

CR 2008/69 - Income tax: return of capital: MYOB Limited

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Class Ruling

Income tax: return of capital: MYOB Limited

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● This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(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;
- subsection 6-5(1) of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-25 of the ITAA 1997;
- section 104-135 of the ITAA 1997.

Class of entities

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

- (a) are 'residents of Australia' within the meaning of that expression in subsection 6(1) of the ITAA 1936;
- (b) hold their shares on capital account; and
- (c) who are registered on the MYOB share register on the Record Date, being the date for determining entitlements under the proposed return of capital as described in paragraphs 16 to 26 of this Ruling.

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 10 to 30 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.

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Date of effect

8. This Ruling applies from 1 July 2008 to 31 December 2008. The Ruling continues to apply after 31 December 2008 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).

Previous Rulings

9. CR 2008/18 Income tax: proposed Equity Return: MYOB Limited.

Scheme

10. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Application for Class Ruling dated 26 August 2008, and
- Correspondence dated 13 August 2008 to 26 August 2008.

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

11. MYOB is an Australian resident public company incorporated in 1999 and is listed on the Australian Securities Exchange (ASX). The original MYOB business was founded in 1991.

12. Currently MYOB has only one class of share on issue comprising approximately 389 million fully paid ordinary shares.

13. MYOB's share register and associated information indicate that as at June 2008, approximately 82.7% of the issued shares are held by the top 25 shareholders. Of these:

- approximately 6.1% of the issued shares are held by non-residents;
- approximately 46.3% of the issued shares are held by resident institutional shareholders; and
- approximately 28.3% of the issued shares are held by related resident persons.

Sale of MYOB UK and Ireland

14. In April and May 2008, MYOB disposed of its United Kingdom and Ireland operations for gross proceeds of approximately \$78.7 million. After accounting for the net assets (goodwill and intangibles) and direct costs involved in the disposals, there was a net accounting loss for MYOB of \$16.567 million.

15. At the time of the disposal, MYOB announced that it would return surplus equity generated by the transaction to its shareholders. It was estimated the surplus would be in the range of \$50 million to \$70 million.

Details of the Return of Capital

16. MYOB proposes to undertake a transaction that will return \$50 million of surplus capital to all shareholders in a single arrangement. This approximates a return of 30.4% of the consolidated equity capital of MYOB to its shareholders.

17. The return of capital is proposed to be structured entirely as an equal share capital reduction (the proposed share capital reduction) to be paid out of the issued share capital of MYOB.

18. The proposed share capital reduction is to be funded by debt funding sourced from an external financial institution.

19. The proposed share capital reduction will be an 'equal share capital reduction' within the meaning of section 256B(2) of the *Corporations Act 2001*.

20. The entirety of the proposed share capital reduction is to be debited to the share capital account of MYOB. MYOB's share capital account is not tainted within the meaning of Division 197 of the ITAA 1997.

21. The proposed return of capital will involve approximately 12.85 cents per share being returned to each shareholder for every ordinary share held (the proposed return of capital).

22. The proposed return of capital will be payable in addition to ordinary dividends and it will not adversely affect the ability of MYOB to pay dividends in the future. MYOB intends to pay an ordinary fully franked dividend (in accordance with its regular dividend policy) of an estimated \$14.7 million in respect of the year ending 31 December 2008.

23. The proposed return of capital will be paid to shareholders exclusively in cash. It will not include any facility for the disposal of shares.

24. Since listing on the ASX, shares in MYOB have traded in the range of approximately \$0.38 to \$5.30.

25. There have been no recent disposals of major assets or extraordinary transactions that have given rise to a **profit** that could be seen to relate to the proposed distribution of share capital (noting the disposal of the MYOB UK business at a loss of \$16.567 million).

26. There will be no alteration to the rights, powers or liabilities attaching to the MYOB shares following the proposed return of capital, other than a reduction in the right to a return of the amount paid up on the shares, which will be reduced by the amount of the distribution debited to the share capital account in respect of the share (approximately 12.85 cents per share).

Ruling

Capital return is not a dividend

27. The proposed return of capital will not be a dividend, as defined in subsection 6(1) of the ITAA 1936.

Capital return is not ordinary income

28. The proposed return of capital will not constitute ordinary income and hence will not be assessable to shareholders under subsection 6-5(1) of the ITAA 1997.

Capital gains tax

29. CGT event G1 (section 104-135 of the ITAA 1997) will happen when MYOB pays the return of capital to a registered shareholder in respect of a MYOB share that they own at both the Record Date and the date of payment.

30. CGT event C2 (section 104-25 of the ITAA 1997) will happen when MYOB pays the return of capital to a shareholder in respect of a MYOB share that they owned at the Record Date but which they ceased to own before the date of payment.

Sections 45A and 45B

31. The Commissioner will not make a determination under section 45A of the ITAA 1936 that section 45C of the ITAA 1936 applies to the proposed return of capital.

32. The Commissioner will not make a determination under section 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the proposed return of capital.

Appendix 1 – Explanation

1 *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.*

Capital return is not a dividend

33. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income a dividend, as defined in subsection 6(1) of the ITAA 1936, which is paid to the shareholder out of the profits derived by the company from any source (if the shareholder is a resident of Australia for tax purposes).

34. The term 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, paragraph (d) in the definition of 'dividend' excludes a distribution from the meaning of 'dividend' if the amount of a distribution is debited against an amount standing to the credit of the company's share capital account.

35. As the proposed return of capital will be debited against the company's untainted share capital account, the proposed return of capital will not constitute a dividend because it meets the exclusion in paragraph (d) in the definition of a 'dividend' in subsection 6(1) of the ITAA 1936.

Capital return is not ordinary income

36. Subsection 6-5(1) of the ITAA 1997 provides that the assessable income of a taxpayer includes income according to ordinary concepts, which is called ordinary income. Ordinary income includes income from property.

37. Each MYOB shareholder will receive the proposed return of capital because they hold shares in MYOB. The proposed return of capital will not be paid by MYOB to the MYOB shareholder out of profits but will be a distribution out of the share capital of MYOB.

38. Accordingly, distributions to shareholders under the proposed share capital reduction will not constitute ordinary income. The distributions to shareholders will not be assessable under section 6-5 of the ITAA 1997.

Capital gains tax***CGT event G1 – section 104-135***

39. CGT event G1 (section 104-135 of the ITAA 1997) will happen when MYOB pays the proposed return of capital amount in respect of a share that a MYOB shareholder owns at the Record Date and continues to own at the time the proposed return of capital is paid, and some or all of the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997 or an amount taken to be a dividend under section 47 of the ITAA 1936.

40. If the proposed return of capital is not more than the cost base of the MYOB share at the time of payment, the cost base and the reduced cost base of the share are reduced (but not below nil) by the amount of the proposed return of capital (subsection 104-135(4) of the ITAA 1997).

41. A MYOB shareholder will make a capital gain if the proposed return of capital is more than the cost base of their MYOB share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

42. If a MYOB shareholder makes a capital gain, the cost base and reduced cost base of the MYOB share are reduced to nil (subsection 104-135(3) of the ITAA 1997). A MYOB shareholder cannot make a capital loss when CGT event G1 happens.

43. If the MYOB share to which the payment relates was acquired by a MYOB shareholder at least 12 months before the payment of the return of capital, a capital gain from CGT event G1 will qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

CGT event C2 – section 104-25

44. The right to receive the payment of the proposed return of capital is one of the rights inherent in a MYOB share at the Record Date. If, after the Record Date but before the date of payment, a MYOB shareholder ceases to own some, or all, of their shares in MYOB in respect of which the proposed return of capital is payable, the right to receive the payment in respect of each of the shares disposed of will be retained by the shareholder and is considered to be a separate CGT asset.

45. A MYOB shareholder's right to receive the payment will be discharged or satisfied when the payment is made under the scheme, causing CGT event C2 to happen.

46. A MYOB shareholder will make a capital gain if the capital proceeds from the ending of the right are more than the cost base of the right. A MYOB shareholder will make a capital loss if the capital proceeds from the ending are less than the reduced cost base of the right (subsection 104-25(3) of the ITAA 1997).

47. In working out the capital gain or capital loss made from CGT event C2 happening, the capital proceeds will be the amount of the return of capital (section 116-20 of the ITAA 1997).

48. The cost base of the MYOB shareholder's right to receive the proposed return of capital is worked out under Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997).

49. The cost base of the right does not include the cost base (or reduced cost base) of the share previously owned by the MYOB shareholder that has been applied in working out a capital gain or capital loss when a CGT event happened to the share – for example, when the MYOB shareholder disposed of the share. Therefore, if the full cost base (or reduced cost base) of the MYOB share has been previously applied in working out a capital gain or capital loss made when a CGT event happened to that share then, in applying subsection 104-25(3) of the ITAA 1997 to work out the capital gain for the ending of the right, the right will have a nil cost base. Therefore a capital gain equal to the amount received as the return of capital is likely to arise.

50. As the right to receive the payment of the return of capital was inherent in the MYOB share during the time it was owned, the right is considered to have been acquired at the time when the MYOB share was acquired (section 109-5 of the ITAA 1997).

51. Consequently, if the MYOB share was originally acquired by the former shareholder at least 12 months before the payment, a capital gain from CGT event C2 happening to the right will qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

Anti-avoidance provisions

Section 45A – streaming of dividends and capital benefits

52. Section 45A of the ITAA 1936 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 (the disadvantaged shareholders) have received or will receive dividends.

53. Although MYOB will be providing its shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936), the capital benefit is to be provided to all the shareholders in MYOB in direct proportion to their individual shareholding. The circumstances of the scheme do not indicate that there is a 'streaming' of capital benefits to advantaged shareholders and of dividends to disadvantaged shareholders. Accordingly, section 45A of the ITAA 1936 will not apply to the proposed return of capital and the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the proposed return of capital.

Section 45B – schemes to provide capital benefits in substitution for dividends

54. Section 45B of the ITAA 1936 applies where certain payments are made to shareholders in substitution for dividends.

55. The purpose of section 45B of the ITAA 1936 is to ensure that relevant amounts distributed to shareholders of a company are treated as dividends for tax purposes if certain payments, allocations and distributions are made in substitution for dividends.

56. Subsection 45B(2) of the ITAA 1936 sets out the conditions under which the Commissioner may make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies. These conditions are that:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- (b) under the scheme, a taxpayer (the relevant taxpayer), who may or may not be the person provided with the demerger benefit or the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- (c) 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 tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

Each condition is considered below.

Scheme

57. The proposed share capital reduction will be a ‘scheme’ for the purposes of section 45B of the ITAA 1936.

58. The phrase ‘provided with a capital benefit’ is defined in subsection 45B(5) of the ITAA 1936. Relevantly, it includes a distribution to a person of share capital. As MYOB proposes to debit the proposed return of capital against its untainted share capital account, its shareholders will be provided with a capital benefit.

Tax benefit

59. The information provided suggests that since listing on the ASX, the cost base of MYOB shares acquired over the years has generally ranged from \$0.38 to \$5.30. The extent of MYOB shares with a cost base of less than 30.88 cents per share (being 12.85 cents per share plus the earlier capital return of 18.03 cents per share) is considered to be immaterial. Consequently, as the combined capital return of 30.88 cents per share does not exceed this cost base, the tax implications at the time of the proposed return of capital will, in most cases, be merely an adjustment to the cost base of the share rather than a liability to tax. Therefore, the proposed return of capital in effect results in a deferral of any liability to tax and will therefore constitute a tax benefit as defined in subsection 45B(9) of the ITAA 1936.

Relevant circumstances

60. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) of the ITAA 1936 to determine whether any part of the scheme was entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) of the ITAA 1936 is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

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

62. The purpose which causes section 45B of the ITAA 1936 to apply may be the purpose of any party to the scheme. In this case, however, the Commissioner is concerned only with the purpose of MYOB. The Commissioner cannot at this stage ascertain the purposes of MYOB's numerous shareholders, all of whom are eligible to vote on the proposed return of capital under the *Corporations Act 2001* and all of whom will participate in the proposed return of capital. Nevertheless, in a case such as this, an objective conclusion as to the purpose of the company should, generally speaking, be consistent with an objective conclusion as to the purpose of the shareholders, in particular those shareholders who voted in favour of the proposal.

63. The relevant circumstances under subsection 45B(8) of the ITAA 1936 cover both the circumstances of the company and the shareholders. In this instance, as the proposed return of capital is to be made to all shareholders of MYOB regardless of individual shareholder's circumstances, paragraphs 45B(8)(c) to (h) of the ITAA 1936 do not incline for or against a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and (j) of the ITAA 1936, pertaining to the provision of ownership interests and demergers, are not relevant. In this case, the circumstances described in paragraphs 45B(8)(a), (b) and (k) of the ITAA 1936 are the more relevant.

64. The relevant circumstances of a scheme under paragraph 45B(8)(a) of the ITAA 1936 includes the extent to which the capital benefit is attributable to capital or the extent to which the capital benefit is attributable to profits (realised or unrealised) of the company. Following the loss incurred on the sale of the MYOB UK business, MYOB does not have any retained earnings as at 30 June 2008 from which it can source any part of the proposed return of capital. Therefore, the proposed return of capital cannot be viewed as a disguised distribution of profits in this instance.

65. Paragraph 45B(8)(b) of the ITAA 1936 covers the relevant circumstance that includes the pattern of distributions of dividends and returns of capital by the company. Based on the dividend distribution history of MYOB, the company has a solid history of distributing profits to its shareholders. Further, MYOB will, in accordance with its regular dividend policy, pay a fully franked dividend in the 2009 year in respect of the year ending 31 December 2008. In this instance, it is considered that the proposed return of capital is not a strategy to substitute the distribution of profits with a return of capital. Rather, the proposed return of capital is a result of the disposal of a part of MYOB's business and is in addition to the regular dividend payments made by the company.

66. Paragraph 45B(8)(k) of the ITAA 1936 refers to the matters in subparagraphs 177D(b)(i) to (viii) of the ITAA 1936. These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, its form and substance, and its financial and other implications for the parties involved. In this case, the practical implications of the scheme for MYOB and its shareholders are consistent with it being, in form and substance, a distribution of share capital.

67. Therefore having regard to the relevant circumstances of the scheme involving the return of the capital to MYOB shareholders, as discussed in paragraphs 61 to 67 of this Ruling, it cannot be concluded that MYOB will enter into or carry out the scheme for a purpose other than a merely incidental purpose of enabling the shareholders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936, that section 45C of the ITAA 1936 applies to the whole, or a part, of the capital benefit represented by the return of capital.

Section 45C

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

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

- ITAA 1936 45B(8)(g)
- ITAA 1936 45B(8)(h)
- ITAA 1936 45B(8)(i)
- ITAA 1936 45B(8)(j)
- ITAA 1936 45B(8)(k)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1936 177D(b)(i)
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- ITAA 1936 177D(b)(iii)
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- ITAA 1936 177D(b)(v)
- ITAA 1936 177D(b)(vi)
- ITAA 1936 177D(b)(vii)
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Related Rulings/Determinations:
CR 2008/18; TR 2006/10

Subject references:

- capital gains tax
- capital streaming
- dividend streaming arrangements
- dividends
- return of capital on shares
- share capital

- ITAA 1936 177D(b)(i)
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Legislative references:

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- ITAA 1936 6(1)
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- ITAA 1936 45B(8)(c)
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- ITAA 1936 45B(8)(e)
- ITAA 1936 45B(8)(f)

ATO references

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