


CR 2009/37 - Income tax: off-market share buy-back, redemption and surrender of assets comprising the Macquarie Media Group stapled securities

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Class Ruling

Income tax: off-market share buy-back, redemption and surrender of assets comprising the Macquarie Media Group stapled securities

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❶ 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 provision(s) 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;
 - Division 16K of Part III of the ITAA 1936;
 - section 159GZZZP of the ITAA 1936;
 - section 159GZZZQ of the ITAA 1936;

- section 177EA of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- section 118-25 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- Division 725 of the ITAA 1997;
- Division 727 of the ITAA 1997;
- section 855-10 of the ITAA 1997; and
- section 855-15 of the ITAA 1997.

All legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the holders of Macquarie Media Group (MMG) stapled securities (consisting of a share in Macquarie Media Holdings Limited (MMHL), a share in Macquarie Media International Limited (MMIL) and a unit in Macquarie Media Trust (MMT)) whose MMG stapled securities were purchased under the Buy-Back Tender (participating security holders) and for cash consideration:

- disposed of their shares in MMHL;
- had their shares in MMIL redeemed; and
- surrendered their units in MMT.

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 9 to 31 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 30 June 2009. The Ruling continues to apply after 30 June 2009 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. 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 23 February 2009 with attachments;
- consolidated copy of the Constitution of MMT as at 31 October 2007;
- copy of the Bye-Laws of MMIL dated 1 November 2007;
- MMG's annual Financial Report for the year ended 30 June 2008;

- notification to Australian Securities Exchange (ASX) of the intention to conduct an off-market tender buy-back and an on-market buy-back dated 2 March 2009;
- notices of meetings for MMHL and MMT together with explanatory material released on 5 March 2009;
- MMG off-market buy-back tender booklet dated 15 April 2009; and
- correspondence to the Tax Office dated 20 April 2009, 1 May 2009, 19 May 2009 and 3 July 2009.

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

10. MMG is a stapled structure comprising three entities:

- MMHL, an Australian resident company;
- MMIL, a non-resident company incorporated in Bermuda; and
- MMT, an Australian resident unit trust.

Macquarie Media Management Limited (MMML) is the Responsible Entity of MMT and manager of MMHL and MMIL.

11. The issued ordinary shares of MMIL and MMHL and the issued ordinary units of MMT are stapled together and quoted jointly on the ASX as MMG securities.

12. On 17 December 2008, MMG announced an on-market buy-back program (the Existing Buy-Back) to purchase up to 10% of the smallest number of MMG securities on issue in the preceding 12 months.

13. Whilst there is no standard profile for MMG security holders, as at 5 February 2009 approximately 17.7% of MMG securities were beneficially held by foreign residents.

14. On 19 February 2009, MMHL, MMIL and MMT each had 210,961,404 shares or units on issue. Their share capital or contributed capital balances at that time were approximately \$4.62 million, \$116.75 million and \$848.09 million respectively.

15. On 2 March 2009, MMG announced its intention to conduct a Buy-Back Program comprising an off-market buy-back tender (the Buy-Back Tender) followed by an on-market buy-back (On-Market Buy-Back) as part of its ongoing capital management plan.

16. The Buy-Back Program required MMG security holder approval. On 14 April 2009, shareholders of MMHL and unitholders of MMT approved the Buy-Back Program of the MMG securities.

17. The Buy-Back Tender targeted approximately \$25 million worth of MMG securities.

18. The Buy-Back Tender was conducted through a tender process. Eligible security holders who held their securities on the record date of 8 April 2009 were eligible to participate in the Buy-Back Tender.

19. The tender period opened on 15 April 2009 and closed on 1 May 2009.

20. Participation in the Buy-Back Tender was voluntary. Hence security holders who did not wish to participate were not required to do anything.

21. Under the Buy-Back Tender, security holders were invited to offer to sell some or all of their securities at a price within the Tender Range of \$0.85 to \$1.50. At the close of the buy-back period, MMG determined the lowest price in the Tender Range (the Buy-Back Price) at which MMG was able to buy back the amount of securities it determined to buy back.

22. Security holders who held less than 1,800 MMG securities were required to tender all MMG securities at either one Tender Price or tender all their securities as a Final Price Tender (a tender in which the security holder elects to be paid the Buy-Back Price). A scale back mechanism operated in the event that MMG received buy-back offers for securities which were in excess of those MMG wished to buy back.

23. All security holders submitting successful tenders were paid the same price for the MMG securities bought back.

24. All shares and units bought back under the Buy-Back Tender were cancelled.

25. The disposal of a MMG security under the Buy-Back Tender comprised three separate transactions:

- the off-market buy-back of a share in MMHL conducted pursuant to section 257J of the *Corporations Act 2001*;
- the redemption of a share in MMIL conducted pursuant to MMIL's Bye-Laws; and
- the surrender of a unit in MMT as permitted by ASIC Instrument 09-00173 [ASIC Gazette 22/09, 17 March 2009].

26. That part of the Buy-Back Price allocated to MMHL and MMIL shares was debited against the untainted share capital accounts of MMHL and MMIL respectively. That part of the Buy-Back Price attributable to the MMT units was debited entirely against the contributed capital of MMT.

27. On 4 May 2009, MMG announced that:

- it had successfully completed the Buy-Back Tender by purchasing 14,723,415 MMG securities at a Buy-Back Price of \$1.50 per security, representing 7.1% of MMG's capital;

- the total amount of capital repurchased under the Buy-Back Tender was \$22.1 million; and
- the scale-back mechanism was not applied.

28. MMG allocated the Buy-Back Price for each MMG stapled security among the three entities. The final allocation of the Buy-Back Price as to a share in MMHL, a share in MMIL and a unit in MMT was 0.0010 cents, 15.6899 cents and 134.3091 cents respectively.

29. MMHL advised that at the time of the disposal of shares in MMHL as part of the Buy-Back Tender, the sum of the market values of MMHL's assets (including any assets of MMHL that were a membership interest in another entity) that were taxable Australian real property did not exceed the sum of the market values of MMHL's assets (including any assets of MMHL that were a membership interest in another entity) that were not taxable Australian real property.

30. MMIL advised that at the time of cancellation of shares in MMIL as part of the Buy-Back Tender, MMIL did not either directly or indirectly hold any taxable Australian real property.

31. MMT advised that at the time of the surrender of the units as part of the Buy-Back Tender, the sum of the market values of MMT's assets (including any assets of MMT that were a membership interest in another entity) that were taxable Australian real property did not exceed the sum of the market values of MMT's assets (including any assets of MMT that were a membership interest in another entity) that were not taxable Australian real property.

Ruling

Dividends and consideration

Share in MMHL

32. As the entire Buy-Back Price attributable to each MMHL share acquired through the Buy-Back Tender was debited against MMHL's share capital account, participating security holders will not be taken to have been paid a dividend under section 159GZZZP of the ITAA 1936.

33. Participating security holders are taken to have received 0.0010 cents as consideration in respect of each MMHL share bought back under the Buy-Back Tender (Sale Consideration) pursuant to section 159GZZZQ of the ITAA 1936.

34. The treatment of the Sale Consideration for tax purposes will depend on whether the Buy-Back Tender transaction was on capital account (where the MMG securities were held for investment) or on revenue account.

Capital gains tax (CGT) consequences

35. CGT event A1 happened as a result of the buy-back of each MMHL share (subsection 104-10(1)). The proportion of the Buy-Back Price for the stapled security allocated to the MMHL share (being 0.0010 cents) represents the capital proceeds under section 116-20.
36. A participating security holder will make a capital gain on the disposal of their MMHL share if the capital proceeds exceeds the cost base of that share. Similarly, a participating security holder will make a capital loss if the capital proceeds is less than the reduced cost base of that share (subsection 104-10(4)).
37. CGT event A1 happened on 4 May 2009 being the date that a participating security holder's tender was accepted (subsection 104-10(3)).
38. Under section 118-20 any capital gain a participating security holder makes will be reduced to the extent that the capital proceeds have otherwise been included in assessable income under section 6-5.
39. If the MMG securities were held as trading stock, the capital gain or loss is disregarded under section 118-25.

Other income tax consequences

40. Where the MMG securities were held as trading stock, the Sale Consideration of 0.0010 cents per MMHL share is included in assessable income under section 6-5. Where the MMG securities were held as revenue assets, the amount by which the Sale Consideration of 0.0010 cents per share exceeds the cost of each MMHL share is included in the participating security holder's assessable income. Correspondingly, if the cost exceeds the Sale Consideration of 0.0010 cents per MMHL share the difference is an allowable deduction.

Share in MMIL

41. The redemption of a share held in MMIL under the Buy-Back Tender does not constitute an off-market share buy-back within the meaning of Division 16K of Part III of the ITAA 1936.
42. Participating security holders are taken to have received 15.6899 cents as consideration in respect of each MMIL share redeemed under the Buy-Back Tender (Redemption Price). No part of the Redemption Price of a share in MMIL will be treated as a 'dividend', as defined in subsection 6(1) of the ITAA 1936, paid to participating security holders on the day of redemption.
43. The treatment of the Redemption Price for tax purposes will depend on whether the Buy-Back Tender transaction was on capital account (where the MMG securities were held for investment) or on revenue account.

CGT consequences

44. CGT event C2 happened as a result of the redemption of each participating security holder's share in MMIL (subsection 104-25(1)). The proportion of the Buy-Back Price for the stapled security allocated to the MMIL share (being 15.6899 cents) represents the capital proceeds under section 116-20.

45. A participating security holder will make a capital gain on the redemption of their MMIL share if the capital proceeds exceed the cost base of that share. Similarly, a participating security holder will make a capital loss if the capital proceeds is less than the reduced cost base of that share (subsection 104-25(3)).

46. CGT event C2 happened on 4 May 2009 being the date that a participating security holder's tender was accepted (subsection 104-25(2)).

47. Under section 118-20 any capital gain a participating security holder makes will be reduced to the extent that the capital proceeds have otherwise been included in assessable income under section 6-5.

48. If the MMG securities were held as trading stock, the capital gain or loss is disregarded under section 118-25.

Other income tax consequences

49. Where the MMG securities were held as trading stock, the Redemption Price of 15.6899 cents per MMIL share is included in assessable income under section 6-5. Where the MMG securities were held as revenue assets, the amount by which the Redemption Price of 15.6899 per share exceeds the cost of each MMIL share is included in the participating security holder's assessable income. Correspondingly, if the cost exceeds the Redemption Price of 15.6899 cents per MMIL share the difference is an allowable deduction.

Unit in MMT

50. The surrender of a unit held in MMT under the Buy-Back Tender does not constitute an off-market share buy-back within the meaning of Division 16K of Part III of the ITAA 1936.

51. Participating security holders are taken to have received 134.3091 cents as consideration in respect of each MMT unit surrendered under the Buy-Back Tender (Sale Consideration).

52. The treatment of the Sale Consideration for tax purposes will depend on whether the Buy-Back Tender transaction was on capital account (where the MMG securities were held for investment) or on revenue account.

CGT consequences

53. CGT event C2 happened as a result of the surrender of each participating security holder's unit in MMT (subsection 104-25(1)). The proportion of the Buy-Back Price for the stapled security allocated to the unit in MMT (being 134.3091 cents) represents the capital proceeds under section 116-20.

54. A participating security holder will make a capital gain on the surrender of their MMT unit if the capital proceeds exceed the cost base of that unit. Similarly, a participating security holder will make a capital loss if the capital proceeds is less than the reduced cost base of that unit (subsection 104-10(4)).

55. CGT event C2 happened on 4 May 2009 being the date that a participating security holder's tender was accepted (subsection 104-10(3)).

56. Under section 118-20 any capital gain a participating security holder makes will be reduced to the extent that the capital proceeds have otherwise been included in assessable income under section 6-5.

57. If the MMG securities were held as trading stock, the capital gain or loss is disregarded under section 118-25.

Other income tax consequences

58. Where the MMG securities were held as trading stock, the Sale Consideration of 134.3091 cents per MMT unit is included in assessable income under section 6-5. Where the MMG securities were held as revenue assets, the amount by which the Sale Consideration of 134.3091 cents per share exceeds the cost of each MMT unit is included in the participating security holder's assessable income. Correspondingly, if the cost exceeds the Sale Consideration of 134.3091 cents per MMT unit the difference is an allowable deduction.

Foreign resident security holders

59. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT events A1 and C2 happened under the Buy-Back Tender, disregards under subsection 855-10(1) any capital gain or capital loss made from the relevant CGT event if the share in MMHL or in MMIL or unit in MMT is not taxable Australian property as defined in section 855-15.

The anti-avoidance provisions

60. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the Buy-Back Price received by participating security holders under the Buy-Back Tender.

61. In respect of MMHL, the Commissioner will not make a determination under section 177EA of the ITAA 1936 in relation to the distribution of share capital to participating security holders under the Buy-Back Tender.

62. In respect of MMHL, the Commissioner will not make a determination under section 204-30 in relation to the distribution of share capital to participating security holders under the Buy-Back Tender.

63. There will be no consequences under Divisions 725 and 727 for participating security holders.

Commissioner of Taxation

15 July 2009

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

64. This Ruling does not deal with disposals of MMG securities under either:

- (a) the Existing Buy-Back (17 December 2008); or
- (b) the On-Market Buy-Back (2 March 2009).

That is, this Ruling only applies to entities whose MMG securities were purchased under the Buy-Back Tender (2 March 2009).

Dividends and consideration

Share in MMHL

65. Under section 159GZZZM of the ITAA 1936, the purchase price in respect of shares acquired through the Buy-Back Tender is the amount of money the participating security holder received as a result of or in respect of the Buy-Back Tender.

66. Under section 159GZZZP of the ITAA 1936, the purchase price of each share bought back contains a dividend component only if the buy-back price exceeds the amount debited against the company's share capital account. As the Buy-Back Price of 0.0010 cents per share was debited entirely against MMHL's untainted share capital account, no part of the purchase price will be taken to be a dividend for income tax purposes.

67. For the purpose of computing the amount of the gain or loss (on capital or revenue account), 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.

68. Subsection 159GZZZQ(1) of the ITAA 1936 provides that the participating security holder is taken to have received an amount equal to the purchase price (in this case the 0.0010 cents received for each share bought back) as consideration in respect of the sale of the share bought back (Sale Consideration).

69. Participating security holders are taken to have disposed of their MMHL shares accepted under the Buy-Back Tender on 4 May 2009. The disposal may have different taxation implications for participating security holders depending on how their MMG securities were held, for instance:

- an investor who held their MMG securities on capital account will be subject to the CGT provisions; and
- a share trader who held their MMG securities on revenue account will be subject to the ordinary income provisions as well as the CGT provisions.

70. It should be noted that participating security holders who have both an income tax and CGT liability will have the amount of the capital gain reduced under the anti-overlap provisions contained in section 118-20. If the MMG securities were held as trading stock, the capital gain or loss is disregarded under section 118-25.

CGT consequences

71. CGT event A1 happens to each MMHL share when they are disposed of under the Buy-Back Tender which is 4 May 2009 being the date when the change of ownership occurred (subsections 104-10(1), 104-10(2) and 104-10(3)).

72. The Sale Consideration of 0.0010 cents in respect of each MMHL share bought back represents the capital proceeds for CGT purposes pursuant to section 116-20. A participating security holder will make a capital gain on a MMHL share if the Sale Consideration per share exceeds the cost base of that share. The capital gain is the amount of the excess. Similarly, a participating security holder will make a capital loss on a share if the Sale Consideration per share is less than the reduced cost base of the share (subsection 104-10(4)).

Other income tax consequences

73. Where the MMG securities were held as trading stock, the Sale Consideration received of 0.0010 cents per MMHL share is included in assessable income under section 6-5. Where the MMG securities were held as revenue assets, the amount by which the Sale Consideration exceeds the cost of the MMHL share is included in the participating security holder's assessable income. Correspondingly, if the cost exceeds the Sale Consideration under the Buy-Back Tender, the difference is an allowable deduction.

Share in MMIL

74. MMIL did not buy back its shares from participating security holders under the terms of the Buy-Back Tender. A redemption of MMIL shares has been undertaken in accordance with Bye-Law 44 of the Bye-Laws of MMIL. Therefore, the redemption of the MMIL shares will not be treated as a buy-back for the purposes of Division 16K of Part III of the ITAA 1936.

75. Subsection 6(1) of the ITAA 1936 defines a 'dividend' to include any distribution made by a company to its shareholder. Paragraph (d) however excludes from the definition of 'dividend' any:

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company...

76. The consideration provided for the redemption of the MMIL shares was debited entirely against MMIL's untainted share capital account. Therefore, paragraph (d) of the definition of 'dividend' will exclude the return of share capital pursuant to the share redemption from being a dividend under subsection 6(1) of the ITAA 1936.

77. Participating security holders have received 15.6899 cents as consideration in respect of the redemption of each MMIL share under the Buy-Back Tender.

78. Participating security holders are taken to have disposed of their MMIL shares accepted under the Buy-Back Tender on 4 May 2009. The disposal may have different taxation implications for participating security holders depending on how they hold their MMG securities, for instance:

- an investor who held their MMG securities on capital account will be subject to the CGT provisions; and
- a share trader who held their MMG securities on revenue account will be subject to the ordinary income provisions as well as the CGT provisions.

79. Participating security holders who have both an income tax and CGT liability as a result of the redemption will have the amount of the capital gain reduced under the anti-overlap provisions contained in section 118-20 to the extent that the amount has otherwise been included in income pursuant to section 6-5. If the MMG securities were held as trading stock, the capital gain or loss is disregarded under section 118-25.

CGT consequences

80. CGT event C2 happens to each MMIL share when they are redeemed under the Buy-Back Tender which is 4 May 2009 as this is when their ownership of the MMIL share ends as a result of the redemption (paragraph 104-25(1)(a) and subsection 104-25(2)).

81. The Redemption Price of 15.6899 cents in respect of each MMIL share represents the capital proceeds for CGT purposes pursuant to section 116-20. A participating security holder will make a capital gain on a MMIL share if the Redemption Price per share exceeds the cost base of that share. The capital gain is the amount of the excess. Similarly, a participating security holder will make a capital loss on a share if the Redemption Price per share is less than the reduced cost base of the share (subsection 104-25(3)).

Other income tax consequences

82. Where the MMG securities were held as trading stock, the Redemption Price received of 15.6899 cents per MMIL share is included in assessable income under section 6-5. Where the MMG securities were held as revenue assets, the amount by which the Redemption Price exceeds the cost of the MMIL share is included in the participating security holder's assessable income. Correspondingly, if the cost exceeds the Redemption Price under the Buy-Back Tender, the difference is an allowable deduction.

Unit in MMT

83. Participating security holders surrendered their MMT units under the Buy-Back Tender to the Responsible Entity on 4 May 2009. The surrender may have different taxation implications for participating security holders depending on how their MMG securities were held, for instance:

- an investor who held their MMG securities on capital account will be subject to the CGT provisions; and
- a share trader who held their MMG securities on revenue account will be subject to the ordinary income provisions as well as the CGT provisions.

84. It should be noted that participating security holders who have both an income tax and CGT liability will have the amount of the capital gain reduced under the anti-overlap provisions contained in section 118-20. If the MMG securities were held as trading stock, the capital gain or loss is disregarded under section 118-25.

CGT consequences

85. CGT event C2 happens to each MMT unit when they are surrendered to the Responsible Entity under the Buy-Back Tender, being 4 May 2009 (paragraph 104-25(1)(a) and subsection 104-25(2)).

86. The capital proceeds for CGT purposes in respect of each MMT unit surrendered is 134.3091 cents pursuant to section 116-20. A participating security holder will make a capital gain on a MMT unit if the capital proceeds per unit exceeds the cost base of that unit. The capital gain is the amount of the excess. Similarly, a participating security holder will make a capital loss on a unit if the capital proceeds per unit is less than the reduced cost base of the unit (subsection 104-10(4)).

Other income tax consequences

87. Where the MMG securities were held as trading stock, the Sale Consideration received of 134.3091 cents per MMT unit is included in assessable income under section 6-5. Where the MMG securities were held as revenue assets, the amount by which the Sale Consideration exceeds the cost of the MMT unit is included in the participating security holder's assessable income. Correspondingly, if the cost exceeds the Sale Consideration under the Buy-Back Tender, the difference is an allowable deduction.

Foreign resident security holders

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

89. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2 or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

90. MMHL, MMIL and MMT advised that at the time CGT events A1 and C2 happen under the Buy-Back Tender, a share in MMHL and in MMIL and a unit in MMT were not an indirect Australian real property interest (as defined in section 855-25) as the interests did not pass the principal asset test in section 855-30 at that time.

91. Consequently, a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT events A1 and C2 happened under the Buy-Back Tender, cannot disregard under subsection 855-10(1) a capital gain or capital loss made from the relevant CGT event if:

- the share in MMHL or in MMIL or unit in MMT has been used at any time by the foreign resident, or the trustee of a foreign trust for CGT purposes, in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15); or
- the share in MMHL or in MMIL or unit in MMT is covered by subsection 104-165(3) (item 5 of the table in section 855-15).

The anti-avoidance provisions

92. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies. The effect of such a determination is that all or part of the distribution of capital received by a participating security holder in respect of their MMHL and MMIL shares under the Buy-Back Tender is treated as an unfranked dividend. Accordingly, the application of these two provisions to the Buy-Back Tender must be considered.

Section 45A

93. Section 45A of the ITAA 1936 is an anti-avoidance provision that applies in circumstances where capital benefits are streamed to certain security holders (the advantaged security holders) who derive a greater benefit from the receipt of share capital and it is reasonable to assume that the other security holders (the disadvantaged security holders) have received or will receive dividends.

94. Although a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936) was provided to participating security holders under the Buy-Back Tender, the circumstances of the Buy-Back Tender indicate that there was no streaming of capital benefits to some security holders and dividends to other security holders. Accordingly, section 45A of the ITAA 1936 has no application to the Buy-Back Tender.

Section 45B

95. Section 45B of the ITAA 1936 applies where certain amounts of a capital nature are provided to security holders 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) of the ITAA 1936);
- (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) 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 a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

96. In the case of the distribution of share capital of MMHL and MMIL under the Buy-Back Tender, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 have been met, having regard to the relevant circumstances of the scheme as set out in subsection 45B(8) of the ITAA 1936, it could not be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose, other than a merely incidental purpose, of enabling a taxpayer to obtain a tax benefit.

97. Consequently, 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 distributions.

Section 45C

98. As neither of sections 45A nor 45B of the ITAA 1936 apply to the Buy-Back Tender, the Commissioner will not make a determination under either of those sections that section 45C of the ITAA 1936 will apply to deem any part of the consideration to be an unfranked dividend.

Section 177EA

99. 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.

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

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the relevant taxpayer) would receive, or could reasonably be expected to receive, imputation benefits as a result of the 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 a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

101. In the present case, the scheme to dispose of the shares in MMHL does not include the payment, or expected payment, of frankable distributions. Accordingly, section 177EA of the ITAA 1936 will not apply to that part of the scheme under the Buy-Back Tender.

Section 204-30

102. Section 204-30 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

103. As the distribution made by MMHL in respect of the Buy-Back Tender was funded entirely from the share capital of MMHL and no part was attributable to the retained or unrealised profits of MMHL, no dividend is taken to have been paid to participating security holders. Accordingly, no participating security holder will receive imputation benefits through their participation in the Buy-Back Tender and section 204-30 will not apply.

Divisions 725 and 727

104. For the purposes of Divisions 725 and 727, the entity in which the equity or loan interests that are affected by a value shift are the target entities, being MMHL, MMIL and MMT.

105. Having regard to:

- all of the documents and any other material referred to in paragraph 9 of the Ruling; and
- all of the facts comprising the scheme as described in paragraphs 10 to 31 of the Ruling,

it is considered that, for value shifting purposes, MMT is a fixed trust as defined in subsection 995-1(1) for the period starting when the scheme was entered into and ending when it is carried out.

106. There is a direct value shift under a scheme involving equity or loan interests in an entity where there is a decrease in the market value of some equity or loan interest and an increase or issue at a discount of other equity or loan interests (section 725-145). There is an indirect value shift where there is an unequal exchange of economic benefits between two entities – the losing entity and gaining entity (subsection 727-150(3)).

107. There can only be consequences for a direct value shift if there is any entity that controls the target entity for value shifting purposes at some time during the scheme period as defined in section 725-55 (paragraph 725-50(b)). Section 727-355 sets out the relevant tests for whether an entity controls a company for value shifting purposes. Section 727-360 sets out the relevant tests for whether an entity controls a fixed trust for value shifting purposes.

108. There can only be consequences for an indirect value shift if the entities between which the value is shifted (the losing entity and the gaining entity) satisfy an ultimate controller test and/or a common ownership nexus test at some time during the indirect value shift period defined in subsection 727-150(7) (paragraph 727-100(c) and sections 727-105 and 727-110).

109. On the basis of the information provided, there was no entity that controlled MMHL, MMIL or MMT for value shifting purposes or that met, together with MMHL, MMIL or MMT, the ultimate controller test and/or the common ownership nexus test as described above. As a result, there are no consequences under Divisions 725 and 727 for any direct value shift or indirect value shift that occurs under the Buy-Back Tender.

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

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Subject references:

- capital gains tax
- CGT event A1 – disposal of a CGT Asset
- CGT events C1 to C3 – end of a CGT asset
- general value shifting regime
- schemes & shams
- share capital
- share buy backs
- stapled structure

Legislative references:

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