CR 2012/14 - Income tax: Oceania Capital Partners Limited: return of capital and off-market share buy-back

Class Ruling

Income tax: Oceania Capital Partners Limited: return of capital and off-market share buy-back

Contents Para

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;
- section 159GZZZK of the ITAA 1936;
- section 159GZZZP of the ITAA 1936;
- section 159GZZZQ of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);

- section 8-1 of the ITAA 1997;
- section 70-80 of the ITAA 1997;
- section 70-90 of the ITAA 1997;
- section 104-10 of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- section 104-135 of the ITAA 1997;
- section 110-45 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- section 118-25 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1936 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Oceania Capital Partners Limited (OCP) registered on the OCP share register on the 29 December 2011 (Record Date), being the date for determining entitlements under the return of capital and the off-market share buy-back and who participated in:

(a) the return of capital and held their shares in OCP neither as 'revenue assets' (as defined in section 977-50 of the ITAA 1997) nor as 'trading stock' (as defined in subsection 995-1(1) of the ITAA 1997) – that is, broadly on capital account; and/or

(b) the off-market share buy-back and held their shares in OCP:

  (i) neither as 'revenue assets' nor as 'trading stock' – that is, broadly on capital account; or

  (ii) as 'revenue assets' or as 'trading stock' and are a 'resident of Australia' (as defined in subsection 6(1)) on the Record Date.

(Note: 'Excluded Foreign Shareholders' are not eligible to participate in the off-market share buyback. 'Excluded Foreign Shareholders' are OCP shareholders whose address in the OCP share register are not in Australia and its external territories, New Zealand, the United States, Hong Kong, the United Kingdom and any other jurisdiction which OCP has determined to allow foreign shareholders to tender.)

4. In this Ruling, these entities are referred to as 'OCP shareholders'.

5. This Ruling does not apply to OCP shareholders who are subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their OCP share.

(Note: Division 230 of the ITAA 1997, will generally not apply to individuals, unless they have made an election for it to apply to them.)

Qualifications

6. 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 36 of this Ruling.

7. 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.

Date of effect

9. This Ruling applies from 1 July 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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

10. The following description of the scheme that is the subject of this Ruling is based on the information provided in the application for Class Ruling dated 1 December 2011 and further correspondence received.

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

11. In this Ruling, unless otherwise indicated, capitalised terms take on the same meaning as in the Notice of Meeting, Explanatory Statement and Independent Expert's Report dated 14 October 2011 and Supplementary Explanatory Statement dated 30 November 2011.

12. OCP, an Australian investment company (formerly known as Allco Equity Partners Limited) was incorporated on 12 November 2004. OCP was listed on the Australian Securities Exchange (ASX) on 22 December 2004 following the completion of the initial public share offer (IPO).

13. At the time of listing on the ASX, OCP's share capital, net of adjustments, was $538.70 million. The capital raised was intended for investments.

14. Since its listing on the ASX, OCP has undertaken two on-market share buy-backs as part of its capital management strategy:

(a) the first buy-back commenced on 8 June 2007 and concluded on 30 January 2008, and resulted in OCP acquiring 5.10 million shares at a total cost of $21.06 million; and

(b) the second buy-back commenced on 15 September 2008 with an initial closing date of 27 August 2009. During that period, OCP acquired 4.8 million shares at a total cost of $8.91 million. This buy-back was subsequently extended to 27 August 2011, but no further shares were bought back during this extended period.

15. In addition to the share buy-backs, OCP has undertaken two returns of share capital:

(a) $59.74 million ($0.65 per OCP share) on 9 July 2009; and

(b) $27.57 million ($0.30 per OCP share) on 9 June 2010.

16. As at 30 June 2011, the share capital of OCP, net of adjustments, was $398,640,000.

Return of capital and share buy-back

17. On 14 November 2011, as a part of its capital management strategy, OCP announced a proposal to undertake a further return of share capital (return of capital) together with an off-market share buy-back (share buy-back) of its shares.

18. Under the return of capital OCP proposed to return approximately $27.60 million, being $0.30 per OCP share, to all OCP shareholders, not only those participating in the share buy-back.

19. Under the share buy-back OCP proposed to buy-back up to 66.24 million of its ordinary shares representing approximately 72.07% of its issued capital.

20. The share buy-back was subject to a cap of $142.42 million (Maximum Buy-Back Pool).

21. On 16 December 2011, the return of capital and the share buy-back, put to OCP shareholders as the 'Revised Continuation Alternative', received shareholders approval.

Return of capital

22. The return of capital was applied equally to each holder of an OCP share registered on the OCP share register on the Record Date. Payment of the return of capital was made on 5 January 2012 (the Payment Date).

23. The entire amount of the return of capital was debited against the share capital of OCP. There has been no change in either the number of OCP shares held by each OCP shareholder, or the proportionate interest of each OCP shareholder in OCP as a result of the return of capital.

24. There were no transfers to OCP's share capital account which would cause the share capital account to become 'tainted' in terms of section 197-50 of the ITAA 1997.

Share buy-back

25. The share buy-back was conducted through a tender process during a specified tender period that commenced on 5 January 2012, and closed on 3 February 2012.

26. Participation in the share buy-back was voluntary, and eligible shareholders who did not wish to participate were not required to do anything. Non-participating shareholders did not receive any compensation.

27. On 6 February 2012, OCP announced that:

(a) it had successfully completed the share buy-back of 66,243,538 shares, representing approximately 72.07% of the issued capital;

(b) the total amount of share capital purchased under the share buy-back was $142,423,607;

(c) the final price of the share buy-back was set at $2.15 per OCP share; and

(d) a scale-back of 3.28% was applied.

28. All OCP shares bought-back were cancelled.

29. Under the share buy-back, OCP debited $142,423,607 against OCP's untainted share capital account.

Sale of OCP's interest in subsidiaries

30. On 29 April 2011, OCP sold its 95.3% interest in an electronic security services subsidiary.

31. On 29 July 2011, OCP realised its 25.5% interest in a software developing company.

32. OCP has confirmed that it recorded a cumulative accounting loss from its investments in those two companies.

33. The funds used to acquire both companies were sourced from the share capital raised by OCP in December 2004.

34. The return of capital and the share buy-back were funded with the proceeds from the realisation of OCP's interest in these companies.

Other aspects

35. OCP has paid dividends to OCP shareholders in respect of the income years ended 30 June 2006, 2007, 2008 and 2009. All dividends, with the exception of the final dividend for 2009, have been fully franked. No dividends were paid in 2010 and 2011 because of OCP's accumulated loss position.

36. OCP has advised that the OCP shares fail the principal asset test in section 855-30 of the ITAA 1997 for the purposes of determining whether they are 'indirect Australian real property interests' under section 855-25 of the ITAA 1997 and, therefore, taxable Australian property under section 855-15 of the ITAA 1997.

Ruling

Return of capital

Distribution is not a dividend

37. The return of capital to OCP shareholders is not a 'dividend', as defined in subsection 6(1).

The application of sections 45A, 45B and 45C

38. The Commissioner will not make a determination under sections 45A or 45B that section 45C applies to the return of capital.

Capital gains tax consequences

39. CGT event G1 (section 104-135 of the ITAA 1997) happened when OCP paid the return of capital to an OCP shareholder in respect of an OCP share that they owned at the Record Date and continued to own at the Payment Date.

40. CGT event C2 (section 104-25 of the ITAA 1997) happened when OCP paid the return of capital to an OCP shareholder in respect of an OCP share that they owned at the Record Date but ceased to own before the Payment Date.

Foreign resident shareholders

41. A foreign resident OCP shareholder who is paid the return of capital disregards any capital gain made when CGT event G1 happened as their OCP share was not 'taxable Australian property' (section 855-10 of the ITAA 1997).

42. A foreign resident OCP shareholder who is paid the return of capital disregards any capital gain or capital loss made when CGT event C2 happened as their right to receive the return of capital was not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Share buy-back

Section 159GZZZK

43. The share buy-back was an off-market purchase for the purposes of section 159GZZZK.

Section 159GZZZP

44. Section 159GZZZP does not apply to treat any part of the share buy-back purchase price paid to OCP shareholders as a dividend.

Section 159GZZZQ

45. OCP shareholders have received $2.15 per OCP share as consideration on 6 February 2012 in respect of the disposal of each of their OCP shares pursuant to section 159GZZZQ.

The application of sections 45A, 45B and 45C

46. The Commissioner will not make a determination under sections 45A or 45B that section 45C applies to the share buy-back.

OCP shares held neither as 'revenue assets' nor as 'trading stock'

47. Under section 104-10 of the ITAA 1997, CGT event A1 happened to OCP shareholders on the disposal of their OCP shares under the share buy-back.

OCP shares held as 'revenue assets' or as a 'trading stock'

OCP shares held as 'revenue assets'

48. Where an Australian resident OCP shareholder held OCP shares as 'revenue assets' (that are not 'trading stock'), any net profit on the disposal of OCP shares under the share buy-back is included in the shareholder's assessable income under section 6-5 of the ITAA 1997. Correspondingly, any net loss on the disposal of the OCP shares is an allowable deduction under section 8-1 of the ITAA 1997.

49. The CGT provisions still apply to shares which are held as 'revenue assets'. However, under section 118-20 of the ITAA 1997, any capital gain an OCP shareholder makes from a CGT event is reduced if, because of the event, a provision of the income tax legislation (outside of Part 3-1 of the ITAA 1997) includes an amount (for any income year) in the assessable income of the OCP shareholder. The capital gain is reduced by the amount of any net profit otherwise included in assessable income. The capital gain is reduced to zero if it is less than the amount of the other income. Similarly, the cost base or reduced cost base of the OCP shares will be reduced by any allowable deductions for net losses on shares held as 'revenue assets' (subsections 110-45(2) and 110-55(9) of the ITAA 1997).

OCP shares held as 'trading stock'

50. Where an OCP share is disposed of (under the share buy-back) as an item of 'trading stock' in the ordinary course of business, the proceeds of $2.15 per OCP share is included in the assessable income of the OCP shareholder under section 6-5 of the ITAA 1997 (section 70-80(1) of the ITAA 1997).

51. Where an OCP share is disposed of (under the share buy-back) as an item of 'trading stock' outside the ordinary course of business, the market value of an OCP share is included in the assessable income of the OCP shareholder under section 6-5 of the ITAA 1997 (section 70-90(1) of the ITAA 1997).

52. The CGT provisions still apply to shares which are held as ‘trading stock’. However, a capital gain or capital loss made from the disposal of the OCP shares held by an OCP shareholder is disregarded if, at the time of the disposal, the shares were ‘trading stock’ (subsection 118-25(1) of the ITAA 1997).

Foreign resident shareholders

53. A foreign resident OCP shareholder who was eligible to participate, and participated in the share buy-back disregards any capital gain or capital loss made when CGT event A1 happened as their OCP share is not ‘taxable Australian property’ (section 855-10 of the ITAA 1997).

Commissioner of Taxation
29 February 2012

Appendix 1 – Explanation

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.

Return of capital

Distribution is not a dividend

54. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

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

56. The return of capital was wholly debited against the share capital account of OCP.

57. There have been no transfers to OCP's 'share capital account', as defined in section 975-300 of the ITAA 1997, prior to the return of capital which would:

(a) have caused the share capital account to become tainted in terms of section 197-50 of the ITAA 1997; or

(b) prevented OCP's share capital account from being treated as a share capital account for the purposes of paragraph (d) of the definition of 'dividend' in subsection 6(1).

58. Therefore, paragraph (d) of the definition of 'dividend' in subsection 6(1) applies and the return of capital is not a dividend.

Subsection 6(4)

59. The exclusion in paragraph (d) of the definition of 'dividend' in subsection 6(1) is limited by subsection 6(4) which applies in circumstances where, under an arrangement:

(a) a company raises share capital, receiving either cash or property from a person or group of persons, crediting it to its share capital account; and

(b) returns it to another person or group of persons, giving them either cash or property, debiting it to its share capital account.

60. In the present case, no arrangements exist under which OCP raised capital from certain shareholders and then distributed the capital raised to other shareholders. Accordingly, subsection 6(4) will have no application in respect of the return of capital.

The application of sections 45A, 45B and 45C

Section 45A – streaming of dividends and capital benefits

61. Section 45A 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.

62. Although OCP has provided its shareholders with a 'capital benefit', as defined in paragraph 45A(3)(b), the capital benefit has been provided to all OCP shareholders in direct proportion to their 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.

63. Accordingly, section 45A does not apply to the return of capital. Therefore, the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the capital benefit.

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

64. Section 45B applies where certain payments are made to shareholders in substitution for dividends.

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

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

(b) under the scheme, a taxpayer (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and

(c) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, 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)).

Each of the conditions is considered below.

66. The return of capital is a 'scheme' for the purposes of section 45B.

67. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). Relevantly, it includes a distribution to a person of share capital. As OCP debited the return of capital against its untainted share capital account, OCP shareholders, under the scheme, have been provided with a capital benefit.

68. A shareholder 'obtains a tax benefit', as defined in subsection 45B(9), if:

(a) the amount of tax payable; or

(b) any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B,

(c) be less than the amount that would have been payable; or

(d) be payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend.

69. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises.

70. A capital gain may not arise at all for foreign resident shareholders: see paragraphs 94 to 97 of this Ruling. By contrast, a dividend would generally be included in the assessable income of a resident shareholder, or in the case of a non-resident shareholder be subject to dividend withholding tax. Therefore, an OCP shareholder has generally obtained a tax benefit from the scheme.

Relevant circumstances

71. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) 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.

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

73. The relevant circumstances under subsection 45B(8) cover the circumstances of the company and the tax profile of the shareholders. In this instance, as the return of capital has been made to all OCP shareholders regardless of individual circumstances, paragraphs 45B(8)(c) to 45B(8)(h) do not incline for, or against, a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and 45B(8)(j) pertaining to the provision of ownership interests and demerger are not relevant in this case. The relevant matters, however, are those covered by the circumstances described in paragraphs 45B(8)(a), 45B(8)(b) and 45B(8)(k).

74. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital and profits (realised or unrealised) of the company or an associate (within the meaning of section 318) of the company. The capital amounts comprising the return of capital have been determined by OCP to be excess to OCP's operating and capital requirements. The source of the funds for the return of capital is referable to the capital raised by OCP.

75. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company. OCP has paid dividends to OCP shareholders in respect of the income years ended 30 June 2006, 2007, 2008 and 2009. No dividends were paid in 2010 and 2011 because of OCP's accumulated loss position.

76. The return of capital has been made in addition to the payment of any future dividend payments by OCP.

77. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to 177D(b)(viii). 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 OCP and its shareholders are consistent with it being, in form and substance, a distribution of share capital.

78. Therefore, having regard to the relevant circumstances of the scheme involving the return of the capital, as discussed in paragraphs 71 to 77 of this Ruling, it cannot be concluded that OCP have entered into, or carried out, the scheme for a purpose other than a merely incidental purpose of enabling the OCP shareholders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3), that section 45C applies to the whole, or a part, of the capital benefit represented by the return of capital.

Section 45C

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

Capital gains tax consequences

CGT event G1 – section 104-135 of the ITAA 1997

80. CGT event G1 happened when OCP paid the return of capital amount to an OCP shareholder in respect of a share that a shareholder owned at the Record Date and continued to own at the Payment Date (section 104-135 of the ITAA 1997).

81. If the return of capital ($0.30 per OCP share) is less than, or equal to, the cost base of the OCP share at the Payment Date, the cost base and reduced cost base of the share will be reduced (but not below nil) by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

82. An OCP shareholder makes a capital gain if the return of capital was more than the cost base of their OCP share. The amount of the capital gain is equal to the excess (subsection 104-135(3) of the ITAA 1997).

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

84. A capital gain made when CGT event G1 happened will be a discount capital gain under Subdivision 115-A of the ITAA 1997 provided that the OCP share was acquired at least 12 months before the payment of the return of capital (subsection 115-25(1) of the ITAA 1997) and the other conditions of that Subdivision are satisfied.

CGT event C2 – section 104-25 of the ITAA 1997

85. The right to receive the return of capital is one of the rights inherent in an OCP share at the Record Date. If, after the Record Date but before the Payment Date, an OCP shareholder ceased to own their OCP shares in respect of which the return of capital was payable, the right to receive the payment is retained by the shareholder and is a separate CGT asset.

86. CGT event C2 happened when the return of capital was paid. The right to receive the payment (being an intangible CGT asset) ended when the payment was made (section 104-25 of the ITAA 1997).

87. An OCP shareholder makes a capital gain if the capital proceeds from the ending of the right are more than the cost base of the right. The capital gain is equal to the amount of the excess. An OCP shareholder makes a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right (subsection 104-25(3) of the ITAA 1997). The capital loss is equal to the amount of the difference.

88. In working out the capital gain or capital loss made when CGT event C2 happens, the capital proceeds will be the amount of the return of capital (subsection 116-20(1) of the ITAA 1997).

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

90. The cost base of the right does not include the cost base (or reduced cost base) of the share previously owned by an OCP shareholder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the share (for example when the OCP shareholder disposed of the share).

91. Therefore, if the full cost base (or reduced cost base) of the OCP share has been previously applied in working out a capital gain or capital loss made when a CGT event happened to that share, then the right to receive the return of capital will have a nil cost base.

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

93. Consequently, if the OCP share to which the payment relates was originally acquired by the former OCP shareholder at least 12 months before the payment of the return of capital, a capital gain made when CGT event C2 happened to the right may 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).

Foreign resident shareholders

94. Under subsection 855-10(1) of the ITAA 1997, 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 in relation to a CGT asset that is not 'taxable Australian property'. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997 and covers five categories of assets.

95. Broadly, these categories are:

(a) taxable Australian real property which is held directly;

(b) indirect Australian real property interests which are not covered by item 5 of the table in section 855-15 of the ITAA 1997;

(c) CGT assets used in carrying on a business through a permanent establishment in Australia, and which are not covered by item 1, 2 or 5 of the table in section 855-15 of the ITAA 1997;

(d) options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table in section 855-15 of the ITAA 1997; and

(e) CGT assets covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

96. A foreign resident OCP shareholder who received the return of capital, and made a capital gain when CGT event G1 happened to their OCP shares, disregards the capital gain as the OCP shares are not ‘taxable Australian property’ (section 855-10 of the ITAA 1997).

97. A foreign resident OCP shareholder who had a right to the payment of the return of capital disregards any capital gain or capital loss made when CGT event C2 happened to that right as the right was not ‘taxable Australian property’ (section 855-10 of the ITAA 1997).

Share buy-back

Section 159GZZZK

98. According to paragraph 159GZZZK(d), where a company buys a share in itself from a shareholder in the company, the purchase is an off-market buy-back if the buy-back is not covered by paragraph 159GZZZK(c). Paragraph 159GZZZK(c) provides that if the share is listed for quotation in the official list of a stock exchange in Australia or elsewhere; and the buy-back is made in the ordinary course of trading on that stock exchange; the buy-back is an on-market purchase.

99. OCP shares are listed on the ASX, but the share buy-back was not made in the ordinary course of trading on the ASX. Hence, the share buy-back was not an on-market buy-back as provided in paragraph 159GZZZK(c). Accordingly, the share buy-back was an off-market purchase for the purposes of section 159GZZZK.

Section 159GZZZP

100. 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 as a shareholder in the company.

101. As OCP debited the whole amount of the buy-back price payable under the share buy-back against its share capital account, section 159GZZZP does not apply to treat any part of that purchase price as a dividend paid to OCP shareholders on the day of the share buy-back.

Section 159GZZZQ

102. Section 159GZZZQ 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.

103. OCP shareholders are taken to have received consideration in respect of the disposal of each of their shares equal to $2.15 per OCP share for the purposes of section 159GZZZQ.

The application of sections 45A, 45B and 45C

104. The Commissioner will not make a determination under sections 45A or 45B that section 45C applies to the share buy-back.

105. The explanation in paragraphs 61 to 79 of this Ruling equally applies to the share buy-back.

OCP shares held neither as 'revenue assets' nor as 'trading stock'

CGT event A1 – section 104-10 of the ITAA 1997

106. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10 of the ITAA 1997). This event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3) of the ITAA 1997).

107. The share buy-back did not involve a disposal of shares under a contract. Hence, CGT event A1 happened when an OCP shareholder disposed of their share under the share buy-back (subsections 104-10(1) and 104-10(2) of the ITAA 1997).

108. The time of the CGT event is when the change of ownership occurred (subsection 104-10(3) of the ITAA 1997). This was on 6 February 2012, when the OCP shares were disposed of to OCP and cancelled.

109. The share buy-back price of $2.15 per OCP share represents the capital proceeds for CGT purposes under section 116-20 of the ITAA 1997. An OCP shareholder made a capital gain when CGT event A1 happened if the capital proceeds in respect of the disposal of their OCP share was more than its cost base. An OCP shareholder made a capital loss if the capital proceeds in respect of the disposal of their OCP share was less than its reduced cost base (subsection 104-10(4) of the ITAA 1997).

110. When determining the capital gain or capital loss that arises for OCP shareholders on the disposal of their OCP shares under the buy-back, the cost base or reduced cost base of the OCP shares should be determined by taking into account any reduction that occurred when CGT event G1 happened (refer to paragraphs 80 to 84 of this Ruling) upon the receipt of the return of capital.

OCP shares held as 'revenue asset' or as a 'trading stock'

OCP shares held as 'revenue assets'

111. Where an OCP shareholder disposes of an OCP share that is a 'revenue asset' (as defined in section 977-50 of the ITAA 1997), the gross receipt is not assessable, but any net profit as a result of the disposal is income according to ordinary concepts and, therefore, assessable under section 6-5 of the ITAA 1997: see *Commercial and General Acceptance Ltd v. FC of T* (1977) 137 CLR 373 at 382-383; 77 ATC 4375 at 4380; 7 ATR 716 at 721-722; *FC of T v. Whitfords Beach Pty Ltd* (1982) 150 CLR 355; 82 ATC 4031; 12 ATR 692; and Parsons, RW 1985, *Income Taxation in Australia*, The Law Book Company Limited, pp 307 and 431-432 (paragraph 67 of Taxation Ruling TR 96/4).

112. Correspondingly, any net loss in respect of the disposal of OCP shares held as 'revenue assets' is an allowable deduction under section 8-1 of the ITAA 1997: see *Ronpibon Tin NL and Tongkah Compound NL v. FC of T* (1949) 78 CLR 47 at 57 (see paragraph 67 of TR 96/4).

113. The CGT provisions apply to OCP shares that are held as 'revenue assets'. However, under section 118-20 of the ITAA 1997, any capital gain an OCP shareholder made from a CGT event will be reduced if, because of the event, a non-CGT provision of the income tax legislation includes an amount (for any income year) in the assessable income of the OCP shareholder. The capital gain is reduced (but not below nil) by the amount of any net profit otherwise included in assessable income. Similarly, the cost base or reduced cost base of the OCP shares will be reduced by any allowable deductions for net losses on OCP shares held as 'revenue assets' (subsections 110-45(2) and 110-55(9) of the ITAA 1997).

OCP shares held as 'trading stock'

114. The buy-back price received by the OCP shareholder where an OCP share is held as 'trading stock' is assessable either as ordinary income under subsection 70-80(1) or under subsection 70-90(1) of the ITAA 1997 in the year of income in which the share buyback occurs.

115. Subsection 70-80(1) of the ITAA 1997 provides that where 'trading stock' is disposed of in the ordinary course of business what is obtained in return is assessable (under section 6-5 of the ITAA 1997) as ordinary income.

116. Therefore, where the OCP shares are held as 'trading stock', the share buy-back price of $2.15 per OCP share is included in the assessable income under section 6-5 of the ITAA 1997.

117. Under subsection 70-90(1) of the ITAA 1997, if an item of 'trading stock' is disposed off outside the ordinary course of a business that is being carried on and of which the item is an asset, the assessable income includes the market value of the item on the day of the disposal.

118. Accordingly, where an OCP share is disposed off (under the share buy-back) as an item of 'trading stock' outside the ordinary course of business, the market value of an OCP share will be included in the assessable income of the OCP shareholder under section 6-5 of the ITAA 1997.

119. The disposal of trading stock also gives rise to either a capital gain or capital loss. However, under section 118-25 of the ITAA 1997 any capital gain or capital loss an OCP shareholder makes will be disregarded.

Foreign resident shareholders

120. A foreign resident OCP shareholder who disposed of their OCP shares under the share buy-back will disregard any capital gain or capital loss made when CGT event A1 happens if their OCP shares are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Appendix 2 – Detailed contents list

121. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 96/4; TR 2006/10

Subject references:

- finance
- investment company
- return of capital on shares
- share buy-backs
- share capital

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 6(1)(d)
- ITAA 1936 6(4)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)
- ITAA 1936 45B(8)
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- ITAA 1936 45B(8)(d)
- ITAA 1936 45B(8)(e)
- ITAA 1936 45B(8)(f)
- ITAA 1936 45B(8)(g)
- ITAA 1936 45B(8)(h)
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- ITAA 1997 118-25(1)
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- ITAA 1997 Div 230
- ITAA 1997 855-10
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- ITAA 1997 855-25
- ITAA 1997 855-30
- ITAA 1997 975-300
- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968

Case references:

- *Commercial and General Acceptance Ltd v. FC of T*

(1977) 137 CLR 373; 77 ATC 4375; 7 ATR 716
- *FC of T v. Whitfords Beach Pty Ltd* (1982) 150 CLR 355; 82 ATC 4031; 12 ATR 692
- *Ronpibon Tin NL and Tongkah Compound NL v. FC of T* (1949) 78 CLR 47

Other references:

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ATOlaw topic: Income Tax ~~ Return of capital
Income Tax ~~ Entity specific matters ~~ share buy-backs
Income Tax ~~ Capital Gains Tax ~~ CGT events G1 to G3 - shares
Income Tax ~~ Capital Gains Tax ~~ CGT events C1 to C3 - end of a CGT asset
Income Tax ~~ Assessable income ~~ derivation of income
Income Tax ~~ Capital Gains Tax ~~ cost base and reduced cost base