

CR 2023/30 - Wesbeam Holdings Limited - selective off-market share buy-back

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Status: **legally binding**

Class Ruling

Wesbeam Holdings Limited – selective 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 penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for shareholders of Wesbeam Holdings Limited (Wesbeam) who participated in the selective off-market share buy-back (Buy-Back) of Wesbeam shares approved by shareholders at a general meeting on 10 January 2023.
2. Details of this scheme are set out in paragraphs 27 to 40 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (as detailed in the table in the Appendix to this Ruling), unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:
 - held ordinary shares in Wesbeam and sold some or all of those shares under the Buy-Back, and
 - held those shares on capital account; that is, you did not hold your Wesbeam shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)).
5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 27 to 40 of this Ruling.

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

When this Ruling applies

6. This Ruling applies from 1 July 2022 to 30 June 2023.

Ruling

Off-market purchase

7. The Buy-Back is an off-market purchase for the purposes of section 159GZZZK.

The dividend component

8. You are taken to have been paid a dividend of \$1.195 (Dividend Component) for each Wesbeam share you sold in the Buy-Back (subsection 159GZZZP(1)).

9. The Dividend Component is not a franked distribution in accordance with section 202-5 as Wesbeam did not allocate a franking credit to the dividend.

10. The difference between the purchase price of \$1.56 (Buy-Back Price) and the Dividend Component, being \$0.365 (Capital Component) is taken not to be a dividend (section 159GZZZM and subsection 159GZZZP(2)).

Assessability of the dividend component

Resident shareholders

11. If you are a resident individual, corporate tax entity or the trustee of a complying superannuation fund, you include the Dividend Component in your assessable income for the income year in which the Buy-Back occurs (paragraph 44(1)(a)).

12. You are not entitled to a tax offset under section 207-20 as the Dividend Component is not a franked distribution.

Partnerships

13. If you are a partnership, the Dividend Component is included in your net income (section 90 and paragraph 44(1)(a)).

Trusts

14. If you are the trustee of a trust, the Dividend Component is included in the net income of the trust (subsection 95(1) and paragraph 44(1)(a)).

Status: **legally binding**

Non-resident shareholders

15. If you are a non-resident who carries on a business at or through a permanent establishment in Australia and the Dividend Component is attributable to the permanent establishment and is not paid to you in your capacity as trustee:

- you include the Dividend Component in your assessable income (paragraph 44(1)(c)), and
- you are not liable to withholding tax on the Dividend Component (subsection 128B(3E)).

16. If you are a non-resident and paragraph 15 of this Ruling does not apply to you:

- you do not include the Dividend Component in your assessable income (section 128D), and
- you are liable to withholding tax on the whole amount of the Dividend Component as it is not franked to any extent (subsection 128B(1), paragraph 128B(3)(ga) and subsection 128B(4)).

Sale consideration

17. You are taken to have received or to be entitled to receive \$0.365 consideration in respect of each share you sold in the Buy-Back (Sale Consideration) (section 159GZZZQ).

Capital gains tax consequences

Resident shareholders

18. CGT event A1 happened to you at the time you executed your own agreement (Buy-Back Agreement) with Wesbeam to sell your shares under the Buy-Back (paragraph 104-10(3)(a)).

19. The Sale Consideration represents the capital proceeds for capital gains tax (CGT) purposes (subsection 116-20(1)).

20. If you did not hold your Wesbeam shares through a partnership, you made a capital gain from CGT event A1 happening if the Sale Consideration is more than the share's cost base. Alternatively, you made a capital loss if the Sale Consideration was less than the share's reduced cost base (subsection 104-10(4)).

21. If you made a capital gain, you can treat it as a 'discount capital gain', provided that:

- you are an individual, a complying superannuation entity or, subject to the rules in Subdivision 115-C, a trust (section 115-10)
- the capital gain was worked out using a cost base that was calculated without reference to indexation (subsection 115-20(1)), and
- you acquired, or were taken to have acquired, your Wesbeam share at least 12 months prior to CGT event A1 happening (subsection 115-25(1)).

22. If the share is held by a partnership, any capital gain or capital loss will be made by the partners individually (subsection 106-5(1)). Each partner has a separate cost base and reduced cost base for the partner's interest in each share sold under the Buy-Back by the partnership (subsection 106-5(2)).

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Foreign-resident shareholders

23. If you were a foreign-resident shareholder when you sold your Wesbeam shares under the Buy-Back, you will only have CGT consequences if the shares you sold were 'taxable Australian property' (section 855-10), in which case the consequences as described in paragraphs 17 to 22 of this Ruling will apply to you (subject to paragraph 25 of this Ruling).

24. The share will be taxable Australian property if:

- you have used it at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- the share is covered by subsection 104-165(3) (about choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident) (table item 5 of section 855-15).

25. A capital gain or capital loss you made from the sale of the share may be proportionately reduced if you used the share in carrying on a business through a permanent establishment for only part of the period from when you acquired the share until CGT event A1 happened because of the sale (section 855-35).

The anti-avoidance provisions

26. The Commissioner will not make a determination under subsection 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the Capital Component of the Buy-Back Price you received.

Scheme

27. 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.

Wesbeam Holdings Limited

28. Wesbeam is an unlisted Australian-resident public company and is the head company of a consolidated group for the purposes of Part 3-90.

29. Just before the Buy-Back, Wesbeam had 194,468,165 shares on issue held by 123 shareholders comprising a mix of individuals, companies, trusts, partnerships and superannuation funds. The majority of shareholders are considered small shareholders as they held less than 500,000 shares each. Two individual shareholders are considered the major shareholders as they together held 124,606,249 shares (approximately 64.1% of the total shares on issue). Wesbeam also had 40,650,610 share options outstanding, all with an expiry date of 31 December 2023. Of these, 6,250,000 were unvested employee options.

30. As at 30 June 2022, Wesbeam's franking account balance was nil.

31. At the time of the Buy-Back, Wesbeam's share capital account was not tainted for the purposes of Division 197.

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Off-market share buy-back

32. The Buy-Back was undertaken in accordance with Division 2 of Part 2J.1 of the *Corporations Act 2001*.
33. On 2 December 2022, Wesbeam notified the Australian Securities and Investment Commission and its shareholders of its intention to offer the Buy-Back.
34. The Buy-Back was offered to all shareholders except the 2 major shareholders. Participation in the Buy-Back was voluntary with small shareholders required to sell all their shares. The remaining shareholders were required to sell 500,000 of their shares.
35. A resolution in favour of the Buy-Back was agreed to by all shareholders at a general meeting held on 10 January 2023.
36. Each participating shareholder executed their own respective Buy-Back Agreement with Wesbeam under which they agreed to sell their shares to Wesbeam under the Buy-Back.
37. Wesbeam purchased 12,618,278 shares under the Buy-Back.
38. Participating shareholders received the Buy-Back Price for each share they sold in the Buy-Back.
39. The Buy-Back was completed in 3 tranches. Wesbeam settled the Buy-Back Agreements by cancelling the Wesbeam shares and making payment of the Buy-Back Price and returning the individual fully executed Buy-Back Agreements to each shareholder on 24 February 2023, 31 March 2023 and 28 April 2023.
40. Wesbeam's share capital account was debited by the Capital Component for each share bought back.

Commissioner of Taxation

7 June 2023

Status: **not legally binding**

Appendix – Legislative provisions

41. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(c)
<i>Income Tax Assessment Act 1936</i>	subsection 45A(2)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(3)
<i>Income Tax Assessment Act 1936</i>	section 45C
<i>Income Tax Assessment Act 1936</i>	section 90
<i>Income Tax Assessment Act 1936</i>	subsection 95(1)
<i>Income Tax Assessment Act 1936</i>	subsection 128B(1)
<i>Income Tax Assessment Act 1936</i>	paragraph 128B(3)(ga)
<i>Income Tax Assessment Act 1936</i>	subsection 128B(3E)
<i>Income Tax Assessment Act 1936</i>	subsection 128B(4)
<i>Income Tax Assessment Act 1936</i>	section 128D
<i>Income Tax Assessment Act 1936</i>	section 159GZZZK
<i>Income Tax Assessment Act 1936</i>	section 159GZZZM
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZP(1)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZP(2)
<i>Income Tax Assessment Act 1936</i>	section 159GZZZQ
<i>Income Tax Assessment Act 1997</i>	paragraph 104-10(3)(a)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(4)
<i>Income Tax Assessment Act 1997</i>	subsection 104-165(3)
<i>Income Tax Assessment Act 1997</i>	subsection 106-5(1)
<i>Income Tax Assessment Act 1997</i>	subsection 106-5(2)
<i>Income Tax Assessment Act 1997</i>	section 115-10
<i>Income Tax Assessment Act 1997</i>	subsection 115-20(1)
<i>Income Tax Assessment Act 1997</i>	subsection 115-25(1)
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-C
<i>Income Tax Assessment Act 1997</i>	subsection 116-20(1)
<i>Income Tax Assessment Act 1997</i>	Division 197
<i>Income Tax Assessment Act 1997</i>	section 202-5
<i>Income Tax Assessment Act 1997</i>	section 207-20
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	Part 3-90
<i>Income Tax Assessment Act 1997</i>	section 855-10

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<i>Income Tax Assessment Act 1997</i>	section 855-15
<i>Income Tax Assessment Act 1997</i>	section 855-35
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)
<i>Corporations Act 2001</i>	Division 2 of Part 2J.1

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References

ATO references

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