


CR 2005/6 - Income tax: off-market share buy-back: Ansell Limited

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Class Ruling

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

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Preamble

*The number, subject heading, **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 laws' 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;
- section 159GZZZP of the ITAA 1936;
- section 159GZZZQ of the ITAA 1936;
- section 960-120 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
- section 995-1 of the ITAA 1997.

This Ruling does not cover the application of the capital gains and losses provisions of the ITAA 1997.

Class of persons

3. The class of persons to whom this Ruling applies is the shareholders holding ordinary shares of Ansell Limited (Ansell) who disposed of shares under the Ansell off-market share buy-back (the Buy-Back) announced on 10 August 2004 and completed on 10 December 2004, and described in the Arrangement part of this Ruling.

4. The class of persons to which this Ruling applies does not include Ansell. The Ruling does not deal with how the taxation law applies to Ansell in relation to the Buy-Back. Furthermore, it should be noted that certain information which relates to the affairs of Ansell, 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 2005. 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 2005. 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 the 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 12 August 2004;
- correspondence from Ansell dated 2 September 2004;
- e-mail correspondence from Ernst & Young dated 23 September 2004, 10 November 2004, 14 December 2004 and 15 December 2004;
- the Buy-Back Offer booklet issued to Ansell shareholders; and
- Press Releases issued by Ansell dated 9 November 2004, 11 November 2004, 25 November 2004 and 13 December 2004.

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

12. On 10 August 2004 Ansell announced that it proposed to undertake an off-market share buy-back to a maximum of 17 million shares, representing approximately 10% of its issued shares as at that date. At the time of the announcement, Ansell had approximately 177 million ordinary shares on issue.

13. Ansell's shareholders are a mix of individuals, companies, trusts and superannuation funds. It is possible that some shareholders hold pre-CGT shares. Approximately 30% of the shareholders are non-resident. As at 31 August 2004 each non-resident shareholder's interest was less than 10%.

14. Ansell has advised that the purpose of the Buy-Back was to return excess capital to shareholders and achieve a more efficient and optimal capital structure. Ansell had already purchased 11.3 million shares on-market since April 2003. The current off-market Buy-Back was part of its capital management strategy to achieve the lowest cost of capital while attaining the highest return on capital for its shareholders.

15. The Buy-Back will be funded from surplus cash which was sourced from return of capital transactions undertaken by Ansell's offshore groups based in the United States, Thailand and Sri Lanka.

16. Shareholder's equity disclosed in Ansell's Statement of Financial Position as at 30 June 2004 was as follows:

Shareholders' Equity	Consolidated
	\$A million
Contributed Equity	1,383.9
Reserves	(275.6)
Accumulated Losses	<u>(306.7)</u>
Total Equity	801.6

17. Under the Buy-Back, Ansell proposed to buy back a number of shares up to a maximum value of \$155 million. Shareholders could sell a nominated number of their shares, except for shareholders with less than 200 shares, who had to offer to sell all of their shares if they wished to participate in the Buy-Back.

18. If the total number of shares for which acceptances were received exceeded \$155 million worth of shares, a scale back was to apply as set out in paragraph 4.1(a) of the Buy Back Booklet and as amended by announcement to the ASX on 25 November 2004.

19. The Buy-Back was not made in respect of shares held subject to the terms of any of Ansell's employee or executive share plans, which are subject to restrictions on sale. Shareholders in the United States, the United Kingdom and New Zealand were also eligible to participate in the Buy-Back.

20. The Buy-Back Price was calculated as the weighted average share price over the 5 day period preceding the Record Date (6 October 2004), adjusted for changes in the S&P/ASX 200 Industrials Index from the commencement of trading on the Record Date to the close of trading on 9 November 2004. The directors also had discretion to adjust the Buy-Back Price if they believed on reasonable grounds that the movements in the S&P/ASX 200 Industrials Index was significantly different from the movement in the market value of Ansell shares over the same period.

21. On 9 November 2004, Ansell announced that the share Buy-Back Price had been set at \$9.20.

22. On 11 November 2004, Ansell announced an extension of the closing date until 23 November 2004. On 25 November 2004, Ansell announced a further extension of the closing date until 10 December 2004. These extensions were necessitated by differing jurisdictional requirements in Australia and the United States.

23. On 13 December 2004, Ansell announced the completion of the Buy-Back. As the total number of shares tendered into the Buy-Back exceeded \$155 million, a scale back was applied resulting in the purchase of 16,847,345 shares at a price per share of \$9.20.

24. All of the Buy-Back consideration, that is, \$9.20 per share, has been debited against Ansell's share capital account.

Ruling

Anti-avoidance provisions

Sections 45A and 45B of the ITAA 1936

25. The Commissioner will not make a determination under either subsection 45A(2) or subsection 45B(3) of the ITAA 1936.

Section 45C of the ITAA 1936

26. Subsection 45C(1) of the ITAA 1936 will not apply to any part of the distribution of share capital received under the Buy-Back by participating shareholders.

Section 159GZZZP of the ITAA 1936

27. Section 159GZZZP of the ITAA 1936 will not apply to treat any part of the Buy-Back purchase price as a dividend paid to participating shareholders on the day of the Buy-Back.

Section 159GZZZQ of the ITAA 1936

28. Participating shareholders will be taken to have received \$9.20 as consideration in respect of the sale of each of their shares under section 159GZZZQ of the ITAA 1936.

Explanation

Anti-avoidance provisions

Sections 45A and 45B of the ITAA 1936

29. Ansell has debited the whole Buy-Back Price to its share capital account. This amount is a distribution of capital to participating shareholders.

30. Sections 45A and 45B of the ITAA 1936 are anti-avoidance provisions which seek to deal with potential streaming of capital benefits and the payment of capital benefits to shareholders instead of dividends. If the Commissioner makes a determination under either subsections 45A(2) or 45B(3) of the ITAA 1936, the amount of the capital benefit or a part of the benefit received by the shareholder is taken by section 45C of the ITAA 1936 to be an unfranked and non-rebatable dividend. Accordingly, the application of these two provisions to the Buy-Back must be considered.

31. Section 45A of the ITAA 1936 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.

32. 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 was no streaming of capital benefits to some shareholders in lieu of the payment of dividends to other shareholders. Accordingly, section 45A has no application to the Buy-Back.

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

34. 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 – is not present.

35. Having regard to the relevant circumstances of the scheme (the Buy-Back) as set out in subsection 45B(8) of the ITAA 1936, it cannot be concluded that a person would have entered into, or carried out, the Buy-Back for a more than incidental purpose of enabling a participating shareholder to obtain a tax benefit. Further, the Buy-Back consideration cannot be said to be attributable to the profits of the company, nor do the pattern of distributions by Ansell indicate that it is being paid in substitution for a dividend. Accordingly, section 45B does not apply to the Buy-Back.

Section 45C of the ITAA 1936

36. As neither section 45A nor 45B of the ITAA 1936 will apply to the Buy-Back, the Commissioner will not make a determination under either of those provisions that section 45C of the ITAA 1936 will apply to the Buy-Back.

37. No part of the Buy-Back consideration will be taken to be an unfranked and non-rebatable dividend in the hands of participating shareholders.

Section 159GZZZP of the ITAA 1936

38. Section 159GZZZP of the ITAA 1936 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 as a shareholder in the company.

39. Ansell has submitted that *'the sole purpose of the proposed Buy-Back is to return excess capital to shareholders (that is, no dividend component)'*. It is further submitted that *'the cost of the Buy-Back will be accounted for against Ansell's share capital account'*. Page 10 of the Buy-Back Offer Booklet also states *'the entire Buy-Back is being debited against the Company's share capital account'*.

40. As Ansell will debit the whole amount of the Buy-Back price to its share capital account, section 159GZZZP of the ITAA 1936 will not apply to treat any part of that purchase price as a dividend paid to participating shareholders on the day of the Buy-Back.

Section 159GZZZQ of the ITAA 1936

41. Section 159GZZZQ of the ITAA 1936 provides that, for general income tax and CGT purposes, the off-market buy-back purchase price of each share is treated as the consideration received by the participating shareholder in respect of the disposal of each share.

Consideration in respect of the sale of bought-back shares

42. Participating shareholders will be taken to have received consideration in respect of the sale of each of their shares equal to \$9.20 for the purposes of section 159GZZZQ of the ITAA 1936.

43. The disposal of shares under the Buy-Back may have different income tax implications for shareholders depending on how the shares were held. For instance:

- an investor holding their shares on capital account will only be subject to the provisions dealing with capital gains and losses; but
- a trader holding their shares on revenue account will also be subject to the ordinary income provisions.

It should be noted that where both the ordinary income tax provisions and the capital gains provisions apply, the amount of the capital gain will be reduced under the anti-overlap provisions in section 118-20 of the ITAA 1997 by the amount included in assessable income.

44. For the purposes of computing the amount of the gain or loss (either on capital or revenue account) in these cases, the consideration in respect of the sale of a share under the Buy-Back that participating shareholders will be taken to have received will be \$9.20, as determined by Ansell in accordance with the arrangement.

Detailed contents list

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Commissioner of Taxation

9 February 2005

<i>Previous draft:</i>	- ITAA 1936 45B
Not previously issued as a draft	- ITAA 1936 45B(2)(a)
	- ITAA 1936 45B(2)(b)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 45B(2)(c)
CR 2001/1; TR 92/1; TR 97/16	- ITAA 1936 45B(3)
	- ITAA 1936 45B(8)
<i>Subject references:</i>	- ITAA 1936 45C
- return of capital on shares	- ITAA 1936 45C(1)
- share buy-backs	- ITAA 1936 159GZZZP
	- ITAA 1936 159GZZZQ
<i>Legislative references:</i>	- ITAA 1997 118-20
- Copyright Act 1968	- ITAA 1997 960-120
- ITAA 1936 45A	- ITAA 1997 995-1
- ITAA 1936 45A(2)	- TAA 1953 Pt IVA
- ITAA 1936 45A(3)(b)	

ATO references

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