

CR 2004/32 - Income tax: off-market share buy-back: Mayne Group Limited

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Class Ruling

Income tax: off-market share buy-back: Mayne Group Limited

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax laws**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a ‘public ruling’ and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law(s)’ identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax laws dealt with in this Class Ruling are:
- Section 45A of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - Section 45B of the ITAA 1936;
 - Section 45C of the ITAA 1936;
 - Section 159GZZZP of the ITAA 1936; and
 - Section 159GZZZQ of the ITAA 1936.

Class of persons

3. The class of persons to which this Ruling applies is the ordinary shareholders (‘Participating Shareholders’) of Mayne Group Limited (‘Mayne’) who disposed of Mayne ordinary shares under the Mayne off-market buy-back (‘the Buy-Back’) first announced on 2 December 2003 and in respect of which a more detailed announcement was made on 30 January 2004. The Buy-Back occurred

on 22 March 2004 and is described in the Arrangement part of this Ruling.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described below at paragraphs 10 to 23.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:
 - this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

8. This Ruling applies to the year ended 30 June 2004. Furthermore, this Ruling only applies to the extent that:
 - it is not later withdrawn by Gazette;
 - it is not taken to be withdrawn by an inconsistent later public ruling; or
 - the relevant tax laws are not amended.

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 30 June 2004. However, the Ruling continues to apply after its withdrawal in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement during the term of the Ruling, subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Arrangement

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- the application for Class Ruling dated 18 August 2003;
- correspondence from Mayne dated 29 October 2003, 10 November 2003 and 21 January 2004;
- Mayne's Annual Review for the year ended 30 June 2003; and
- Mayne's Financial Report for the year ended 30 June 2003.

Note: Mayne has provided certain information on a commercial-in-confidence basis that will not be disclosed under the Freedom of Information Legislation.

11. On 2 December 2003, Mayne first announced its intention to undertake the Buy-Back. A more detailed announcement of the buy-back occurred on 30 January 2004 when Mayne indicated its timetable and process to seek shareholder approval in order to buy-back up to 180 million ordinary shares through on-market and off-market buy-backs.

12. As at the record date for participation in the Buy-Back, being 26 February 2004, Mayne had 739,327,859 ordinary shares on issue. There were no other classes of share on issue.

13. Mayne operates various businesses and has recently divested its hospitals business. Although Mayne has realised an accounting loss on the sale of its hospitals business, including the accounting write-down in the financial year ended 30 June 2003, the net sale proceeds have substantially added to the excess funds within the group.

14. Mayne has stated that the purpose of the Buy-Back is to achieve a more efficient capital structure, and to return to shareholders the portion of capital reflective of the assets that will no longer form part of the ongoing business. Mayne has already bought back more than 10 per cent of its share capital on-market. The current off-market Buy-Back is another part of this continuing program. By executing the Buy-Back Mayne hoped to improve its key capital management targets, by increasing its earnings per share and return on equity. In essence, the Buy-Back was funded from the net proceeds from the sale of the hospitals business.

15. The Buy-Back was implemented through a tender process and participation by shareholders was voluntary. Shareholders not wishing to participate in the Buy-Back were not required to do anything. Implementation of the Buy-Back program was subject to obtaining shareholder approval, which Mayne sought at a General Meeting held on 4 March 2004.

16. The tender period opened on 4 March 2004 and closed at 7:00p.m 19 March 2004 (Buy-Back Period). Under the tender process Mayne shareholders were invited to tender up to 100% of their shareholding at specified prices within a tender price range of \$2.80 to \$4.00.

17. Shareholders could also tender their shares as a 'Final Price Tender'. A Final Price Tender enables a shareholder to elect to receive the final 'Buy-Back Price', whatever it is determined to be by the tender process. All Final Price Tenders will be accepted in priority to other tenders at nominated prices above the lowest price in the specified tender price range.

18. The Buy-Back Price is the lowest price, within the tender price range, that allowed Mayne to purchase the number of shares that it actually decided to buy-back. Only shareholders who tendered shares at or below the Buy-Back Price had their shares bought back. All Mayne shareholders whose tenders were successful received the same Buy-Back Price. Tenders at prices above the Buy-Back Price were not accepted.

19. A scale back mechanism would have operated in the event that the number of shares tendered at or below the Buy-Back Price (including Final Price Tenders) exceeded the number of shares that Mayne decided to buy-back.

20. All of the Buy-Back consideration will be debited against Mayne's share capital account.

21. Mayne has confirmed that there have not been any transfers to its Contributed Equity that would constitute a tainting of its share capital account for the purposes of Division 7B of Part IIIAA of the ITAA 1936.

22. Shareholders' equity disclosed in Mayne's Statement of Financial Position as at 31 December 2003 is as follows:

Shareholders' Equity	Consolidated
	\$A,000
Contributed Equity [Share Capital Account]	3,199,011
Reserves	(35,200)
Accumulated Losses	(276,049)
Total Mayne Group Limited Equity Interest	2,887,762
Outside Equity Interests	6,947
Total Equity	2,894,709

Consolidated accumulated losses included asset write-downs, in the financial year ended 30 June 2003, of \$350m of which \$270m related to the hospitals business. The net proceeds from the sale of the hospitals business were broadly in line with the written down values.

23. On 22 March 2004 Mayne announced that:

- \$101.3 million shares were acquired by way of the Buy-Back for \$359.7 million;
- Mayne determined the Buy-Back Price to be \$3.55; and
- All shareholders who tendered shares into the Buy-Back at any of the specified tender prices from \$2.80 to \$3.55 inclusive, or as a Final Price Tender, would receive \$3.55 as the Buy-Back Price.

Ruling

Purchase price in respect of each bought-back share

24. As the entire purchase price in respect of the shares acquired through the Buy-Back is debited against Mayne's share capital account, Participating Shareholders will not be taken to have been paid a dividend under section 159GZZZP of the ITAA 1936, under the law in force at the date of issue of this Ruling.

25. The Government has announced its intention to introduce laws with effect from 1 July 2002 dealing with the tainting of share capital accounts [Minister for Revenue and Assistant Treasurer's Press Release C104/02 of 27 September 2002]. Although such laws may be

relevant to the application of section 159GZZZP, this Ruling does not extend to the application of these proposed laws.

Consideration in respect of the sale of bought-back shares

26. Participating Shareholders will be taken to have received \$3.55 per share as consideration in respect of the sale of each of their shares under section 159GZZZQ of the ITAA 1936.

27. The treatment of this consideration amount for tax purposes will depend on whether the sale is on capital account (that is, where the shares are held for investment) or on revenue account (for example, where the shares are turned over in the course of a share trading business). In general, the relevant treatment should be as follows:

(a) Shares held on capital account:

- The amount by which the capital proceeds, being \$3.55, exceeds the cost base of each share will be a capital gain under Part 3-1 of the ITAA 1997. If the reduced cost base of the share exceeds \$3.55, the difference will be a capital loss under Part 3-1 of the ITAA 1997.

(b) Shares held on revenue account:

- The amount by which the consideration on disposal, being \$3.55, exceeds the cost of each share will be included in the shareholder's assessable income under section 6-5 of the ITAA 1997. Correspondingly, if the cost exceeds \$3.55, the difference will be a deductible loss under section 8-1 of the ITAA 1997.

Specific Anti-Avoidance Provisions

28. The Commissioner will not make a determination under sections 45A or 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the Buy-Back Price received by Participating Shareholders.

Explanation

Income tax treatment of the Buy-Back

29. The purchase by Mayne of its shares under the Buy-Back is an off-market purchase for the purposes of Division 16K of the ITAA 1936. This characterisation follows from the definitions contained in sections 159GZZZJ and 159GZZZK of the ITAA 1936.

Purchase price in respect of each bought-back share

30. Under section 159GZZZM of the ITAA 1936, the purchase price in respect of shares acquired through the Buy-Back is the amount of money the Participating Shareholder received as a result of or in respect of the Buy-Back.

31. Under section 159GZZZP of the ITAA 1936, the purchase price contains a dividend component only if the Buy-Back Price exceeds the amount debited against the company's share capital account. *Share capital account* is defined in subsection 6(1) of the ITAA 1936 as having the meaning given by section 6D of the ITAA 1936, which in turn defines the term as an account which the company keeps of its share capital, or any other account created after 1 July 1998 where the first amount credited to the account was an amount of share capital.

32. Subsection 6D(3) states that an account is not a share capital account if it is tainted for the purposes of Division 7B of Part IIIAA of the ITAA 1936. An account, that would otherwise be a share capital account, is tainted for the purposes of Division 7B if an amount is transferred from another account except in the circumstances provided for by section 160ARDM of the ITAA 1936. Mayne has confirmed that there have been no transfers that have tainted its share capital account under that rule, which applies to transfers before 1 July 2002.

33. Under the law as presently enacted, the Buy-Back price of \$3.55 will be debited entirely against Mayne's share capital account, and therefore no part of the purchase price will be taken to be a dividend for income tax purposes.

34. The Government has announced its intention to introduce laws dealing with the tainting of share capital accounts [Minister for Revenue and Assistant Treasurer's Press Release C104/02 of 27 September 2002]. Although such laws may be relevant to the application of section 159GZZZP, this Ruling does not extend to the application of these proposed laws.

Consideration in respect of the sale of bought-back shares

35. Participating Shareholders will be taken to have received consideration in respect of the sale of each of their shares equal to \$3.55 under subsection 159GZZZQ(1) of the ITAA 1936.

Participating Shareholders are taken to have disposed of those shares accepted under the Buy-Back on 22 March 2004.

36. The disposal of shares under the Buy-Back may have different income tax implications for shareholders depending on how the shares were held. For instance:

- an investor holding their shares on capital account will only be subject to the provisions dealing with capital gains and losses; but
- a trader holding their shares on revenue account will also be subject to the ordinary income provisions.

It should be noted that where both the ordinary income tax provisions and the capital gains provisions apply, the amount of the capital gain will be reduced under the anti-overlap provisions in section 118-20 of the ITAA 1997 by the amount included in assessable income.

37. For the purposes of computing the amount of the gain or loss (either on capital or revenue account) in these cases, the consideration in respect of the sale of a share under the Buy-Back that Participating Shareholders will be taken to have received will be \$3.55, as determined by Mayne under the tender process.

Specific Anti-Avoidance Provisions

38. As the Buy-Back price is to be debited entirely against Mayne's share capital account, the consideration received by Participating Shareholders will be treated wholly as a distribution of share capital.

39. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination under section 45C that all or part of the distribution of share capital to a shareholder is treated as an unfranked distribution.

Section 45A of the ITAA 1936

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

41. Under paragraph 45A(3)(b), the Buy-Back Price received by the Participating Shareholders would constitute the *provision of a capital benefit* within the meaning conveyed by subsection 45A(4). However, it is not reasonable to assume that other shareholders will instead receive dividends.

42. Although a capital benefit will be provided to Participating Shareholders, the circumstances of the Buy-Back do not indicate that there is a streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly, section 45A will not apply to the Buy-Back.

Section 45B of the ITAA 1936

43. Section 45B of the ITAA 1936 applies where certain capital payments are made to shareholders in substitution for dividends. Specifically, the provision applies where:

- (a) there is a scheme under which a person is provided with a capital benefit by a company [paragraph 45B(2)(a)];
- (b) under the scheme a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit [paragraph 45B(2)(b)]; and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit [paragraph 45B(2)(c)].

44. Under the Buy-Back (which is a *scheme* within the broad meaning of that term under subsection 45B(10)), Mayne will *provide a capital benefit* to Participating Shareholders. The distribution of share capital constitutes the provision of a capital benefit within the meaning conveyed by subsection 45B(5).

45. As some Participating Shareholders will derive either a capital gain or capital loss from the sale of their shares under the Buy-Back, they will pay less income tax than if the Buy-Back consideration had been a dividend. Some Participating Shareholders will therefore obtain a tax benefit within the meaning conveyed by subsection 45B(9).

46. In this case, while the conditions of paragraphs 45B(2)(a) and (b) would be taken to have been met, the requisite purpose of enabling a shareholder to obtain a tax benefit by way of capital distribution would not be present.

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47. Paragraph 45B(2)(c) requires a ‘more than incidental’ purpose of enabling a taxpayer to obtain a tax benefit. A reference to such a purpose is usually understood to include any main or substantial purpose of the scheme. Circumstances which are relevant in determining whether any person has the requisite purpose include the factors listed in subsection 45B(8).

48. However, having regard to the relevant circumstances of the scheme, it cannot be concluded that a person would enter into, or carry out, the Buy-Back for a more than incidental purpose of enabling a Mayne shareholder to obtain a tax benefit. Further, the Buy-Back consideration cannot be said to be attributable to the profits of the company, nor do the pattern of distributions by Mayne indicate that it is being paid in substitution for a dividend. Accordingly, section 45B does not apply to the Buy-Back.

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

Detailed contents list

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Commissioner of Taxation

7 April 2004

<i>Previous draft:</i>	- ITAA 1936 45B
Not previously issued as a draft	- ITAA 1936 45B(2)(a)
	- ITAA 1936 45B(2)(b)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 45B(2)(c)
CR 2001/1; TR 92/1; TR 97/16	- ITAA 1936 45B(5)
	- ITAA 1936 45B(8)
<i>Subject references:</i>	- ITAA 1936 45B(9)
- share buy-backs	- ITAA 1936 45B(10)
- capital streaming	- ITAA 1936 45C
- share capital	- ITAA 1936 159GZZZJ
- return of capital on shares	- ITAA 1936 159GZZZK
	- ITAA 1936 159GZZZM
<i>Legislative references:</i>	- ITAA 1936 159GZZZP
- ITAA 1936 6(1)	- ITAA 1936 160ARDM
- ITAA 1936 6D	- ITAA 1997 6-5
- ITAA 1936 6D(3)	- ITAA 1997 8-1
- ITAA 1936 Div 7B	- ITAA 1997 Part 3-1
- ITAA 1936 Div 7B Pt IIIAA	- ITAA 1997 118-20
- ITAA 1936 45A	- TAA 1953 Part IVAAA
- ITAA 1936 45A(3)(b)	- Copyright Act 1968
- ITAA 1936 45A(4)	

ATO references

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