shareholder. If the share's reduced cost base exceeds \$3.48 the difference is a capital loss.

Shares held on revenue account

29. The amount by which the consideration on disposal of \$3.48 exceeds the cost of each share is included in the shareholder's assessable income. Correspondingly, if the cost exceeds \$3.48 the difference is an allowable deduction.

The Anti-avoidance Provisions

Sections 45A and 45B of the ITAA 1936

30. The Commissioner will not make a determination under section 45A or section 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the distribution of share capital under the Buy-Back received by participating shareholders.

Section 204-30 of the ITAA 1997

31. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received in relation to the Dividend Component under the Buy-Back by participating shareholders.

Section 177EA of the ITAA 1997

32. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received in relation to the Dividend Component under the Buy-Back by participating shareholders.

Explanation

The Dividend and Capital Components

33. The purchase price received by participating shareholders under an off-market share buy-back comprises two components:

- a dividend component; and
- a capital component.

34. The amount of each of these components is determined in accordance with sections 159GZZZP and 159GZZZQ of the ITAA 1936, having regard to how the company accounts for the off-market share buy-back.

The Dividend Component

35. 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 in respect of the buy-back of the share which is debited against amounts standing to the credit of the company's share capital account is taken to be a dividend paid by the company to the seller on the day the buy-back occurs. In this case the purchase price was \$5.80 per share and \$3.48 of this was debited to the share capital account. Thus the dividend amount is \$2.32 per share.

36. The dividend amount of \$2.32 is frankable but only to the extent that the buy-back price does not exceed the market value of the share at the time of the buy-back if the buy-back did not occur and was never proposed to occur (section 202-45 of the ITAA 1997). In this case, the Buy-Back Price achieved by the tender process was not inconsistent with the otherwise market value of the share. Thus, the dividend amount of \$2.32 is fully frankable.

37. For Australian resident individual and corporate tax entity shareholders, the amount of the dividend is included in their assessable income under subsection 44(1) of the ITAA 1936. An amount equal to the amount of the franking credit is included in their assessable income under subsection 207-20(1) of the ITAA 1997. Australian resident individual and corporate tax entity shareholders are also entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 reflecting the imputation benefit attached to the dividend.

38. As the Dividend Component is fully franked, a non-resident shareholder is not liable to Australian withholding tax on the Dividend Component (paragraph 128B(3)(ga)).

39. It should be noted that provisions exist which may deny a franking credit or tax offset in certain circumstances. For instance, paragraph 207-145(1)(a) of the ITAA 1997 requires that the shareholder be a 'qualified person for the purposes of Division IA of Part IIIAA of the ITAA 1936' to obtain a franking credit or tax offset. 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 payment rule.

40. Sections 204-30 of the ITAA 1997 and 177EA of the ITAA 1936 are anti-avoidance provisions concerned with striking down arrangements which inappropriately provide imputation benefits to a relevant taxpayer. These provisions allow the Commissioner to make determinations denying all or a part of a shareholder's entitlement to imputation benefits. In this case, no determinations will be made to deny imputation benefits received by participating shareholders under the Buy-Back. A discussion of these provisions appears in paragraphs 54 to 64.

The Capital Component

41. Participating shareholders are taken to have disposed of those shares accepted under the Buy-Back on 14 December 2003. 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 capital gains tax provisions; and
- a share trader who held their shares on revenue account will be subject to the ordinary income provisions.

42. It should be noted that shareholders 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 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 paragraph 118-25(1)(a) of the ITAA 1997.

43. For the purposes 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.

44. The consideration determined under section 159GZZZQ is:

- The buy-back price; less
- The reduction amount (within the meaning of subsection 159GZZZQ(4) of the ITAA 1936).

45. Subsection 159GZZZQ(2) also contains a market value rule which applies if the buy-back price in respect of a share bought back under the buy-back is less than the market value of the share at the time of the buy-back if the buy-back did not occur and was never proposed to occur. The effect of this rule is that the difference between the buy-back price and the market value will be treated as consideration for ordinary income or capital gains tax purposes.

46. As discussed in paragraph 34, in this case the Buy-Back Price achieved was not inconsistent with the otherwise market value of the share. Thus, for the purposes of calculating the profit or loss on disposal of the shares, under either the income or capital gains tax provisions, participating shareholders are taken to have received \$3.48 per share as consideration in respect of the sale of their shares under the Buy-Back.

The Anti-Avoidance Provisions

Sections 45A and 45B of the ITAA 1936

47. That part of the price received by a shareholder in a share buy-back that is not identified as a dividend by the operation of Division 16K is a distribution of capital. It is the part of the price the company debits against its share capital account.

48. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, 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 dividend. Accordingly, the application of these two provisions to the Buy-Back must be considered.

49. 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 capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

50. 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 has no application to the Buy-Back.

51. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends. Specifically, section 45B of the ITAA 1936 applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- 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
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose), of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

52. In this case, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 have been met, the requisite purpose of enabling the shareholder to obtain a tax benefit – by way of capital distribution – was not present.

53. Having regard to the ‘relevant circumstances’ of the scheme (the Buy-Back), as set out in subsection 45B(8) of the ITAA 1936, it is apparent that the inclusion of a capital element in the Buy-Back Price was not inappropriate. Further, the capital element of the Buy-Back Price cannot be said to be attributable to the profits of the company, nor does the pattern of distributions that have been made by SNL in the past indicate that it was being paid in substitution for a dividend.

Section 204-30 of the ITAA 1997

54. Section 204-30 applies where a company streams the payment of franked distributions to its shareholders in such a way that the imputation benefits attaching to the distribution are received by those shareholders who derive a greater benefit from them and other shareholders receive lesser imputation benefits, or no imputation benefits.

55. If section 204-30 applies the Commissioner is vested with a discretion, pursuant to subsection 204-30(3), whether or not to make a determination to debit the company’s franking account pursuant to paragraph 204-30(3)(a), or that no imputation benefit is to arise in respect of the dividend to those shareholders who derive a greater benefit pursuant to paragraph 204-30(3)(b).

56. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from imputation benefits than the members who do not participate in the Buy-Back. The words 'derives a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

57. Having regard to the information provided by SNL, it cannot be said that there exists, in relation to the shareholders of SNL, a group of shareholders that have a greater ability to use the franking credits than other shareholders within the meaning of the words in subsection 204-30(8). There are no identifiable characteristics attaching to the shareholding of SNL that would suggest one part of that shareholding would benefit more or less from franking credits. Non-resident shareholders (for the purposes of the ITAA 1936 and ITAA 1997) hold only a small proportion of SNL's shares. SNL expects to continue to pay fully franked dividends in the foreseeable future at least at the same level as that paid in the 2003 year to both ordinary and TELYS shareholders. Accordingly, section 204-30 does not apply to the Dividend Component of the Buy-Back.

Section 177EA of the ITAA 1936

58. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to 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.

59. Specifically, subsection 177EA(3) provides that section 177EA of the ITAA 1936 applies if:

- there is a scheme for a disposition of shares, or an interest in shares, in a company;
- a frankable dividend has been paid, or is payable or expected to be payable, in respect of the shares or a distribution has been paid, or is payable or expected to be payable, in respect of the interest, as the case may be;
- the dividend or distribution was, or is expected to be, franked;
- except for this section, a person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, franking credit benefits as a result of the dividend or distribution; and

- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain a franking credit benefit.

60. In the present case 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, it would be concluded that, on the part of SNL, its shareholders or any other relevant party, there is a purpose more than merely an incidental purpose of conferring an imputation benefit under the scheme. Under this arrangement the relevant taxpayer is the participating shareholder and the scheme comprises the circumstances surrounding the Buy-back.

61. 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(17). The relevant circumstances listed there encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances some may not be present at any one time in any one scheme.

62. Where section 177EA applies the Commissioner is vested with a discretion, pursuant to subsection 177EA(5), whether to make a determination. If the company is a party to the scheme he has a choice as to whether that determination is to debit the company's franking account pursuant to paragraph 177EA(5)(a), or to deny the imputation benefit to each shareholder pursuant to paragraph 177EA(5)(b).

63. The Commissioner has come to the view that section 177EA does not apply to the Buy-Back. In coming to this conclusion the Commissioner had regard to all the relevant circumstances of the arrangement, in particular the allocation of the Buy-Back Price between share capital and retained profits, the shareholder profile of SNL, whether the franking credits were being delivered in excess of what would have otherwise been distributed in the ordinary course of dividend declaration, and SNL's capital management strategy and business plan, as manifested in past activities and transactions and intended future transactions.

64. Accordingly, the Commissioner will not make a determination that the imputation benefit obtained by the participating shareholders be denied under paragraph 177EA(5)(b).

Detailed contents list

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Commissioner of Taxation

28 January 2004

Previous draft:

Not previously issued as a draft

- ITAA 1936 159GZZZQ
- ITAA 1936 159GZZZQ(2)
- ITAA 1936 159GZZZQ(4)

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

- ITAA 1936 177EA
- ITAA 1936 177EA(3)
- ITAA 1936 177EA(3)(a)
- ITAA 1936 177EA(3)(b)
- ITAA 1936 177EA(3)(c)
- ITAA 1936 177EA(3)(d)
- ITAA 1936 177EA(5)
- ITAA 1936 177EA(5)(a)
- ITAA 1936 177EA(5)(b)
- ITAA 1936 177EA(17)

Subject references:

- share buy-backs
- dividend streaming arrangements
- return of capital on shares

Legislative references:

- Copyright Act 1968
- ITAA 1936 Div IA of Pt IIIAA
- ITAA 1936 Div 16K
- 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(3)(b)
- ITAA 1936 45B(8)
- ITAA 1936 45C
- ITAA 1936 128B(3)(ga)
- ITAA 1936 159GZZZP

- ITAA 1997 118-20
- ITAA 1997 118-25(1)(a)
- ITAA 1997 202-40
- ITAA 1997 202-45
- ITAA 1997 204-30
- ITAA 1997 204-30(3)
- ITAA 1997 204-30(3)(a)
- ITAA 1997 204-30(3)(b)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 204-30(8)
- ITAA 1997 207-20(1)
- ITAA 1997 207-20(2)
- ITAA 1997 207-145(1)(a)
- TAA 1953 Part IVAAA

ATO references

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