

CR 2019/38 - Woolworths Group Limited - off-market share buy-back



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Class Ruling

Woolworths Group Limited – off-market share buy-back

Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or pay any penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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What this Ruling is about

1. This Ruling sets out the income tax consequences of the off-market buy-back of Woolworths ordinary shares (Woolworths shares) undertaken by Woolworths Group Limited (Woolworths), which was announced by Woolworths on 1 April 2019 and which took place on 27 May 2019 (the buy-back).
2. Full details of the buy-back are set out in paragraphs 35 to 53 of this Ruling.

Who this Ruling applies to

3. This Ruling applies to you if you are a holder of Woolworths shares who:
 - was registered on the Woolworths share register on 8 April 2019 (the Record Date)
 - disposed of any of the Woolworths shares you held at the Record Date under the buy-back, and
 - is a resident of Australia or New Zealand.

4. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 of the *Income Tax Assessment Act 1997* (ITAA 1997) in relation to the scheme outlined in paragraphs 35 to 53 of this Ruling.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply to them.

When this Ruling applies

5. This Ruling applies from 1 July 2018 to 30 June 2019.

Ruling

The buy-back is an off-market purchase

6. For the purposes of Division 16K of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936), the buy-back is an off-market purchase within the meaning given by paragraph 159GZZZK(d) of the ITAA 1936.

The dividend component

7. You are taken to have been paid a dividend of \$24.15 per share (the dividend component) by Woolworths on 27 May 2019 for each Woolworths share bought back.¹

8. The dividend component is a frankable distribution², and has been franked by Woolworths.³

9. The difference between the buy-back price of \$28.94 per share and the dividend component of \$24.15 per share is the capital component (\$4.79 per share). This is not a dividend for income tax purposes.⁴

Inclusion of the dividend component and franking credit in assessable income, and entitlement to a franking credit tax offset

Direct distributions

10. If you are an Australian resident individual or corporate shareholder or the trustee of a resident complying superannuation fund who participated in the buy-back, your assessable income in the income year in which the buy-back occurred⁵ includes:

- the dividend component of \$24.15 per share, and
- subject to you being a 'qualified person' (see paragraphs 30 and 31 of this Ruling), the amount of the franking credit on the dividend component.

11. You will be entitled to a tax offset equal to the amount of the franking credit on the dividend component, subject to you being a 'qualified person'.⁶

¹ Section 159GZZZP of the ITAA 1936.

² Section 202-40 of the ITAA 1997.

³ Section 202-5 of the ITAA 1997.

⁴ Subsection 159GZZZP(2) of the ITAA 1936.

⁵ Subsection 44(1) of the ITAA 1936 and subsection 207-20(1) of the ITAA 1997.

⁶ Subsection 207-20(2) of the ITAA 1997.

Indirect distributions***Partnerships***

12. If you are a partnership, your assessable income in the income year in which the buy-back occurred⁷ for the purposes of calculating the net income of the partnership⁸ includes:

- the dividend component of \$24.15 per share, and
- subject to you being a 'qualified person', the amount of the franking credit on the dividend component.

Trusts

13. If you are a trustee of a trust, your assessable income in the income year in which the buy-back occurred⁹ for the purposes of calculating the net income of the trust¹⁰ includes:

- the dividend component of \$24.15 per share, and
- subject to you being a 'qualified person', the amount of the franking credit on the dividend component.

Partners and beneficiaries

14. Subsections 207-35(3) to (6) of the ITAA 1997 set out the circumstances in which a partner or beneficiary to whom a franked distribution flows indirectly is required to gross up their assessable income for their share of the franking credit on the franked distribution. Where the franked distribution 'flows indirectly' (within the meaning of Subdivision 207-B of the ITAA 1997) through a trust or partnership to a resident that is an individual, a corporate tax entity (at the time the distribution flows indirectly to it) or a trustee mentioned in paragraph 207-45(c) or (d) of the ITAA 1997, the entity will, subject to being a 'qualified person', be entitled to a tax offset equal to the entity's share of the franking credit on the franked distribution.¹¹

Refundable tax offset

15. The franking credit tax offset is subject to the refundable tax offset rules in Division 67 of the ITAA 1997. Certain trustees and corporate tax entities are excluded from the refundable tax offset rules by subsection 67-25(1A) to (1DA) of the ITAA 1997.

Non-resident shareholders

16. If you are a non-resident, you will not be liable to Australian withholding tax on the dividend component as it is fully franked (paragraph 128B(3)(ga) of the ITAA 1936) and no determination will be made in respect of the dividend component under either paragraph 204-30(3)(c) of the ITAA 1997 or paragraph 177EA(5)(b) of the ITAA 1936.

⁷ Subsection 44(1) of the ITAA 1936 and subsection 207-35(1) of the ITAA 1997.

⁸ Section 90 of the ITAA 1936.

⁹ Subsection 44(1) of the ITAA 1936 and subsection 207-35(1) of the ITAA 1997.

¹⁰ Subsection 95(1) of the ITAA 1936.

¹¹ Section 207-45 of the ITAA 1997.

Amount taken to be the sale consideration for income tax purposes

17. You are taken to have received \$7.50 per share as the sale consideration in respect of each share bought back under the buy-back on 27 May 2019 (in accordance with section 159GZZZQ of the ITAA 1936, unless you are a corporate tax entity to which subsections 159GZZZQ(8) and 159GZZZQ(9) apply).

18. If the buy-back price for each share bought back under the buy-back was less than what would have been the market value of the share if the buy-back did not occur and was never proposed to occur, then the market value rule in subsection 159GZZZQ(2) of the ITAA 1936 applies to the buy-back. Taxation Determination TD 2004/22 outlines the Commissioner's approach for determining what would have been the market value of the share at the time of the buy-back if the buy-back did not occur and was never proposed to occur.

19. The effect of the rule is that if the buy-back price is less than the market value determined in accordance with TD 2004/22, the difference is included in the consideration received for the disposal of the share, in addition to the amount of \$4.79 per share debited to the share capital account of Woolworths. As the buy-back price was less than the relevant market value, the sale consideration is \$7.50 per share.

20. The treatment of the sale consideration will depend on whether the shares are held on capital account or on revenue account.

Shares held on capital account

21. If you held the Woolworths shares on capital account, the shares are taken to have been disposed of (CGT event A1) for CGT purposes on 27 May 2019.¹²

22. The sale consideration of \$7.50 per share (which may be adjusted under subsection 159GZZZQ(8) of the ITAA 1936 if you are a corporate tax entity) represents the capital proceeds for CGT purposes.¹³

23. Unless you are a partnership, you will make a capital gain in respect of the disposal of a share under the buy-back if the sale consideration per share exceeds the cost base of the share. The capital gain is the amount of the excess. Similarly, unless you are a partnership, you will make a capital loss in respect of the disposal of a share under the buy-back if the sale consideration per share is less than the reduced cost base of the share.¹⁴

24. If you are a partnership, any capital gain or capital loss will be made by the partners individually.¹⁵ Each partner in a partnership has a separate cost base and reduced cost base for the partner's interest in each Woolworths share sold into the buy-back by the partnership.¹⁶ Each partner is allocated an appropriate share of the sale consideration received by the partnership for the disposal of Woolworths shares into the buy-back.

¹² Section 104-10 of the ITAA 1997.

¹³ Section 116-20 of the ITAA 1997.

¹⁴ Subsection 104-10(4) of the ITAA 1997.

¹⁵ Subsection 106-5(1) of the ITAA 1997.

¹⁶ Subsection 106-5(2) of the ITAA 1997.

Shares held on revenue account

25. If you held the Woolworths shares as 'trading stock' (as defined in subsection 995-1(1) of the ITAA 1997), the sale consideration of \$7.50 per share is included in your assessable income.¹⁷ Unless you are a partnership, if you held shares as trading stock, you also made a capital gain or capital loss calculated as discussed at paragraphs 21 to 24 of this Ruling. However, any capital gain or capital loss you made will be disregarded if at the time of the CGT event the shares were held as trading stock.¹⁸ There is a similar exemption for partners in partnerships.¹⁹

26. Where shares were held as 'revenue assets' (as defined in section 977-50 of the ITAA 1997), but were not trading stock, the amount by which the sale consideration of \$7.50 per share exceeds the cost of each share is included in your assessable income. Correspondingly, if the cost of each share exceeds the sale consideration of \$7.50 per share, the difference is an allowable deduction.

27. Where the sale consideration per share exceeds the cost base of that share, you (unless you are a partnership) also made a capital gain. However, any capital gain you made will be reduced if, because of the event, an amount is otherwise included in your assessable income.²⁰ The capital gain will be reduced to zero if the capital gain does not exceed the amount otherwise included in assessable income.²¹ If the capital gain exceeds the amount otherwise included in assessable income, the capital gain will be reduced by the amount otherwise included in assessable income.²² There is a similar reduction for partners in partnerships.²³

Foreign resident shareholders – CGT consequences

28. If you are a foreign resident who sells Woolworths shares under the buy-back, you disregard any capital gain or capital loss made in respect of a share bought back under the buy-back if the share is not 'taxable Australian property'.²⁴

29. If you are a foreign resident, a Woolworths share that you sell in the buy-back will be 'taxable Australian property' (from which you will make a capital gain or capital loss) if the share:

- was used by you (the foreign resident shareholder) in carrying on a business through a permanent establishment in Australia²⁵, or
- is a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident).²⁶

¹⁷ Section 6-5 of the ITAA 1997.

¹⁸ Section 118-25 of the ITAA 1997.

¹⁹ Paragraph 118-25(1)(b) of the ITAA 1997.

²⁰ Section 118-20 of the ITAA 1997.

²¹ Subsection 118-20(2) of the ITAA 1997.

²² Subsection 118-20(3) of the ITAA 1997.

²³ Paragraphs 118-20(1)(b) and 118-20(2)(b), and subsection 118-20(3), of the ITAA 1997.

²⁴ Sections 855-10 and 855-15 of the ITAA 1997.

²⁵ Item 3 of the table in section 855-15 of the ITAA 1997.

²⁶ Item 5 of the table in section 855-15 of the ITAA 1997.

Qualified persons for franking credit purposes

30. You will be a 'qualified person'²⁷ in relation to the dividend component of the buy-back price by satisfying the 'holding period rule'²⁸ if the shares you sold into the buy-back were:

- acquired **before** the Buy-Back Tender Ex-entitlement Date (5 April 2019), or
- issued to you under the Dividend Reinvestment Plan (as defined in the Scheme – see paragraphs 35 to 53 of this Ruling) on 5 April 2019,

and during the period when the shares were held, you had sufficient risks of loss or opportunities for gain in respect of the shares²⁹ for a continuous period of at least 45 days. Neither the announcement of the buy-back, the making of an invitation to you to offer to sell your Woolworths shares nor the making of an offer by you to Woolworths in respect of a Woolworths share will affect whether you had sufficient risks of loss or opportunities for gain in respect of the shares bought back under the buy-back.

31. The 'last-in first-out rule' in former subsection 160APHI(4) of the ITAA 1936 has no effect for the purposes of the buy-back in respect of Woolworths shares acquired on or after the Buy-Back Tender Ex-entitlement Date of 5 April 2019 (other than Woolworths shares issued under the Dividend Reinvestment Plan on 5 April 2019) because they did not confer an entitlement to participate in the buy-back.

The anti-avoidance provisions

32. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 or subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital component of the buy-back price you received.

33. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits you received in relation to the dividend component of the buy-back price.

34. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits you received in relation to the dividend component of the buy-back price.

Scheme

35. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Woolworths

36. Woolworths is a public company listed on the Australian Securities Exchange (ASX).

²⁷ For the purposes of paragraph 207-145(1)(a) of the ITAA 1997, which refers to Division 1A of former Part IIIA of the ITAA 1936.

²⁸ Former section 160APHO of the ITAA 1936.

²⁹ As defined in former section 160APHM of the ITAA 1936.

37. The financial statements of Woolworths as at 30 December 2018 show that at that date it had:

- approximately \$6,315 million of share capital
- \$447 million credited to reserves, and
- \$4,267 million of retained earnings.

38. As at 29 March 2019, Woolworths had 1,317,420,520 fully paid ordinary shares on issue, held by a mix of individuals, companies, trusts, partnerships and superannuation funds. Some of the Woolworths shares on issue were held by non-residents.

The buy-back

39. On 1 April 2019, Woolworths announced its intention to undertake the buy-back through a tender process. Woolworths announced that it intended to buy back \$1.7 billion of Woolworths shares (reserving the right to buy back any number of shares or to not buy back any shares), using the proceeds of the recent sale of its petrol business and the normal cash flow it generates from its other businesses.

40. Participation in the buy-back was open to all eligible Australian and New Zealand resident shareholders who were registered on the Woolworths share register on the Record Date for the buy-back (8 April 2019), including those shareholders who were issued new shares under the Dividend Reinvestment Plan in respect of the interim dividend paid by Woolworths on 5 April 2019.

41. However, participation in the buy-back was not open to the following shareholders:

- an Excluded Foreign Person who is not a resident of Australia or New Zealand
- a person who held only Restricted Employee Shares
- a person who held only American Depositary Receipts, or
- shareholders who acquired their shares on or after 5 April 2019 (Buy-Back Tender Ex-entitlement Date), other than shares issued under the Dividend Reinvestment Plan on 5 April 2019.

42. Participation in the buy-back was voluntary. Any shareholder who did not wish to participate was not required to do anything. Non-participating shareholders did not receive any property, dividends or distributions as compensation for not participating in the buy-back.

43. The tender period for the buy-back commenced on 16 April 2019 (the Opening Date) and closed on 24 May 2019 (the Closing Date).

44. Under the tender process, eligible shareholders could make an offer to sell (tender) some or all of their ordinary shares to Woolworths at specified discount percentages (tender discount) to the volume weighted average price (VWAP) of Woolworths shares sold on the ASX over the last five trading days up to and including the Closing Date. The tender discount ranged from 10% to 14% inclusive, in 1% increments. Shareholders also had the option of offering to sell their shares at a 'final price offer', which was the price that was ultimately determined under the tender process to be the price at which shares were bought back (that is, the buy-back price). In conjunction with the tender discount or final price offer, shareholders could also nominate a minimum price below which they were not prepared to sell their Woolworths shares.

45. Eligible shareholders who held less than 180 Woolworths shares, and who wished to participate in the buy-back, were required to tender all their shares at one of the specified tender discounts or as a final price offer.

46. In the event that the number of shares tendered which satisfied the buy-back criteria exceeded the number of shares Woolworths had determined to buy back, Woolworths was entitled to scale back all accepted tenders.

47. All shares bought back received the same buy-back price per share. None of the shares tendered above the buy-back price would be bought back.

48. The buy-back price was subject to two overriding limits:

- Woolworths would not buy back shares at a discount greater than 14% applied to the VWAP of Woolworths shares sold on the ASX over the last five trading days up to and including the Closing Date, and
- the buy-back price would not exceed the market value of a Woolworths share determined in accordance with TD 2004/22.

49. The buy-back did not qualify as an 'equal access scheme' as defined in subsection 257B(2) of the *Corporations Act 2001*, but was a 'selective buy-back' as defined in section 9 of the *Corporations Act 2001*. Woolworths obtained an exemption from the Australian Securities and Investments Commission pursuant to subsection 257D(4) of the *Corporations Act 2001* so that it was not required to obtain shareholder approval for the buy-back.

50. On 27 May 2019, Woolworths announced that:

- it had successfully completed the buy-back of 58,733,844 Woolworths shares, representing 4.46% of the issued shares of Woolworths
- the total purchase price of the Woolworths shares bought back under the buy-back was \$1,699,757,445.36
- the buy-back price was \$28.94 per share, which represented a discount of 14% to the VWAP of Woolworths shares sold on the ASX over the last five trading days up to and including the Closing Date of 24 May 2019
- tenders at a discount of 14% or as a final price offer were successful, subject to any minimum price condition and scale-back
- tenders at discounts from 10% to 13% were not accepted, and
- due to the significant oversubscription for the buy-back, an 84.68% scale-back of tenders was required.

51. All shares bought back under the buy-back were cancelled by Woolworths, as required by subsection 257H(3) of the *Corporations Act 2001*.

52. For each Woolworths share acquired by Woolworths under the buy-back, \$4.79 per share (the capital component) was debited to the share capital account of Woolworths. The balance of the buy-back price was debited to Woolworths' retained earnings, and was fully franked by Woolworths under paragraph 202-5(c) of the ITAA 1997.

Other information

53. The share capital account of Woolworths (as defined in section 975-300 of the ITAA 1997) was not tainted for the purposes of section 197-50 of the ITAA 1997.

Commissioner of Taxation19 June 2019

Appendix – Explanation

ⓘ *This Explanation 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.*

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Summary

54. The issues that will be discussed in the Explanation section are the application of Division 16K of Part III of the ITAA 1936, the holding period rule for franking credit purposes and the anti-avoidance provisions.

The buy-back is an off-market purchase

55. For the purposes of Division 16K of Part III of the ITAA 1936, where a company buys a share in itself from a shareholder, the purchase is a 'buy-back'.³⁰

56. Division 16K of Part III of the ITAA 1936 categorises a buy-back as either an 'on-market purchase' or an 'off-market purchase'.

57. A buy-back is an on-market purchase if the share bought back 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.³¹ A buy-back that is not an on-market purchase is an off-market purchase.³²

58. Although Woolworths shares are listed for quotation in the official list of the ASX, the buy-back was not made in the ordinary course of trading on the ASX. As a result, for the purposes of Division 16K of Part III of the ITAA 1936, the buy-back is an off-market purchase.³³

³⁰ Paragraph 159GZZZK(a) of the ITAA 1936.

³¹ Paragraph 159GZZZK(c) of the ITAA 1936.

³² Paragraph 159GZZZK(d) of the ITAA 1936.

³³ Paragraph 159GZZZK(d) of the ITAA 1936.

The buy-back price

59. The buy-back price you received consists of two components:

- a dividend component, and
- a capital component.

60. The amount of each of these components is determined in accordance with sections 159GZZZP and 159GZZZQ of the ITAA 1936, and has regard to how Woolworths accounted for the buy-back.

The dividend component

61. Section 159GZZZP of the ITAA 1936 provides that where the buy-back of a share is an off-market purchase, the difference between the purchase price and the part (if any) of the purchase price 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, out of profits derived by the company and on the day the buy-back occurs.

62. The buy-back price was \$28.94 per share, of which the capital component of \$4.79 was debited against amounts standing to the credit of Woolworths' share capital account. As a result, the dividend component paid by Woolworths on 27 May 2019 is taken to be \$24.15 per share.

63. The dividend component is a frankable distribution, but only to the extent that the buy-back price does not exceed the market value of a Woolworths share at the time of the buy-back if the buy-back did not take place and were never proposed to take place.³⁴

64. TD 2004/22 sets out the Commissioner's view as to how to determine what would have been the market value of a Woolworths share at the time of the buy-back if the buy-back did not occur and was never proposed to occur. Under the buy-back, the buy-back price per share did not exceed the market value determined in accordance with TD 2004/22. As a result, the entire dividend component is a frankable distribution. The tax treatment of the dividend component is outlined in paragraphs 10 to 14, and 16, of this Ruling.

The capital component – adjusted to calculate the sale consideration for income tax purposes

65. For the purposes of determining the amount of a gain or loss (for Woolworths shares held on capital account or revenue account), the consideration you received in respect of the disposal of a share (the sale consideration) under the buy-back is determined in accordance with section 159GZZZQ of the ITAA 1936. The effect of section 159GZZZQ is to adjust the capital component in order to determine the sale consideration for CGT or revenue account treatment.

66. Subsection 159GZZZQ(1) of the ITAA 1936 provides that you are taken to have received an amount equal to the purchase price (in this case the buy-back price of \$28.94 received for each Woolworths share bought back) as consideration in respect of the sale of the share bought back. However, this amount is subject to certain adjustments in order to arrive at the sale consideration.

67. Subsection 159GZZZQ(2) of the ITAA 1936 is one of the adjusting provisions. It provides that if the purchase price is less than the amount that would have been the

³⁴ Section 202-40 and paragraph 202-45(c) of the ITAA 1997.

market value of the share at the time of the buy-back if the buy-back did not occur and was never proposed to occur, you are taken to have received an amount equal to that market value of the share as consideration in respect of the sale of the share bought back.

68. For the purposes of determining the application of subsection 159GZZZQ(2) of the ITAA 1936, the following methodology has been proposed by Woolworths and accepted by the Commissioner as outlined in TD 2004/22 – the market value of a Woolworths share on 27 May 2019 is the VWAP of a Woolworths share on the ASX over the last five trading days before the announcement date (1 April 2019), adjusted for the percentage change in the S&P/ASX 200 Index from the commencement of trading on 1 April 2019 to the close of trading on the Closing Date of 24 May 2019.

69. Under this methodology, the market value of a Woolworths share bought back was calculated as \$31.65. As a result, you are taken to have instead received consideration of \$31.65 for the sale of each Woolworths share.

70. This deemed consideration of \$31.65 is reduced by a 'reduction amount'.³⁵ In the circumstances of the buy-back, the reduction amount is equivalent to the dividend component of \$24.15, unless you are a corporate tax entity to whom subsection 159GZZZQ(8) of the ITAA 1936 applies (see paragraph 72 of this Ruling).

71. As a result, the sale consideration for each Woolworths share disposed of under the buy-back is \$7.50 (being \$31.65 less \$24.15).

72. However, if you are a corporate tax entity which is entitled to a franking credit tax offset under Division 207 of the ITAA 1997 in respect of the dividend component, a further adjustment may be made to the sale consideration. Under subsection 159GZZZQ(8) of the ITAA 1936, if you would also make either a capital loss or a deductible loss (or any increase in such a loss) in respect of the sale of a Woolworths share bought back under the buy-back, the sale consideration is increased by an offsettable amount determined under subsection 159GZZZQ(9) of the ITAA 1936. The reduction amount (being the dividend component) is itself reduced by so much of the offsettable amount that does not exceed the capital loss or the deductible loss.

73. You are taken to have disposed of your shares accepted under the buy-back on 27 May 2019 (CGT event A1).³⁶ The disposal may have different taxation implications depending on how your shares were held, for instance:

- if you are an investor who held your shares on capital account, you will be subject to the CGT provisions (see paragraphs 21 to 24 of this Ruling), or
- if you are a share trader who held your shares on revenue account, you will be subject to the ordinary income provisions and the CGT provisions (see paragraphs 25 to 27 of this Ruling).

Qualified persons and the holding period rule

74. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked distribution made to an entity, only a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIA of the ITAA 1936 is required to include the franking credit in its assessable income and is entitled to claim the franking credit as a tax offset. Broadly speaking, to be a 'qualified person' in relation to the dividend component paid under the buy-back, you must satisfy the 'holding period rule'.³⁷

³⁵ Subsections 159GZZZQ(3) and (4) of the ITAA 1936.

³⁶ Section 104-10 of the ITAA 1997.

³⁷ Former section 160APHO of the ITAA 1936.

75. There are two versions of the holding period rule. The version that applies depends on whether or not there is a 'related payment'.³⁸ Broadly, there will be a related payment if you, or your associate, have done, are under an obligation to do, or may reasonably be expected to do, anything having the effect of passing the benefit of the dividend to one or more other persons.

76. The holding period rule requires you to hold the shares on which the dividend is paid for a continuous period of at least 45 days during the relevant qualification period. In the absence of a related payment, the relevant qualification period is the primary qualification period, which commences on the day after the shares are acquired and ends on the 45th day after the day on which the shares became *ex dividend*.³⁹

77. In determining whether you have satisfied the holding period rule, any days during which you have materially diminished risks of loss or opportunities for gain in respect of the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

78. You are taken to have materially diminished risks of loss or opportunities for gain in respect of shares or an interest in shares if your 'net position'⁴⁰ on a particular day in relation to the shares or interest has less than 30% of those risks and opportunities.⁴¹

79. The requirement to exclude any days on which you have materially diminished risks of loss or opportunities for gain in respect of shares or an interest in shares is often referred to in positive terms as requiring you to only count the days during the relevant qualification period on which you hold the shares or interest in shares 'at risk'.

80. Neither the announcement of the buy-back, the making of an invitation to you to offer to sell your Woolworths shares nor the making of an offer by you to Woolworths in respect of a Woolworths share will affect whether you had sufficient risks of loss or opportunities for gain in respect of the shares bought back under the buy-back.

81. There are at least 45 clear days between 4 April 2019 (the last day Woolworths shares could be acquired on-market with the right to participate in the buy-back) and 27 May 2019 (the date tender offers were accepted). As a result, if you acquired Woolworths shares on or before 4 April 2019 that were bought back under the buy-back, you will satisfy the holding period rule as long as those shares were held 'at risk' for at least 45 continuous days.

82. In addition, there are at least 45 clear days between 5 April 2019 (the day Woolworths shares were issued under the Dividend Reinvestment Plan) and 27 May 2019 (the date tender offers were accepted). As a result, if you acquired Woolworths shares under the Dividend Reinvestment Plan on 5 April 2019 that were bought back under the buy-back, you will satisfy the holding period rule as long as those shares were held 'at risk' for at least 45 continuous days.

83. If you acquired Woolworths shares after 4 April 2019 (other than Woolworths shares issued under the Dividend Reinvestment Plan on 5 April 2019), you cannot participate in the buy-back, and thus will not receive the dividend component of the buy-back price or the franking credits on the dividend component.

84. Generally, under the holding period rule you will be deemed to have disposed of your most recently acquired shares first.⁴² This is a 'last-in first-out' basis.

³⁸ Former section 160APHN of the ITAA 1936.

³⁹ Former section 160APHE of the ITAA 1936.

⁴⁰ Former subsection 160APHJ(5) of the ITAA 1936.

⁴¹ Former subsection 160APHM(2) of the ITAA 1936.

⁴² Former subsection 160APII(4) of the ITAA 1936.

85. Where you acquired ex-entitlement Woolworths shares and participated in the buy-back with cum-entitlement shares (which conferred an entitlement to participate in the buy-back), you will not be considered for the purposes of the holding period rule to be subject to the last-in first-out rule⁴³, and so will not be considered to have participated with the ex-entitlement shares. Ex-entitlement shares do not constitute 'related securities'⁴⁴ in relation to any cum-entitlement shares. Woolworths shares commenced trading on an ex-entitlement basis on 5 April 2019 (Buy-Back Tender Ex-entitlement Date).

86. Accordingly, the last-in first-out rule⁴⁵ will not apply to any additional Woolworths shares you acquired on or after 5 April 2019 (other than Woolworths shares issued under the Dividend Reinvestment Plan on 5 April 2019) because they did not confer an entitlement to participate in the buy-back.

The anti-avoidance provisions

Sections 45A and 45B of the ITAA 1936

87. 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 capital component you received under the buy-back would be treated as an unfranked dividend.

88. Section 45A of the ITAA 1936 applies where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the capital benefits than other shareholders, and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

89. Although the distribution of share capital of \$4.79 per share is the 'provision of a capital benefit'⁴⁶ to you under the buy-back, the circumstances of the buy-back indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. All shareholders who participated in the buy-back received both the capital component and the dividend component based on the number of shares they sold into the buy-back.

90. Accordingly, section 45A of the ITAA 1936 does not apply to the buy-back. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat all or part of the distribution of share capital of \$4.79 per share as an unfranked dividend paid by Woolworths.

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

- there is a scheme under which a person is provided with a capital benefit by a company⁴⁷
- under the scheme, a taxpayer (the 'relevant taxpayer'), who may or may not be the person provided with the capital benefit, obtains a tax benefit⁴⁸, and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose

⁴³ Former subsection 160APHI(4) of the ITAA 1936.

⁴⁴ Former subsection 160APHI(2) of the ITAA 1936.

⁴⁵ Former subsection 160APHI(4) of the ITAA 1936.

⁴⁶ Paragraph 45A(3)(b) of the ITAA 1936.

⁴⁷ Paragraph 45B(2)(a) of the ITAA 1936.

⁴⁸ Paragraph 45B(2)(b) of the ITAA 1936.

(whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit.⁴⁹

92. The conditions of paragraphs 45B(2)(a) and (b) of the ITAA 1936 were met in respect of the buy-back. However, having regard to the 'relevant circumstances'⁵⁰ of the buy-back, the Commissioner considers that the scheme consisting of the buy-back was not entered into or carried out for a more than incidental purpose of enabling the shareholders who participated in the buy-back to obtain a tax benefit. Some of the key factors are:

- the capital component (a distribution of share capital) of \$4.79 per share accords with the average capital per share methodology and could not be said to be attributable to the profits of Woolworths
- the pattern of distributions of Woolworths does not indicate that the distribution of share capital of \$4.79 per share reflects an amount in substitution for a dividend
- the buy-back is not expected to alter Woolworths's dividend policy, and
- as a consequence of the buy-back, the distribution of share capital resulted in the cancellation of Woolworths shares held by shareholders who participated in the buy-back and a corresponding loss of dividend, voting and other rights.

93. Accordingly, section 45B of the ITAA 1936 does not apply to the buy-back. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat all or part of the distribution of share capital of \$4.79 per share as an unfranked dividend paid by Woolworths.

Section 177EA of the ITAA 1936

94. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. This would include a buy-back with a franked dividend component.

95. Subsection 177EA(3) of the ITAA 1936 prescribes when section 177EA applies to a scheme. The conditions of paragraphs 177EA(3)(a) to (3)(d) are satisfied as the buy-back is a scheme involving the disposal of Woolworths shares in which there is a franked distribution and franking credits were received by shareholders who participated in the buy-back.

96. For section 177EA of the ITAA 1936 to apply, the requirements of paragraph 177EA(3)(e) must also be satisfied. In broad terms, paragraph 177EA(3)(e) requires that, 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.

97. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of Woolworths, its shareholders or any other relevant party, there is a more than incidental purpose of conferring an imputation benefit under the scheme. In respect of the buy-back, the relevant taxpayer is each shareholder who participated in the buy-back and the scheme consists of the buy-back and the circumstances surrounding the buy-back.

⁴⁹ Paragraph 45B(2)(c) of the ITAA 1936.

⁵⁰ Subsection 45B(8) of the ITAA 1936.

98. In arriving at a conclusion, the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed in subsection 177EA(17) encompass a range of circumstances which, taken individually or collectively, could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may not be present at any one time in a scheme.

99. The Commissioner has come to the view that section 177EA of the ITAA 1936 applies to the buy-back. In coming to this conclusion, the Commissioner has had regard to all the relevant circumstances of the scheme.⁵¹ Among the circumstances of the buy-back reflected in subsection 177EA(17) is the greater attraction of the buy-back to resident shareholders (because of the franking credits on the dividend component of the buy-back price) than to non-resident shareholders.

100. Where section 177EA of the ITAA 1936 applies, the Commissioner has a discretion under subsection 177EA(5) to make a determination to debit Woolworths' franking account pursuant to paragraph 177EA(5)(a), or deny the imputation benefit to each shareholder who participated in the buy-back pursuant to paragraph 177EA(5)(b). The Commissioner will exercise the discretion not to make a determination that the imputation benefit obtained by shareholders who participated in the buy-back will be denied under paragraph 177EA(5)(b).

Section 204-30 of the ITAA 1997

101. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of distributions, or the payment of distributions and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from section 204-30 would be, received by a member of the entity as a result of the distribution or distributions⁵²,
- (b) the member (the favoured member) would derive a greater benefit from franking credits than another member of the entity⁵³, and
- (c) the other member (the disadvantaged 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.⁵⁴

102. If section 204-30 of the ITAA 1997 applies, the Commissioner has a discretion under subsection 204-30(3) to make a determination either:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member⁵⁵,
- (b) that a specified exempting debit arises in the exempting account of the entity, for a specified distribution or other benefit to a disadvantaged member⁵⁶, or
- (c) that no imputation benefit is to arise in respect of a distribution that is made to a favoured member and specified in the determination.⁵⁷

⁵¹ Subsection 177EA(17) of the ITAA 1936.

⁵² Paragraph 204-30(1)(a) of the ITAA 1997.

⁵³ Paragraph 204-30(1)(b) of the ITAA 1997.

⁵⁴ Paragraph 204-30(1)(c) of the ITAA 1997.

⁵⁵ Paragraph 204-30(3)(a) of the ITAA 1997.

⁵⁶ Paragraph 204-30(3)(b) of the ITAA 1997.

⁵⁷ Paragraph 204-30(3)(c) of the ITAA 1997.

103. For section 204-30 of the ITAA 1997 to apply, shareholders who participated in the buy-back to whom distributions are streamed must derive a greater benefit from franking credits than other shareholders of Woolworths who did not participate in the buy-back. Some of the cases in which a member of an entity 'derives a greater benefit from franking credits' are listed in subsection 204-30(8) by reference to the ability of a member to fully utilise franking credits.

104. A portion of Woolworths' ordinary shares are held by non-resident shareholders who do not benefit from franking credits to the same extent as resident shareholders. As a result, the conditions in subsection 204-30(1) of the ITAA 1997 are satisfied. However, the Commissioner will not make a determination under subsection 204-30(3).

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NO: 1-H486LH3

ISSN: 2205-5517

BSL: PGI

ATOlaw topic Income tax ~~ Assessable income ~~ Dividend income ~~ Dividend income
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