


# ***TR 2017/D3 - Income tax: taxation of rights and retail premiums under renounceable rights offers where shares held on capital account***

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## Draft Taxation Ruling

# Income tax: taxation of rights and retail premiums under renounceable rights offers where shares held on capital account

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### **📌 This publication provides you with the following level of protection:**

This publication is a draft for public comment. It represents the Commissioner’s preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don’t have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

## **Summary – what this ruling is about**

1. This Ruling is about the taxation of rights granted, and Retail Premiums paid, to retail shareholders in connection with renounceable rights offers.<sup>1</sup> It applies only to the extent the rights and Retail Premiums relate to shares held on capital account. It covers the tax treatment of Australian resident Eligible shareholders<sup>2</sup> and foreign resident Ineligible shareholders.

2. Shareholders covered by this Ruling do not need to include anything in their assessable income upon the grant of the Entitlement. Any retail premium received is treated as the realisation of a CGT asset.

3. This Ruling does not cover the application of Australia’s tax treaties.

<sup>1</sup> Taxation Ruling TR 2012/1 *Income tax: retail premiums paid to shareholders where share entitlements are not taken up or are not available* applies to non-renounceable rights offers.

<sup>2</sup> An Australian resident is a resident of Australia for income tax purposes, not a person with a registered address in Australia for the purpose of determining Eligible shareholders. An Australian resident with a registered address in a foreign country (other than New Zealand) may be an Ineligible shareholder. And a foreign resident with a registered address in Australia may be an Eligible shareholder. These two scenarios are outside the scope of this Ruling.

## Scheme

4. This Ruling applies to offers with the following features:
- Retail shareholders<sup>3</sup> are classified as either Eligible or Ineligible. Eligible shareholders are generally shareholders with a registered address in Australia or New Zealand. All other retail shareholders are generally Ineligible shareholders.
  - Each Eligible shareholder receives an Entitlement to be issued shares in the Company for an Offer Price (a fixed price per share). Eligible shareholders may do one or more of the following:
    - exercise all or part of their Entitlement,
    - sell all or part of their Entitlement (either on-market or off-market), or
    - do nothing.
  - The Entitlements of Eligible shareholders who do nothing<sup>4</sup> are offered for sale to investors in a retail bookbuild process.
  - Ineligible shareholders do not receive the same offer as Eligible shareholders.<sup>5</sup> Each Ineligible shareholder has an Entitlement to the number of shares which they would otherwise have been entitled to subscribe for, which must be offered for sale for their benefit in the retail bookbuild.<sup>6</sup> A nominee is appointed to sell the Entitlements to subscribe for shares on behalf of Ineligible shareholders in the retail bookbuild process.<sup>7</sup> The Entitlements cannot be exercised by Ineligible shareholders or sold on-market or off-market before the retail bookbuild.
  - A retail bookbuild takes place if the Company delivers a Retail Shortfall Notice to the underwriter. Investors bid to acquire and exercise Entitlements to subscribe for shares. Successful bidders pay the Retail Bookbuild Price.
  - The Retail Bookbuild Price is the total amount payable by an investor in respect of the acquisition and

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<sup>3</sup> Shareholders who are not institutional shareholders.

<sup>4</sup> An Eligible shareholder may do nothing in relation to the whole or part of their rights.

<sup>5</sup> In the case of an ASX listed company, it has the power under ASX listing rule 7.7.1 not to offer the rights to shareholders with registered addresses outside Australia and New Zealand.

<sup>6</sup> The descriptions of the Entitlements of Eligible and Ineligible shareholders is based on the definition of "Entitlement" in a small sample of Underwriting Agreements relating to Renounceable Rights offers.

<sup>7</sup> ASX listing rule 7.7.1.

exercise of an Entitlement to subscribe for shares. It comprises the Offer Price (payable to the Company as the subscription price for the shares) and the retail premium, if any, which is referable to the acquisition of the Entitlement to subscribe for shares.

- If the Retail Bookbuild Price exceeds the Offer Price, the underwriter pays, or procures payment, of the excess, less expenses and taxes, to the Company Registry (or other nominated party) which remits the funds to Eligible and Ineligible retail shareholders on behalf of whom the Entitlements were sold in the retail bookbuild. The amount remitted is known as the Retail Premium.

## Ruling

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### Part A – Australian Resident Eligible Shareholders

#### ***Non-assessable non-exempt income***

5. The market value of the Entitlements of Eligible shareholders at the time they are granted is non-assessable non-exempt income under section 59-40 of the *Income Tax Assessment Act 1997* (ITAA 1997).

#### ***Capital gains tax***

6. Each Entitlement, being a right to be issued shares, is a CGT asset. CGT event A1 happens when an Entitlement is transferred to a successful bidder under the retail bookbuild process. The Retail Premium represents capital proceeds from a CGT event. An Eligible shareholder will make a capital gain if the capital proceeds exceed the cost base of the Entitlement.

#### ***CGT discount***

7. An Eligible shareholder's Entitlements are 'rights' acquired from the Company for the purposes of section 130-45 of the ITAA 1997. Accordingly, an Eligible shareholder is taken to have acquired the rights when it acquired the original shares. Therefore, any capital gain may represent a discount capital gain so far as the Eligible shareholder's original shares have been held for 12 months or more.<sup>8</sup>

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<sup>8</sup> The other conditions which must be satisfied for a capital gain to be a discount capital gain are contained in Division 115 of the ITAA 1997. For example, the gain must be made by an individual, complying superannuation fund, trust or a life insurance company (in respect of a limited range of assets).

## ***Not ordinary income***

8. Retail Premiums paid to Eligible shareholders are not ordinary income for the purpose of section 6-5 of the ITAA 1997.

## ***Not dividends***

9. Retail Premiums paid to Eligible shareholders are not dividends.

## **Part B – Foreign resident Ineligible Shareholders**

### ***Non-assessable non-exempt income***

10. The market value of the Entitlements of Ineligible shareholders at the time they are granted is non-assessable non-exempt income under section 59-40 of the ITAA 1997.

### ***Not ordinary income***

11. Retail Premiums paid to Ineligible shareholders are not ordinary income for the purpose of section 6-5 of the ITAA 1997.

### ***Capital gains tax***

12. Each Entitlement, being a right to have offered for sale the number of rights to subscribe for shares which the Ineligible shareholder would otherwise have been entitled to be issued, is a CGT asset. CGT event C2 happens when the right to subscribe for the relevant number of shares is allocated to a successful bidder under the retail bookbuild process. The Retail Premium represents capital proceeds from a CGT event. An Ineligible shareholder will make a capital gain if the capital proceeds exceed the cost base of the Entitlement.

13. Any capital gain is disregarded if the conditions in subsection 855-10(1) of the ITAA 1997 are satisfied.<sup>9</sup>

### ***CGT discount***

14. The CGT discount is generally not available to a foreign resident in respect of a CGT event which happens after 8 May 2012.<sup>10</sup>

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<sup>9</sup> A detailed account of the application of Subdivision 855-A is outside the scope of this Ruling.

<sup>10</sup> A detailed account of the application of the CGT discount rules to foreign residents is outside the scope of this Ruling.

***Not dividends***

15. The Retail Premiums paid to Ineligible shareholders are not dividends.

***No withholding tax obligations***

16. There is no withholding tax obligation for the Company in respect of Retail Premiums paid to foreign resident Ineligible shareholders.

**Date of effect**

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17. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**10 May 2017

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## Appendix 1 – Explanation

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

### Part A – Australian Resident Eligible Shareholders

#### **Non-assessable non-exempt income**

18. Entitlements granted to an Eligible shareholder because of its ownership of original shares in the Company constitute rights for the purpose of section 59-40 of the ITAA 1997. Accordingly, the market value of the Entitlements at the time they are granted is non-assessable non-exempt income under section 59-40.

#### **Not ordinary income**

19. The sale of the Entitlements in the retail bookbuild process is the mere realisation of a capital asset. Therefore, Retail Premiums are not ordinary income.<sup>11</sup>

#### **Capital gains tax**

20. A CGT asset is ‘any kind of property; or a legal or equitable right that is not property.’<sup>12</sup> An Entitlement of an Eligible shareholder is a CGT asset, being a right to subscribe for shares. CGT event A1 happens when an Entitlement is transferred because a change of ownership occurs. The Retail Premium is the capital proceeds from the event because it represents money received in respect of the transfer. As Entitlements are granted to Eligible shareholders for nil consideration, the cost base of an Entitlement would generally be limited to any incidental costs.

#### **Not dividends**

21. The term ‘dividend’ includes a distribution by a company to any of its shareholders and any amount credited by a company to any of its shareholders as shareholders.<sup>13</sup>

22. The subscription amount for new shares issued upon the exercise of Entitlements acquired under a Retail Bookbuild is the Offer Price only. This amount is paid to the Company as a contribution to share capital.

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<sup>11</sup> *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355; (1982) 56 ALJR 240; (1982) 39 ALR 521; (1982) 12 ATR 692; 82 ATC 4031; [1982] HCA 8 and *Federal Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199; (1987) 61 ALJR 270; (1987) 71 ALR 28; (1987) 18 ATR 693; 87 ATC 4363; [1987] HCA 18..

<sup>12</sup> Subsection 108-5(1) of the ITAA 1997.

<sup>13</sup> Definition of ‘dividend’ in subsection 6(1) of the *Income Tax Assessment Act 1936*.

23. The money paid to shareholders as Retail Premiums is not paid out of the subscription moneys. It is paid out of the excess of the Retail Bookbuild Price over the Offer Price. Typically, under the terms of the relevant deed poll, the Underwriter (or such body) is required to remit (directly or via a body such as the Company Registry) the excess, if any, to the relevant shareholders.

24. The Retail Premiums are referable to the proceeds of sale of the Entitlements.

25. Similarly, the payment of Retail Premiums does not represent a distribution of any of the assets of the Company.

### **Part B – Foreign resident Ineligible Shareholders**

#### ***Non-assessable non-exempt income***

26. Entitlements held by nominees to be sold on behalf of Ineligible shareholders constitute rights issued to Ineligible shareholders for the purposes of section 59-40 of the ITAA 1997. Accordingly, the market value of the Entitlements at the time they are granted is non-assessable non-exempt income under section 59-40.

#### ***Not ordinary income***

27. The Retail Premiums represent proceeds from the mere realisation of a capital asset for example, the right to have an Entitlement offered for sale by the nominee for the Ineligible shareholder's benefit. Accordingly, the Retail Premiums are not ordinary income.

#### ***Capital gains tax***

28. Each Entitlement of an Ineligible shareholder is a CGT asset, being a right to have offered for sale the right to subscribe for that number of shares for which the Ineligible shareholder would otherwise have been entitled to subscribe. CGT event C2 happens when the shareholder's ownership of the asset comes to end for example, when the right to subscribe for the relevant shares is allocated to a successful bidder(s) under the retail bookbuild process. The Retail Premium is the capital proceeds from the event because it represents money received in respect of the event happening. As Entitlements are granted to Ineligible shareholders for nil consideration, the cost base of the Entitlement would generally be limited to any incidental costs.

## ***No withholding tax obligations***

29. Section 12-140 of Subdivision 12-E of Part 2-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) provides that an investment body must withhold an amount from a payment it makes to another entity in respect of a Part VA investment if all or some of the payment is ordinary income or statutory income of the other entity.

30. Any capital gains which are not disregarded under Subdivision 855-A of the ITAA 1997 would represent statutory income. However, section 12-140 of Schedule 1 to the TAA 1953 only applies to payments made by the Company (an 'investment body' as defined in section 202D of the *Income Tax Assessment Act 1936* (ITAA 1936)).

31. As outlined above, the Retail Premium payments are not made by the Company. The Company is entitled to the subscription moneys only (equal to the Offer Price). The Retail Premiums are not paid out of the subscription moneys.

## **Appendix 2 – Your comments**

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32. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

33. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments, and
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 9 June 2017  
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**Appendix 3 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; TR 2012/1

*Legislative references:*

- ITAA 1936
- ITAA 1936 202D
- ITAA 1936 6(1)
- ITAA 1936 Pt VA
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 59-40
- ITAA 1997 Div 115
- ITAA 1997 108-5(1)
- ITAA 1997 130-45
- ITAA 1997 Subdiv 855-A
- ITAA 1997 855-10(1)

- TAA 1953
- TAA 1953 Subdiv 12-E
- TAA 1953 12-140
- TAA 1953 Pt 2-5 Sch 1

*Cases relied on:*

- Federal Commissioner of Taxation v Whitfords Beach Pty Ltd (1982) 150 CLR 355; (1982) 56 ALJR 240; (1982) 39 ALR 521; (1982) 12 ATR 692; 82 ATC 4031; [1982] HCA 8
- Federal Commissioner of Taxation v Myer Emporium Ltd (1987) 163 CLR 199; (1987) 61 ALJR 270; (1987) 71 ALR 28; (1987) 18 ATR 693; 87 ATC 4363; [1987] HCA 18

## ATO references

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