

# ***CR 2015/32 - Income tax: off-market share buy-back: IMB Limited***

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## Class Ruling

### Income tax: off-market share buy-back: IMB Limited

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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, 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

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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 in this Ruling are:

- subsection 44(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 90 of the ITAA 1936
- subsection 95(1) of the ITAA 1936
- paragraph 128B(3)(ga) of the ITAA 1936
- section 159GZZZP of the ITAA 1936
- section 159GZZZQ of the ITAA 1936
- Division 1A of former Part IIIAA of the ITAA 1936

- section 177EA of the ITAA 1936
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Division 67 of the ITAA 1997
- section 104-10 of the ITAA 1997
- section 116-20 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 202-40 of the ITAA 1997
- section 204-30 of the ITAA 1997
- section 207-20 of the ITAA 1997
- section 207-145 of the ITAA 1997, and
- section 855-10 of the ITAA 1997.

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 ordinary shareholders of IMB Limited (IMB), an unlisted company, who:

- (a) disposed of their ordinary shares in IMB under the IMB off-market share buy-back (the Buy-Back) which was announced by IMB on 28 January 2015 and which is described in the Scheme section of this Ruling, and
- (b) are not subject to the taxation of financial arrangement rules in Division 230 of the ITAA 1997 in relation to gains and losses on their IMB shares.

(Note: Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them).

In this Ruling, the class of entities is referred to as 'Participating Shareholder Members'.

## **Qualifications**

4. The Commissioner makes this Ruling based on the precise scheme 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 44 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**

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7. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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**

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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:

- IMB's class ruling application dated 13 January 2015, and
- IMB's Off-Market Buy-Back Booklet dated 28 January 2015.

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

### **Corporate structure of IMB**

9. IMB is an Australian resident unlisted public company limited by shares and guarantee.
10. IMB is a mutual Authorised Deposit-taking Institution (ADI).
11. IMB is the head company of a tax consolidated group.
12. IMB is regulated by the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investment Commission (ASIC).

## Composition of Members

13. The members of IMB comprise of:
- by way of guarantee (Guarantee Members), and
  - Guarantee Members who hold ordinary shares in IMB (Shareholder Members).

A person or an entity cannot become a member of IMB through shareholding alone.

14. The composition of IMB's members at 30 September 2014 included approximately 180,000 Guarantee Members (including the Shareholder Members) and 3,827 Shareholder Members of which 3,756 were eligible to vote (that is, Shareholder Members with shareholding of at least 100 shares).

15. The Shareholder Members of IMB are a mix of individuals, companies, nominee companies, trusts and superannuation funds, a minority of whom are non-residents (1.03% by value as at 30 September 2014).

16. As at 30 September 2014, the majority of Shareholder Members are individuals (92.66% by number) with shareholdings of 75.19% (by value).

17. The maximum permissible shareholding of any one Shareholder Member is 5%. Any excess is forfeited to IMB and the Shareholder Member is appropriately compensated.

18. All IMB shares were acquired by their respective Shareholder Member after 20 September 1985.

19. Immediately prior to the Buy-Back, IMB's share capital comprised of 34,863,795 fully paid ordinary shares.

## History of distributions

20. IMB limits its annual distributions on shares to less than 50% of its annual net profit after tax in accordance with ASIC Regulatory Guide 147.

21. Since its dividend reinvestment plan ended in August 2004, dividend payments totalling \$92,800,773 have been paid over the last eight calendar years (up to 30 September 2014). All past distributions have been fully franked.

## IMB's share trading mechanism

22. IMB is not listed on an official stock exchange.

23. IMB operates its own trading facility for shares under both an Australian Market Licence and Clearing and Settlement Facility Licence in accordance with the *Corporations Act 2001*. IMB's market involves the manual matching of buyers and sellers at mutually accepted prices.

24. In holding the above licences, IMB is subject to disclosure obligations, including a requirement to disclose price sensitive information.

25. Trade volumes are relatively low with approximately 5% of IMB shares traded per year.

### **The Buy-Back**

26. In 2011, IMB engaged external advisors to conduct a broad based review to consider the most appropriate structure to support IMB. It was recommended that IMB's mutual structure should be supported by seeking to cancel the ordinary shares through Buy-backs of the ordinary shares on issue. IMB's board unanimously adopted this recommendation. The first series of Buy-backs was completed on 27 September 2012. A second Buy-back was completed on 28 November 2013.

27. On 28 January 2015 (the Announcement Date), IMB announced its intention to undertake an off-market buy-back of its own shares.

28. IMB was granted relief from ASIC to conduct the Buy-Back as an equal access share buy-back in accordance with Division 2 of Part 2J.1 of the *Corporations Act 2001*.

29. Under the Buy-Back, IMB acquired a number of shares such that no more than 10% of the voting rights were acquired in a 12 month period, in accordance with a share buy-back under subsections 257B(4) and 257B(5) of the *Corporations Act 2001* (the Buy-Back Limit).

30. IMB obtained approval to conduct the Buy-Back from APRA.

31. The Buy-Back was conducted through a tender process during a specified tender period and was open to all eligible Shareholder Members identified as such on 5 February 2015 (the Record Date). IMB shares acquired after 5 February 2015 were not entitled to participate in the Buy-Back.

32. The Buy-Back tender period opened on 23 February 2015 (the Opening Date) and closed on 18 March 2015 (the Closing Date).

33. Participation in the Buy-Back was voluntary. Eligible Shareholder Members who did not wish to participate were not required to take any action. Shareholder Members who did not participate in the Buy-Back did not receive any property, dividends or distributions by way of compensation for not participating in the Buy-Back.

34. Under the tender process, the Shareholder Members were able to submit offers to sell some or all of their IMB ordinary shares under the Buy-Back. The Tender Discount ranged from 0% to 14%, in 2% intervals. Shareholder Members could also submit tenders to sell some or all of their IMB ordinary shares under the Buy-Back as a Final Price Tender which is the Buy-Back price finally determined by IMB under the tender process.

35. Shareholder Members who held 300 shares or less were only permitted to tender all of their holding at a single Tender Discount or as a Final Price Tender.

36. Tenders received from Shareholder Members fell into three categories:

- Tender Discount greater than Buy-Back Discount: Tender accepted in full with no scale back
- Tender Discount equal to Buy-Back Discount: Priority Parcel and Small Residual Holdings were accepted in full. All other tenders were accepted subject to being scaled back on a pro-rata basis, and
- Tender Discount less than Buy-Back Discount: Tender not accepted.

37. IMB used a scale back mechanism as part of the tender to manage legal and regulatory constraints. The scale back mechanism will enable IMB to scale-back the number of Shares acquired from participants after ensuring that small parcels of Shares are bought back in full where possible and ensuring that no Buy-back participant, who has tendered all their shares, is left with less than 100 shares.

38. IMB undertook not to buy-back its shares at a price higher than the calculated market value (IMB has referred to this as the 'Deemed Market Value' in its off-market share Buy-Back Booklet) of IMB shares (as calculated by the agreed methodology between IMB and the Australian Taxation Office for subsection 159GZZZQ(2) purposes).

39. The discount for the Buy-Back (Buy-Back Discount) was selected by IMB as 0%, which enabled IMB to buy-back shares which did not exceed the Buy-Back Limit.

40. On the Buy-Back Date of 26 March 2015, IMB announced that:

- it had successfully completed an off-market share buy-back of 2,990,647 shares representing approximately 8.6% of the issued capital of IMB
- the total amount of capital repurchased under the Buy-Back was \$16 million, and
- the final price of the Buy-Back was set at \$5.35 (the Buy-Back price).

41. On 30 March 2015, IMB advised the Commissioner that:

- as a result of the strong demand for the Buy-Back, all shares tendered will be bought back from shareholders who tendered their shares at a discount of 2% or more and/or as a Final Price Tender, and
- a scale back mechanisms will apply to tenders submitted at a discount of 0%.

42. All shares acquired by IMB under the Buy-Back were cancelled.

43. The Buy-Back price of \$5.35 comprised of two components. The capital component of the Buy-Back price (the Capital Component) was \$1.18 per share. The Capital Component was based on the average capital per share methodology and was debited to IMB's share capital account. The dividend component was the difference between the Buy-Back price and the Capital Component (the Dividend Component). The Dividend Component of \$4.17 per share was debited to IMB's retained earnings.

44. IMB has confirmed that its share capital account was not tainted for the purposes of section 197-50 of the ITAA 1997.

## **Ruling**

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### **The Dividend Component**

45. Participating Shareholder Members will be taken to have been paid a dividend of \$4.17 (the Dividend Component) for each share bought back under section 159GZZP.

46. The Dividend Component is a frankable distribution pursuant to section 202-40 of the ITAA 1997, and is therefore capable of being franked in accordance with section 202-5 of the ITAA 1997.

47. The difference between the Buy-Back price and the Dividend Component (that is, the Capital Component of \$1.18) is not a dividend for income tax purposes.

### **Assessability of the Dividend Component and tax offset**

#### ***Direct distributions***

48. The Dividend Component of \$4.17 and an amount equal to the franking credit on the Dividend Component is included in the assessable income of resident individual, superannuation fund and company Participating Shareholder Members under subsection 44(1) of the ITAA 1936 and subsection 207-20(1) of the ITAA 1997 respectively in the income year in which the Buy-Back occurred.

49. These Participating Shareholder Members will be entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the Dividend Component, subject to being a 'qualified person' (see paragraph 64 of this Ruling).

## ***Indirect distributions***

### *Partnerships*

50. The Dividend Component of \$4.17 and an amount equal to the franking credit on the Dividend Component is included in the assessable income of a partnership that participates in the Buy-Back for the purposes of computing the net income of the partnership under section 90.

### *Trusts*

51. The Dividend Component of \$4.17 and an amount equal to the franking credit on the Dividend Component is included in the assessable income of a trustee for the purposes of computing the net income of the trust under subsection 95(1).

## **Refundable tax offset**

52. The tax offsets (franking credits) are subject to the refundable tax offset rules in Division 67 of the ITAA 1997. Certain superannuation funds, trustees and corporate tax entities are not subject to the refundable tax offset rules and are excluded by subsections 67-25(1A) to 67-25(1D) of the ITAA 1997.

## **Non-resident Shareholder Members**

53. As the Dividend Component is fully franked, Participating Shareholder Members who are not residents are not liable for Australian withholding tax on the Dividend Component pursuant to paragraph 128B(3)(ga).

## **Sale Consideration**

54. Participating Shareholder Members are taken for tax purposes to have received \$1.18 as consideration in respect of each share bought back under the Buy-Back (Sale Consideration) on 26 March 2015 in accordance with section 159GZZZQ, unless the Participating Shareholder Member is a corporate tax entity to which subsections 159GZZZQ(8) and 159GZZZQ(9) apply.

55. Where the Buy-Back price for each share bought back under the Buy-Back was less than what would have been the market value of the share if the Buy-Back did not occur and was never proposed to occur, then the market value rule in subsection 159GZZZQ(2) applies to the Buy-Back for tax purposes.

56. The effect of the rule is that the difference between the Buy-Back price and the market value will be included in the consideration received for the disposal of the share for ordinary income or capital gains tax (CGT) purposes. In this instance the Buy-Back price of \$5.35 is equal to the accepted market value of

each share bought-back. Accordingly, no additional amount is included in the Sale Consideration for income tax purposes.

57. The treatment of the Sale Consideration of \$1.18 for tax purposes will depend on whether the IMB share is held on capital account or on revenue account.

### **Shares held on capital account**

58. CGT Event A1 happens when the Participating Shareholder Members disposed of their IMB shares under the Buy-Back (section 104-10 of the ITAA 1997).

59. The time of CGT Event A1 is when the change of ownership occurs (subsection 104-10(3) of the ITAA 1997). The IMB shares are taken to be disposed of on 26 March 2015.

60. The Sale Consideration of \$1.18 represents the capital proceeds for CGT purposes under section 116-20 of the ITAA 1997. A Participating Shareholder Member will make a capital gain on a share if the Sale Consideration per share exceeds the cost base of that share. The capital gain is the amount of the excess. Similarly, a Participating Shareholder Member will make a capital loss on a share if the Sale Consideration per share is less than the reduced cost base of the share (subsection 104-10(4) of the ITAA 1997).

### **Shares held on revenue account**

61. Where the shares are held as trading stock, the Sale Consideration of \$1.18 is included in assessable income under section 6-5 of the ITAA 1997. These Participating Shareholder Members will also make a capital gain or capital loss calculated as discussed at paragraph 60 of this Ruling. However, under section 118-25 of the ITAA 1997 any capital gain or capital loss a Participating Shareholder Member makes will be disregarded if at the time of the CGT event the shares are held by them as trading stock.

62. Where the shares are held as revenue assets, but are not trading stock, the amount by which the Sale Consideration of \$1.18 per share exceeds the cost of each share is included in the Participating Shareholder Member's assessable income. Correspondingly, if the cost exceeds the Sale Consideration of \$1.18 per share the difference is an allowable deduction. Where the Sale Consideration per share exceeds the cost base of that share these Participating Shareholder Members will also make a capital gain. However, under section 118-20 of the ITAA 1997 any capital gain a Participating Shareholder Member makes will be reduced if, because of the event, the capital proceeds have otherwise been included in assessable income. The capital gain is reduced by the amount of the Sale Consideration otherwise included in assessable income or to zero, whichever is the greater. (A corresponding rule applies to a partner of a partnership.)

## **Non-resident Shareholder Members: CGT consequences**

63. Under section 855-10 of the ITAA 1997, non-resident Shareholder Members who participate in the Buy-Back will only have CGT consequences if their shares bought back under the Buy-Back are 'taxable Australian property'.

## **Qualified persons**

64. Paragraph 207-145(1)(a) of the ITAA 1997 states that if a franked distribution is made to an entity that is not a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, then pursuant to paragraph 207-145(1)(f) of the ITAA 1997, the entity is not entitled to a tax offset under Subdivision 207-F of the ITAA 1997.

65. For the purposes of Division 1A of former Part IIIAA, Participating Shareholder Members will be considered to satisfy the holding period rule under former section 160APHO and therefore be qualified persons (as long as the related payments rule is also met) in relation to the Dividend Component received under the Buy-Back if:

- the shares sold into the Buy-Back were acquired on or before 5 February 2015, and
- during the period when the shares or interest in the shares were held the Participating Shareholder Members had sufficient risks of loss or opportunities for gain in respect of the shares or interest in the shares (as defined in former section 160APHM) for a continuous period of at least 45 days. Neither the announcement of the Buy-Back, the making of an invitation to Shareholder Members to offer to sell their IMB shares nor the making of an offer by a Shareholder Member to IMB in respect of a IMB share will affect whether the shares bought back under the Buy-Back are held 'at risk' for the purposes of Division 1A of former Part IIIAA.

66. The 'last-in first-out' rule in former subsection 160APHI(4) has no effect for the purposes of the Buy-Back to IMB shares acquired after 5 February 2015 which do not confer an entitlement to participate in the Buy-Back.

## **The anti-avoidance provisions**

67. 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 received by Participating Shareholder Members that is, no part of the Capital Component will be taken to be an unfranked dividend.

68. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits received in relation to the Dividend Component of the Buy-Back Price by Participating Shareholder Members.

69. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received in relation to the Dividend Component of the Buy-Back Price by Participating Shareholder Members.

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**Commissioner of Taxation**

13 May 2015

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## Appendix 1 – Explanation

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**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.*

70. The purchase price received by Participating Shareholder Members comprises two components:

- a Dividend Component, and
- a Capital Component.

The amount of each of these components is determined in accordance with sections 159GZZZP and 159GZZZQ, having regard to how the company accounts for the off-market share buy-back.

### **The Dividend Component**

71. Section 159GZZZP provides that where the buy-back of a share is an off-market purchase, the difference between the purchase price and the part (if any) of the purchase price which is debited against the share capital account, is taken to be a dividend paid by the company to the seller on the day the buy-back occurs. In this case the purchase price was \$5.35 per share and \$1.18 of this was debited to the share capital account (Capital Component). Therefore the Dividend Component is \$4.17 per share.

72. The Dividend Component of \$4.17 per share is frankable but only to the extent that the Buy-Back Price does not exceed the market value of the share at the time of the Buy-Back if the Buy-Back did not occur and was never proposed to occur (paragraph 202-45(c) of the ITAA 1997). Under the IMB Buy-Back, the Buy-Back Price did not exceed the market value of the share.

### **Assessability of the Dividend Component and tax offset**

#### ***Direct distributions***

73. In the case of Participating Shareholder Members who are residents (other than a partnership or trust) and who directly receive the Dividend Component:

- the Dividend Component is included in the assessable income of each Shareholder Member under subsection 44(1), and
- subject to the 'qualified person' rule, an amount equal to the franking credit on the Dividend Component is included in the assessable income of each Shareholder Member under subsection 207-20(1) of the ITAA 1997.

74. Subject to the 'qualified person' rule, these Shareholder Members are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the Dividend Component.

### ***Indirect distributions***

#### *Partnerships*

75. Pursuant to subsection 44(1), the Dividend Component is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90.

76. Subject to the 'qualified person' rule, pursuant to subsection 207-35(1) of the ITAA 1997, the franking credit on the Dividend Component is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90 of the ITAA 1936.

#### *Trusts*

77. Pursuant to subsection 44(1), the Dividend Component is included in the assessable income of a trustee for the purposes of computing the net income of the trust under subsection 95(1).

78. Subject to the 'qualified person' rule, pursuant to subsection 207-35(2) of the ITAA 1997, an amount equal to the franking credit on the Dividend Component is included in the assessable income of the trustee for the purposes of computing the net income of the trust under subsection 95(1) of the ITAA 1936..

### ***Refundable tax offset***

79. The tax offsets (franking credits) are subject to the refundable tax offset rules in Division 67 of the ITAA 1997, provided the Participating Shareholder Members are not excluded by subsections 67-25(1A) to 67-25(1D) of the ITAA 1997.

### ***Non-resident Shareholder Members***

80. As the Dividend Component is fully franked, Participating Shareholder Members who are not residents will not be liable to Australian withholding tax on the Dividend Component (paragraph 128B(3)(ga)).

## **The Capital Component**

### **Calculation of Sale Consideration**

81. For the purposes of determining the amount of a capital gain or loss (where the shares are held on capital or revenue account) the consideration in respect of the disposal of a share, the Sale Consideration, under a buy-back is determined in accordance with section 159GZZZQ.

82. Subsection 159GZZZP(1) provides that if the buy-back of a share is an off-market purchase, then the shareholder is taken to have received an amount equal to the purchase price (in this case the \$5.35 received for each share bought back) as consideration in respect of the sale of the share bought back.

83. For the purposes of determining the application of subsection 159GZZZQ(2), the methodology proposed by IMB to determine the market value of the share for subsection 159GZZZQ(2) purposes was accepted by the Commissioner.

84. Under this methodology, the market value of the share bought back under the Buy-Back was calculated to be \$5.35. As the Buy-Back purchase price of \$5.35 is equal to the accepted market value of each share bought-back, Participating Shareholder Members are taken for income tax purposes to have received \$5.35 consideration for the sale of each share.

85. Pursuant to subsection 159GZZZQ(3), the consideration of \$5.35 is reduced by a 'Reduction Amount'. The Reduction Amount is an amount calculated under subsection 159GZZZQ(4). In the circumstances of the Buy-Back, the Reduction Amount is equivalent to the Dividend Component, that is, \$4.17 unless the seller is a corporate tax entity to whom subsection 159GZZZQ(8) applies. Therefore, the Sale Consideration for each share disposed of under the Buy-Back is \$1.18 (\$5.35 less \$4.17).

86. However, it should be noted that where a Participating Shareholder Member is a corporate tax entity which is entitled to a tax offset under Division 207 of the ITAA 1997 in respect of the Dividend Component, an adjustment may be made to the Sale Consideration. Under subsection 159GZZZQ(8), if that Shareholder Member would otherwise incur either a capital loss or a deductible loss (or any increase in such a loss) in respect of the sale of a share bought back under the Buy-Back, the Sale Consideration is increased by an off-settable amount determined under subsection 159GZZZQ(9). The Reduction Amount is reduced by so much of the off-settable amount that does not exceed the capital loss or the deductible loss.

87. Participating Shareholder Members are taken to have disposed of those shares accepted under the Buy-Back on 26 March 2015 (CGT event A1). The disposal may have different taxation implications for Participating Shareholder Members depending on how the shares were held, for instance:

- an investor who held their shares on capital account will be subject to the CGT provisions, and
- a share trader who held their shares on revenue account will be subject to the ordinary income provisions and the CGT provisions.

### ***Shares held on capital account***

88. The Sale Consideration of \$1.18 represents the capital proceeds for CGT purposes under section 116-20 of the ITAA 1997. A Participating Shareholder Member will make a capital gain on a share if the Sale Consideration per share exceeds the cost base of that share. The capital gain is the amount of the excess. Similarly, a Participating Shareholder Member will make a capital loss on a share if the Sale Consideration per share is less than the reduced cost base of the share (subsection 104-10(4) of the ITAA 1997).

### ***Shares held on revenue account***

89. Where the shares are held as trading stock, the Sale Consideration of \$1.18 is included in assessable income under section 6-5 of the ITAA 1997. These Participating Shareholder Members will also make a capital gain or capital loss. However, as the shares are held as trading stock, the capital gain or loss is disregarded under section 118-25 of the ITAA 1997.

90. Where the shares are held as revenue assets, but are not trading stock, the amount by which the Sale Consideration of \$1.18 per share exceeds the cost of each share is included in the Participating Shareholder Member's assessable income. Correspondingly, if the cost exceeds the Sale Consideration of \$1.18 per share the difference is an allowable deduction. Where the Sale Consideration per share exceeds the cost base of the share these Participating Shareholder Members will also make a capital gain. However, Participating Shareholder Members who hold their shares as revenue assets will have the amount of the capital gain reduced under the anti-overlap provisions contained in section 118-20 of the ITAA 1997.

### **Non-resident Shareholder Members: CGT consequences**

91. A Participating Shareholder Member who is not a resident disregards any capital gain or capital loss made in respect of a share bought back under the Buy-Back if the share is not taxable Australian property under the tests in section 855-10 of the ITAA 1997.

92. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2, or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident).

93. A non-resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happened under the Buy-Back, cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain or capital loss from CGT event A1 if:

- their share in IMB is an indirect Australian real property interest (item 2 of the table in section 855-15 of the ITAA 1997)
- their share in IMB has been used at any time by the non-resident in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15), or
- their share in IMB is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15).

### Qualified persons

94. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked dividend made by an entity only a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA is entitled to a franking credit or tax offset. Broadly speaking, to be a 'qualified person' in relation to the Dividend Component paid under the Buy-Back, the Participating Shareholder Member must satisfy both the holding period rule and the related payments rule.

95. Broadly, a Participating Shareholder Member will not satisfy the related payments rule if the Participating Shareholder Member, or associate of the Participating Shareholder Member, 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.

96. The holding period rule requires a Participating Shareholder Member 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 Participating Shareholder Member 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.

97. Under former subsection 160APHM(2), a Participating Shareholder Member 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 Member results in the Shareholder Member having less than 30% of the risks and opportunities relating to the shares or interest in shares.

98. In this case the Commissioner does not regard the announcement of the Buy-Back offer as affecting whether the shares or an interest in shares was held at risk or not.

99. Shares acquired after 5 February 2015 did not confer an entitlement to participate in the Buy-Back. There are at least 45 clear days between 5 February 2015 and the Buy-Back Date of 26 March 2015, that is, the date the tender offer was accepted. Therefore, a Shareholder Member who acquired shares on or before 5 February 2015 satisfies the holding period rule as long as those shares were held at risk for at least 45 continuous days.

100. Generally, under the holding period rule a Participating Shareholder Member will be deemed to have disposed of his or her most recently acquired shares first: former subsection 160APHI(4). The 45 day rule operates on a 'last-in first-out' basis, so that Participating Shareholder Members will be deemed to have disposed of their most recently acquired shares first for the purposes of applying the 45 day rule.

101. IMB shares acquired by Participating Shareholder Members which did not confer an entitlement to participate in the Buy-Back (ex-entitlement shares) which were purchased after IMB shares that did confer an entitlement to participate in the Buy-Back (cum-entitlement shares) will not be considered to take the place of cum-entitlement shares under an application of the 'last-in first-out' rule in former subsection 160APHI(4). Ex-entitlement shares do not constitute 'related securities' for the purposes of former subsection 160APHI(2) to any cum-entitlement shares. Accordingly, for any additional IMB shares that a Participating Shareholder Member acquired after 5 February 2015 that did not confer an entitlement to participate in the Buy-Back, the 'last-in first out' rule in former subsection 160APHI(4) will not apply in relation to those shares.

**The anti-avoidance provisions****Section 45A and 45B**

102. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies. The effect of such a determination is that all or part of the distribution of capital received by the Participating Shareholder Member under the Buy-Back is treated as an unfranked dividend. Accordingly, the application of these two provisions to the Buy-Back must be considered.

103. Section 45A 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.

104. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) is provided to Participating Shareholder Members under the Buy-Back, the circumstances of the Buy-Back indicate that there is no streaming of capital benefits to some Participating Shareholder Members and dividends to other Participating Shareholder Members. Accordingly, section 45A has no application to the Buy-Back.

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

106. In the case of the Buy-Back, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) have been met, the requisite purpose of enabling the Participating Shareholder Member to obtain a tax benefit – by way of capital distribution – was not present.

107. Having regard to the 'relevant circumstances' of the scheme (the Buy-Back), as set out in subsection 45B(8), it is apparent that the inclusion of the Capital Component as part of the Buy-Back Price was not inappropriate. Further, the Capital Component of the Buy-Back cannot be said to be attributable to the profits of the company, nor does the pattern of distributions indicate that the Capital Component is being paid in substitution for a dividend. Accordingly, the

Commissioner will not make a determination under subsection 45B(3) that section 45C applies.

### **Section 177EA**

108. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. In essence, it applies to schemes for the disposition of membership interests or an interest in membership interest, where a franked distribution is paid or payable in respect of the membership interests or an interest in membership interests. This would include a buy-back with a franked dividend component.

109. Specifically, subsection 177EA(3) 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.

110. In the present case the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) 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 IMB, its Shareholder Members 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 arrangement the relevant taxpayer is the Participating Shareholder Member and the scheme comprises the circumstances surrounding the Buy-Back.

111. 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). The relevant circumstances listed there 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.

112. The Commissioner has come to the view that section 177EA applies to the Buy-Back. In coming to this conclusion the Commissioner had regard to all the relevant circumstances of the arrangement, as outlined in subsection 177EA(17) of the ITAA 1936. Among the circumstances of the Buy-Back reflected in those paragraphs is:

- the greater attraction of the Buy-Back to resident shareholders who could fully utilise the franking credits than to non-resident shareholders who could not (or who were not eligible to participate).

113. Where section 177EA applies the Commissioner has a discretion pursuant to subsection 177EA(5) to make a determination to debit the company's franking account pursuant to paragraph 177EA(5)(a), or deny the imputation benefit to each Shareholder Member pursuant to paragraph 177EA(5)(b). The Commissioner will exercise his discretion in such a way that he does not make a determination that the imputation benefit obtained by the Participating Shareholder Members be denied under paragraph 177EA(5)(b).

### **Section 204-30**

114. 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:

- (a) 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))
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)), and
- (c) 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)).

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

- (a) 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

- (b) that no imputation benefit is to arise in respect of any streamed distribution made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

116. For section 204-30 of the ITAA 1997 to apply, Shareholder Members to whom distributions are streamed must derive a greater benefit from imputation benefits than the members who do not participate in the Buy-Back. The words 'derives a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8) of the ITAA 1997 by reference to the ability of the members to fully utilise imputation benefits.

117. A portion of IMB shareholding was held by non-resident Shareholder Members who do not fully benefit from franking, a feature of the Buy-Back, to the same extent as resident Shareholder Members. Therefore, the conditions in subsection 204-30(1) of the ITAA 1997 for the provision to apply are met. However, the Commissioner will not make a determination under section 204-30 of the ITAA 1997.

**Appendix 2 – Detailed contents list**

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*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

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- dividend streaming arrangements
- frankable dividends
- qualified person
- share buy backs

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