


CR 2014/57 - Income tax: MYOB Group Pty Limited - Return of Capital

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Class Ruling

Income tax: MYOB Group Pty Limited – Return of Capital

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① 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 104-25 of the ITAA 1997; and
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA1997).

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the holders of ordinary shares in MYOB Group Pty Limited (MYOB) who:

- were registered on the ordinary shareholder register of MYOB on 30 April 2013 (the Record Date); and
- are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to the gains and losses on their MYOB shares.

(Note – Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

In this Ruling an entity belonging to this class of entities is referred to as a MYOB shareholder.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. 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 8 to 22 of this Ruling.

6. 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.

Date of effect

7. This Ruling applies from 1 January 2014 to 31 December 2014. The Ruling continues to apply after 31 December 2014 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

8. The following description of the scheme is based on information provided by the applicant. The following documents, or

relevant parts of them, form part of and are to be read with the description:

- application for Class Ruling (including appendices) dated 28 March 2014, and
- correspondence from the applicant dated 23 June 2014.

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

Background

9. MYOB is an Australian private company, which was incorporated in September 2011. It is the head company of the MYOB tax consolidated group of which MYOB Holdings Pty Limited (MYOB Holdings), MYOB Acquisition Pty Limited (MYOB Acquisition) and MYOB Finance Pty Limited (MYOB Finance) are subsidiary members.

10. Currently, 95.13% of the ordinary shares on issue in MYOB are held by Bain Capital Abacus Holdings, L.P. (Bain), a limited partnership formed under the laws of the Cayman Islands, with the balance held by members of the Senior Management of MYOB. Bain (95.11%) and members of the Senior Management of MYOB (4.89%) also hold the Mandatorily Redeemable Preference Shares in MYOB.

11. The members of Senior Management (approximately fifty) are individuals (as defined in subsection 995-1(1) of the ITAA 1997) and the majority of them are Australian residents for tax purposes.

Notes issue

12. On 20 December 2012, MYOB Finance raised \$155 million through the issue of ASX listed Subordinated Notes (Notes).

13. The purposes of the Notes issue were to refinance a portion of the MYOB group's debt, to fund the acquisition of a subsidiary in New Zealand, and to fund the return of share capital to the holders of ordinary shares in MYOB.

14. Subsequent to raising the funds MYOB Finance lent the entire \$155 million to MYOB Acquisition, which used \$53.75 million to repay MYOB group's senior debt. MYOB Acquisition returned the balance of \$93.578 million (after payment of transaction costs of approximately \$7.671 million) to MYOB Holdings as a return of capital. MYOB Holdings, in turn, returned capital to MYOB of the same amount.

15. MYOB used approximately \$50.80 million of the return of capital it received to fund the acquisition of a New Zealand company and allocated approximately \$19.17 million of the amount to fund strategic projects. The balance of approximately \$23.60 million is currently held by MYOB.

Return of capital

16. On 16 June 2014 (Payment Date), MYOB returned capital of \$23.84 million, equating to approximately 6.7 cents per ordinary share, to shareholders by debiting the entire amount to its share capital account. The return of capital will apply to those shareholders who held ordinary shares on the Record Date, with each shareholder participating in the capital return on the same terms in proportion to the number of ordinary shares they held at the time.

17. The return of capital was approved by the ordinary shareholders of MYOB on 28 May 2014.

18. The return of capital will be funded entirely out of MYOB's existing cash reserves of approximately \$23.60 million, being the balance of the return of capital it received from MYOB Holdings.

Other matters

19. MYOB has not paid any dividends to its ordinary shareholders since its incorporation in September 2011 as the company has had negative retained earnings on a stand-alone and consolidated basis since its incorporation in 2011.

20. As at 31 December 2013, MYOB has accumulated losses of approximately \$103.08 million on a stand-alone basis and approximately \$171.80 million on a consolidated basis. MYOB had no undistributed profits at the time of the return of capital.

21. MYOB's share capital account is 'untainted' for the purposes of the share capital tainting provisions in Division 197 of the ITAA 1997.

22. In 2012 MYOB bought back \$154,000 of ordinary shares. The share buy-back was not a general return of capital, but was targeted at Senior Management shareholders that ceased to be employed by affiliates of MYOB during 2012. The share buy-back resulted in a \$154,000 reduction in MYOB's share capital.

Ruling

Distribution is not a dividend

23. The return of capital will not be a dividend, as defined in subsection 6(1) of the ITAA 1936.

Sections 45A, 45B and 45C

24. The Commissioner will not make a determination under section 45A that section 45C applies to the whole, or any part, of the return of capital.

25. The Commissioner will not make a determination under section 45B that section 45C applies to the whole, or any part, of the return of capital.

Capital gains tax

26. CGT event G1, in subsection 104-135 of the ITAA 1997, happened when MYOB pays the return of capital to a MYOB shareholder in respect of an ordinary share they owned at the Record Date and continue to own at the Payment Date.

27. CGT event C2, in section 104-25 of the ITAA 1997, happened when MYOB pays the return of capital to a MYOB shareholder in respect of an ordinary share they owned at the Record Date, but ceased to own before the Payment Date.

Commissioner of Taxation

9 July 2014

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.*

Capital return is not a dividend

28. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholder out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

29. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, later paragraphs in this subsection exclude certain items from being a dividend for tax purposes.

30. Paragraph (d) of subsection 6(1) specifically excludes from the definition of 'dividend' an amount of the distribution debited against an amount standing to the credit of a company's share capital account.

31. The term 'share capital account' is defined in subsection 995-1(1) of the ITAA 1997 to have the meaning given in section 975-300 of the ITAA 1997 as an account that a company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

32. Subsection 975-300(3) of the ITAA 1997 states that an account is not a share capital account, except for certain purposes, if it is tainted.

33. As the return of capital has been debited against the untainted share capital account of MYOB, the return of capital will not constitute a dividend because it meets the exclusion in paragraph (d) of the definition of 'dividend' in subsection 6(1).

Anti-avoidance provisions

34. Section 45A and 45B are two anti-avoidance provisions which, if they apply, would allow the Commissioner to make a determination that section 45C applies to treat all or part of the return of capital amount received by the shareholders as an unfranked dividend.

Section 45A – streaming of dividend and capital benefits

35. Section 45A 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.

36. Although MYOB has provided ordinary shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b)), the capital benefit is to be provided to shareholders in direct proportion to their individual shareholding. As MYOB shareholders benefited equally from the return of capital, there is no 'streaming' of capital benefits to some shareholders and not to others.

37. Accordingly, section 45A does not apply to the return of capital and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the whole or any part of the return of capital amount.

Section 45B – scheme to provide capital benefits

38. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. Specifically, the provision will apply where:

- there is a scheme under which a person is 'provided with a capital benefit' by a company (paragraph 45B(2)(a));
- under the scheme a taxpayer (the relevant taxpayer) who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); 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 the scheme or carried out the scheme or any part of the scheme did so for a purpose, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

Each condition is considered below.

Scheme

39. The return of capital undertaken by MYOB is a 'scheme' for the purposes of section 45B.

40. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) to include a distribution to the person of share capital. Under the present scheme, MYOB made a distribution of capital to its ordinary shareholders which constituted the provision of a capital benefit.

Tax benefit

41. A relevant taxpayer 'obtains a tax benefit', as defined in subsection 45B(9), if an amount of tax or other amount payable under the ITAA 1936 or the ITAA 1997 is, apart from section 45B, less than the amount that would have been payable or payable at a later time if the capital benefit had instead been an assessable dividend.

42. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises. A capital gain may not arise at all for foreign resident shareholders if section 855-10 of the ITAA 1997 applies. By contrast a dividend would generally be included in the assessable income of a resident shareholder or in the case of a non-resident, be subject to dividend withholding tax. Therefore, MYOB shareholders will generally obtain tax benefits from the return of capital.

Relevant circumstances

43. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the 'relevant circumstances', as set out in subsection 45B(8), to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances.

44. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into, or carried out the scheme, did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. The requisite purpose does not have to be the most influential or prevailing purpose, but it must be more than an incidental purpose.

45. In this case, the return of capital was made to MYOB shareholders. Therefore, the circumstances in paragraphs 45B(8)(c) to (h) do not incline for or against a conclusion as to purpose. Also, the circumstances covered by paragraphs 45B(8)(i) and (j) pertaining to the provision of ownership interests and demergers are not relevant. So, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b), and (k).

46. Paragraph 45B(8)(a) refers to the extent to which a capital benefit is attributable to realised and unrealised profits of the company and its associate (which includes MYOB's subsidiaries). The source of the funds for the return of capital is MYOB's existing cash reserves of approximately \$23.60 million, being the balance of the return of capital it received from MYOB Holdings. In addition, MYOB has stand-alone and consolidated accumulated losses as at 31 October 2013, and no undistributed profits at the time of the return of capital. Accordingly, the return of capital is attributable to capital and not to profits, realised or unrealised, of MYOB and its associates.

47. Paragraph 48B(8)(b) refers to the pattern of distribution of dividends, bonus shares and returns of paid up capital of the company or its associates. MYOB has not paid any dividends since its incorporation in 2011 as it has had negative retained earnings on a stand-alone and consolidated basis since incorporation. In 2012 MYOB returned share capital of \$154,000 to its shareholders when it bought back ordinary shares which were held by Senior Management shareholders who ceased to be employed by affiliates of MYOB during the year. Accordingly, MYOB's pattern of distribution does not suggest that the return of capital was made in substitution for a dividend.

48. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(2)(a) to (h). These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. These matters include, among other things, the form and substance of the scheme and its financial implications for the parties involved. In this case, the practical implications of the scheme for MYOB and its shareholders are consistent with it being, in form and substance, a distribution of share capital.

49. Therefore, having regard to the relevant circumstances of the scheme involving the return of capital to MYOB shareholders as discussed in paragraphs 43 to 48 of this ruling, it cannot be concluded that MYOB will enter into or carry out the scheme for a purpose, other than an incidental purpose, of enabling the shareholders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole, or a part, of the capital benefit represented by the return of capital.

Section 45C

50. As the Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) in relation to the scheme as described, section 45C will not deem any part of the return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or the ITAA 1997.

Capital gains tax

CGT event G1 – section 104-135

51. CGT event G1, in section 104-135 of the ITAA 1997, happened when MYOB paid the capital return amount in respect of a share that a MYOB shareholder owned at the Record Date and continues to own at the Payment Date, and some or all of the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997.

52. MYOB made a payment to its shareholders out of its untainted share capital account. This payment will not be a dividend as defined in subsection 995-1(1) of the ITAA 1997. If the capital return is not more than the cost base of the MYOB share at the time of the payment, the cost base and reduced cost base of the share are reduced by the amount of the capital return (subsection 104-135(4) of the ITAA 1997).

53. A MYOB shareholder will make a capital gain if the capital return amount is more than the cost base of their MYOB share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

54. If a MYOB shareholder makes a capital gain, the cost base and reduced cost base of the share are reduced to nil (subsection 104-135(3) of the ITAA 1997).

55. A MYOB shareholder cannot make a capital loss under CGT event G1.

56. A foreign resident MYOB shareholder who was paid the return of capital disregards any capital gain made when CGT event G1 happened if their MYOB share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

CGT event C2 – section 104-25

57. If, after the Record Date but before the Payment Date, a MYOB shareholder ceased to own some, or all, of their shares in MYOB in respect of which the return of capital is payable, the right to receive the payment in respect of each of the shares disposed of is considered to be a separate CGT asset. That right is one of the rights inherent in the share at the Record Date and is retained by the shareholder when the share is sold.

58. A MYOB shareholder's right to receive the payment will be discharged or satisfied when the payment is made under the scheme, causing CGT event C2, in section 104-25 of the ITAA 1997, to happen.

59. In working out the capital gain or capital loss made from CGT event C2 happening, the capital proceeds from the event will be the capital return amount.

60. The cost base of the MYOB shareholder's right to receive a payment under the scheme is worked out in accordance with Division 110 of the ITAA 1997. However, the cost base of the right will be nil if the full cost base (or reduced cost base) of the share previously held by the MYOB shareholder has been applied in working out a capital gain or loss when a CGT event happened to the share – for example, when the MYOB shareholder disposed of the share. In these cases, the MYOB shareholder will generally make a capital gain equal to the amount paid under the scheme.

61. Because the right to the payment of the return of capital was inherent in the share during the time it was owned, the right is considered to have been acquired at the time when the share was acquired (section 109-5 of the ITAA 1997).

62. A foreign resident MYOB shareholder who was paid the return of capital disregards any capital gain made when CGT event C2 happened if their right to receive the return of capital is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital benefit
- capital reductions
- dividend substitutions
- share capital

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45B
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)
- ITAA 1936 45B(8)(a)
- ITAA 1936 45B(8)(b)
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- ITAA 1936 45B(8)(h)
- ITAA 1936 45B(8)(i)
- ITAA 1936 45B(8)(j)
- ITAA 1936 45B(8)(k)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 177D(2)(a)
- ITAA 1936 177D(2)(b)
- ITAA 1936 177D(2)(c)
- ITAA 1936 177D(2)(d)
- ITAA 1936 177D(2)(e)
- ITAA 1936 177D(2)(f)
- ITAA 1936 177D(2)(g)
- ITAA 1936 177D(2)(h)
- ITAA 1997 104-25
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(4)
- ITAA 1997 109-5
- ITAA 1997 855-10
- ITAA 1997 995-1(1)
- Copyright Act 1968

ATO references

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