


CR 2007/52 - Income tax: Selective Capital Reduction: Bridgestone Australia Ltd

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Class Ruling

Income tax: Selective Capital Reduction: Bridgestone Australia Ltd

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ⓘ This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 160APHO of the ITAA 1936;
- subsection 160APHM(2) of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-25 of the ITAA 1997;

- Division 116 of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- section 118-25 of the ITAA 1997;
- section 202-5 of the ITAA 1997;
- section 202-45 of the ITAA 1997 (excluding paragraph 202-45(e));
- section 204-30 of the ITAA 1997;
- section 207-145 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of Bridgestone Australia Limited (BSAL), a publicly listed company, who had their shares cancelled under the Selective Capital Reduction which was announced by BSAL on 12 December 2006 and described in the Scheme part of this Ruling. In this Ruling, this class of entities are referred to as 'eligible shareholders'.

4. The class of entities to which this Ruling applies does not include BSAL. The Ruling does not deal with how the taxation law applies to BSAL in relation to the capital reduction.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. This Ruling does not consider paragraph 202-45(e) of the ITAA 1997.

7. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 15 to 22 of this Ruling.

8. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Robert Garran Offices
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Barton ACT 2600

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Date of effect

10. This Ruling applies from 1 July 2006 to 30 June 2007. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

11. The Ruling does 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

12. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

13. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

14. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

15. The scheme that is the subject of this Ruling is described in paragraphs 15 to 22 of this Ruling. This description is based on the following documents listed below. 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 scheme are:

- the application for a Class Ruling dated 3 August 2006;
- correspondence from Cowell Clarke dated
13 September 2006, 3 October 2006,
12 October 2006, 17 October 2006,
16 November 2006, 1 December 2006,
8 December 2006, 11 December 2006,
12 December 2006, 20 March 2007 and 15 May 2007;
and
- announcements published on the Australian Stock Exchange (ASX) and BSAL's websites dated
12 December 2006, 29 January 2007; 2 March 2007,
20 March 2007 and 30 April 2007.

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

16. BSAL is an Australian incorporated company listed on the Australian Stock Exchange (ASX). The shareholders in BSAL are a mix of resident and non-resident companies, trusts, superannuation funds and individuals. As at 18 January 2007, BSAL had 36,519,448 fully paid ordinary shares on issue.

17. On 12 December 2006, BSAL announced that it proposed to undertake a Selective Capital Reduction by way of a share cancellation. The proposal was to cancel all shares in BSAL not held by the holding company, effectively privatising the company. BSAL announced it would outlay approximately \$49.3 million to implement the proposed capital reduction of approximately 14.5 million shares. The proposed selective capital reduction by way of a share cancellation was subject to shareholder approval.

18. The purpose of the Selective Capital Reduction is to:

- (a) provide management with greater flexibility in its decision-making and to allow management to focus on managing the company rather than managing public market reactions;
- (b) to enable savings in administration and compliance costs; and
- (c) to provide an efficient means by which shareholders can realise their investment.

19. BSAL announced it would cancel the shares that are not held by the majority shareholder and their associated entities for \$3.40 per share. Under the Selective Capital Reduction, \$0.50 of this amount was debited to BSAL's share capital account and the balance of the capital reduction amount of \$2.90 was debited to BSAL's retained profits.
20. On 20 March 2007, BSAL shareholders approved the Selective Capital Reduction proposal.
21. The last day shares in BSAL were traded on the ASX was 4 May 2007.
22. BSAL cancelled 14,485,970 shares on 11 May 2007.

Ruling

Dividend

Part of the Distribution is a Dividend for income tax purposes

23. The amount paid by BSAL to an eligible shareholder in respect of the cancellation of a share (Cancellation Consideration) is a distribution made by the company. The distribution will be a dividend to the extent that it is not debited to BSAL's share capital account (paragraphs (a) and (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936). As \$0.50 of the Cancellation Consideration was debited against BSAL's share capital account, the eligible shareholder received a dividend of \$2.90 (the Dividend) for each share cancelled.

24. The Dividend is a frankable distribution, and capable of being franked under section 202-5 of the ITAA 1997, to the extent that it is not an unfrankable distribution under section 202-45 of the ITAA 1997. The Dividend is not an unfrankable distribution under paragraphs 202-45(a) to (d) and 202-45(f) to (j) of the ITAA 1997. However this Ruling does not consider whether the Dividend is unfrankable under paragraph 202-45(e) of the ITAA 1997.

Qualified persons

25. For the purposes of Division 1A of Part IIIAA of the ITAA 1936 eligible shareholders are considered to have satisfied the holding period rule under section 160APHO of the ITAA 1936 and therefore be qualified persons (as long as the related payments rule is also met) in relation to the Dividend received under the Selective Capital Reduction if:

- (a) the shares cancelled under the Selective Capital Reduction were acquired on or before 26 March 2007;
- (b) the eligible shareholder has no other positions (for example, an option) in relation to the shares disposed of by way of share cancellation; and

- (c) the eligible shareholder or an associate of the eligible shareholder has not made, is not under an obligation to make, nor is likely to make, any related payments.

26. An eligible shareholder who acquired shares after 26 March 2007 that were subsequently cancelled is not a qualified person in relation to the Dividend paid in respect of those shares.

Capital gains tax

27. The cancellation of BSAL shares under the scheme constitutes a CGT event C2 for each eligible shareholder (section 104-25 of the ITAA 1997).

28. The CGT event C2 happened on 11 May 2007, being the date on which the shares were cancelled under the Selective Capital Reduction (subsection 104-25(2) of the ITAA 1997).

29. Eligible shareholders received \$3.40 as capital proceeds in respect of the cancellation of each of their shares on 11 May 2007 (paragraph 116-20(1)(a) of the ITAA 1997). The capital proceeds will be replaced with the market value of the shares if the capital proceeds are more or less than the market value of the shares on 11 May 2007 (subparagraph 116-30(2)(b)(ii) of the ITAA 1997). In the particular circumstances of this case the Commissioner accepts that the capital proceeds of \$3.40 are commensurate with market value.

30. To the extent that the capital proceeds exceed the cost base of the BSAL shares, a capital gain will result; to the extent that the reduced cost base of the BSAL shares exceeds the capital proceeds, a capital loss will arise (subsection 104-25(3) of the ITAA 1997).

31. To the extent that some part of the capital gain arising from CGT event C2 happening to the BSAL shares is included in the assessable income of the eligible shareholder as an assessable dividend, the capital gain will be reduced (subsection 118-20(1) of the ITAA 1997).

32. A foreign resident BSAL shareholder who has a right to the payment of the Selective Capital Reduction and makes a capital gain or loss from CGT event C2 happening to that right can disregard that capital gain or loss if the right is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Shares held as trading stock

33. Where the shares are held as trading stock, the Cancellation Consideration of \$3.40 is included in assessable income under section 6-5 of the ITAA 1997.

34. A capital gain or capital loss made from a CGT asset held as trading stock is disregarded (paragraph 118-25(1)(a) of the ITAA 1997).

The anti-avoidance provisions

35. The Commissioner will not make a determination under subsection 45A(2) 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 amount of the Selective Capital Reduction price received by eligible shareholders.

36. The Commissioner will not make a determination under subsection 177EA(5) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received in relation to the Dividend received under the Selective Capital Reduction by eligible shareholders.

37. The Commissioner will not make a determination under subsection 204-30(3) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received in relation to the Dividend received under the Selective Capital Reduction by eligible shareholders.

Commissioner of Taxation13 June 2007

Appendix 1 – Explanation

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

The Dividend and Capital Component

38. The Cancellation Consideration received by an eligible shareholder for each share cancelled under the Selective Capital Reduction comprises two elements:

- a Dividend; and
- a Capital Component.

The amount of these components is determined in accordance with the definition of 'dividend' in subsection 6(1) of the ITAA 1936, having regard to how the company accounts for the Selective Capital Reduction.

Dividend

39. The definition of 'dividend' in subsection 6(1) of the ITAA 1936 has the effect that any distribution made by the company to any of its shareholders, whether in money or property, is a dividend except where the distribution is debited against an amount standing to the credit of the share capital account of the company (paragraphs (a) and (d) of the definition). The Cancellation Consideration of \$3.40 per share was a distribution made by BSAL to its eligible shareholders and \$0.50 was debited to the share capital account (Capital Component). As the remainder of the Cancellation Consideration was debited to retained earnings, the shareholders received a Dividend of \$2.90 per share.

Qualified person

40. Paragraph 207-145(1)(a) of the ITAA 1997 provides that, in relation to a franked distribution, an entity that is not a 'qualified person' in relation to the distribution for the purposes of Division 1A of Part IIIAA of the ITAA 1936 is denied a gross-up and a tax offset. Broadly speaking, to be a 'qualified person' in relation to the dividend paid under the Selective Capital Reduction, the shareholder must satisfy both the holding period rule and the related payments rule.

41. Broadly, a shareholder will not satisfy the related payments rule if the shareholder, or associate of the shareholder, is under an obligation to make, or makes, a payment in respect of the dividend which effectively passes the benefit of the dividend to another person.

42. The holding period rule requires shareholders to hold the shares, or the interest in the shares, on which the dividend is paid at risk for a continuous period of at least 45 days. In determining whether a shareholder has satisfied the holding period rule, any days

during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

43. Under subsection 160APHM(2) of the ITAA 1936, a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the 'net position' of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares.

44. In this case, the Commissioner does not regard the announcement of the Selective Capital Reduction by way of share cancellation as affecting whether the shares or an interest in shares was held at risk or not. The Commissioner is satisfied that, by virtue of the *Corporations Act 2001*, BSAL shares were held at risk until the date of cancellation.

45. There are 45 clear days between 26 March 2007 and 11 May 2007. Therefore, an eligible shareholder who acquired shares on or after 27 March 2007 will not satisfy the holding period rule. Only shares purchased on or before 26 March 2007 satisfies the holding period rule as long as those shares were held at risk for at least 45 continuous days. An eligible shareholder who acquired shares after 26 March 2007 that were subsequently cancelled under the Selective Capital Reduction is not a qualified person in relation to the dividend paid under the Selective Capital Reduction for the purposes of Division 1A of Part IIIAA of the ITAA 1936.

Capital gains tax

46. The cancellation of BSAL shares under the scheme constitutes a CGT event C2 for each eligible shareholder (section 104-25 of the ITAA 1997).

47. The CGT event C2 happened on 11 May 2007, being the date on which the shares were cancelled under the Selective Capital Reduction (subsection 104-25(2) of the ITAA 1997).

48. Eligible shareholders received \$3.40 as capital proceeds in respect of the cancellation of each of their shares on 11 May 2007 (paragraph 116-20(1)(a) of the ITAA 1997). The capital proceeds will be replaced with the market value of the shares if the capital proceeds are more or less than the market value of the shares on 11 May 2007 (subparagraph 116-30(2)(b)(ii) of the ITAA 1997). In the present circumstances the \$3.40 capital proceeds amount is considered not to be more or less than the market value of the shares on 11 May 2007.

49. To the extent that the capital proceeds exceed the cost base of the BSAL shares, a capital gain will result; to the extent that the reduced cost base of the BSAL shares exceeds the capital proceeds, a capital loss will arise (subsection 104-25(3) of the ITAA 1997).

50. To the extent that some part of the capital gain arising from CGT event C2 happening to the BSAL shares is included in the assessable income of the eligible shareholder as an assessable dividend, the capital gain will be reduced (subsection 118-20(1) of the ITAA 1997).

51. A foreign resident can disregard a capital gain or loss from a CGT event that happens in relation to a CGT asset that is not 'taxable Australian property' (section 855-10 of the ITAA 1997). The term 'taxable Australian property' as described in the table in section 855-15 of the ITAA 1997 covers five categories of CGT assets. Broadly, these CGT asset categories are:

- (1) taxable Australian real property which is held directly;
- (2) indirect Australian real property interests which are not covered by category 5 of the table;
- (3) CGT assets used in carrying on a business through an Australian permanent establishment which are not covered by categories 1, 2 or 5 of the table;
- (4) options or rights to acquire CGT assets covered by categories 1, 2 or 3 of the table; and
- (5) CGT assets where a capital gain or loss is deferred when an individual ceases to be an Australian resident.

52. A foreign resident BSAL shareholder who has a right to the payment of the Selective Capital Reduction makes a capital gain or loss if the right is 'taxable Australian property' (section 855-10 of the ITAA 1997).

Shares held as trading stock

53. A capital gain or capital loss made from a CGT asset held as trading stock is disregarded (paragraph 118-25(1)(a) of the ITAA 1997).

The anti-avoidance provisions

Sections 45A and 45B

54. Sections 45A and 45B of the ITAA 1936 are 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 distribution of capital received by the shareholder under the Selective Capital Reduction is treated as an unfranked dividend. Accordingly, the application of these two provisions to the capital reduction must be considered.

55. 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 share capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

56. Although a 'provision of capital benefit' (as defined in subsection 45A(3) of the ITAA 1936) is provided to shareholders under the Selective Capital Reduction, the circumstances of the Selective Capital Reduction indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly, section 45A of the ITAA 1936 has no application to the capital reduction.

57. Section 45B of the ITAA 1936 applies where certain capital payments are paid to shareholders in substitution for dividends. In broad terms, section 45B of the ITAA 1936 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, 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 a taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

58. In the case of the Selective Capital Reduction, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 have been met, the requisite purpose of enabling the eligible shareholder to obtain a tax benefit – by way of capital distribution – was not present.

59. Having regard to the relevant circumstances of the scheme, set out in subsection 45B(8) of the ITAA 1936, it is apparent that the inclusion of a capital element in the consideration for the Selective Capital Reduction was not inappropriate. Further, the Capital Component of the Cancellation Consideration cannot be said to be attributable to the profits of the company, nor do the pattern of distributions indicate that it is being paid in substitution for a dividend. Accordingly, section 45B of the ITAA 1936 has no application to the Selective Capital Reduction.

Section 177EA

60. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares. This would include a capital reduction with a franked dividend amount.

61. Specifically, subsection 177EA(3) of the ITAA 1936 provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) 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.

62. In the present case the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of BSAL, its shareholders or any other relevant party, there is a purpose more than merely an incidental purpose of conferring an imputation benefit under the scheme. Under this scheme the relevant taxpayer is the shareholder and the scheme comprises the circumstances surrounding the Selective Capital Reduction.

63. 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 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 any one scheme.

64. Having regard to the relevant circumstances of the scheme, the Commissioner has come to the view that the requisite purpose was not present and accordingly section 177EA of the ITAA 1936 does not apply to the Selective Capital Reduction.

Section 204-30

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

- an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- the other 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 (paragraph 204-30(1)(c)).

66. Relevantly, if section 204-30 of the ITAA 1997 applies the Commissioner is vested with a discretion under subsection 204-30(3) to make a determination in writing either:

- that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); or
- that no imputation benefit is to arise in respect of any streamed distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

67. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from imputation benefits than other members. The words 'derives a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

68. The Commissioner has come to the view that section 204-30 of the ITAA 1997 does not apply to the Selective Capital Reduction.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Subject references:

- cancellation of shares
- capital reductions
- franked dividend
- holding period rule
- qualified person
- related payment rule

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(8)
- ITAA 1936 45C
- ITAA 1936 Pt IIIAA Div 1A
- ITAA 1936 160APHM(2)
- ITAA 1936 160APHO
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- ITAA 1997 204-30(8)
- ITAA 1997 207-145
- ITAA 1997 207-145(1)(a)
- ITAA 1997 855-10
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- TAA 1953
- TAA 1953 Sch 1 357-75(1)
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