


# ***CR 2015/49 - Income tax: off market share buy-back - OnCard International Limited***

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## Class Ruling

### Income tax: off market share buy-back – OnCard International Limited

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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 provisions

2. The relevant provisions dealt with in this Ruling are:
- section 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
  - Division 16K of Part III of the ITAA 1936
  - section 104-10 of the *Income tax Assessment Act 1997* (ITAA 1997)
  - section 116-20 of the ITAA 1997, and
  - Division 855 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1936 unless otherwise stated.

## **Class of entities**

3. The class of entities to which this Ruling applies are the holders of ordinary shares in OnCard International Limited (ONC) who:

- disposed of their ordinary shares in ONC under the ONC off-market share buy-back which was announced by ONC on 13 April 2015 and which is described in paragraphs 8 to 28 of this Ruling
- hold their fully paid ONC ordinary shares on capital account, and
- are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their ONC shares.

(Note: Division 230 of the ITAA 1997 will generally not apply to individuals who hold ONC ordinary shares, unless they have made an election for this Division to apply to their financial arrangements.)

In this Ruling, an entity belonging to this class of entities is referred to as an 'ONC shareholder'.

## **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 28 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.

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## Date of effect

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7. This Ruling applies from 1 April 2015 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).

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## Scheme

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8. The following description of the scheme is based on the class ruling application and other correspondence provided by the applicant.

**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. ONC is an Australian resident entity that was incorporated in Australia on 19 October 1988. ONC has been a public company listed on the Australian Stock Exchange (ASX) since 1999.

10. As at 31 December 2014, the share capital of ONC comprised 174,572,890 fully paid ordinary shares and issued share capital of \$38.51 million.

11. ONC's share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (Division 197 of the ITAA 1997).

12. Approximately, 1.58% of ONC fully paid ordinary shares are held by foreign shareholders.

13. ONC had retained earnings of \$18.26 million, cash balance of \$55.33 million and a nil franking account balance as at 31 December 2014.

14. On 16 February 2015, ONC announced an unfranked dividend of 9 cents per share (total amounting to \$15.70 million) with a record date of 23 February 2015 and a payment date of 20 March 2015. Prior to 16 February 2015, ONC has not paid any dividends.

15. The shareholders in ONC are a mix of individuals, companies, trusts, partnerships and superannuation funds, some of whom are non-residents.

16. All shares were acquired after 19 September 1985.

17. ONC does not directly or indirectly own any real property.

## **The Share Buy-back**

18. On 13 April 2015, ONC announced its intention to undertake an off-market share buy-back (the Share Buy-back).

19. Under the Share Buy-back, ONC proposed a pro rata off market share buy-back of 95 shares for each 100 shares held by each OnCard shareholder.

20. The Share Buy-back offer was open to all shareholders who were registered in the ONC's share register on the Record Date of 1 June 2015.

21. Participation in the Share Buy-back was voluntary and therefore shareholders who did not wish to participate were not required to do anything.

22. ONC shareholders who did not participate in the Share Buy-back continue to hold their ONC shares.

23. The Share Buy-back was approved by ONC shareholders at an Extraordinary General Meeting held on 25 May 2015.

24. The Share Buy-back price was 22 cents per ONC share.

25. Under the Share Buy-back, 22 cents per share was debited to ONC's share capital account.

26. The Share Buy-back was entirely funded from ONC's cash reserves.

27. All shares bought back under the Share Buy-back were cancelled.

28. On 25 June 2015, ONC announced that it had successfully completed the Share Buy-back of 153,709,376 ONC shares.

## **Ruling**

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### **Off-market Share Buy-back**

29. The Share Buy-back was an off-market buy-back as defined in paragraph 159GZZZK(d), as the Share Buy-back was not made in the ordinary course of trading in ONC shares on the ASX.

30. The purchase price for the participating ONC shareholders under paragraph 159GZZZM(a) was 22 cents per share.

31. Participating ONC shareholders are taken to have received 22 cents per share as consideration (Sale Consideration) in respect of the sale of each of their shares bought back under the Share Buy-back pursuant to section 159GZZZQ.

**Distribution is not a dividend**

32. As the entire purchase price in respect of the shares acquired through the Share Buy-back is debited against ONC's share capital account, participating shareholders will not be taken to have been paid a dividend under section 159GZZZP or under subsection 6(1).

**Capital gains tax*****CGT event A1 – section 104-10 of the ITAA 1997***

33. The shares are taken to have been disposed of for capital gains tax (CGT) purposes on 26 June 2015 pursuant to section 104-10 of the ITAA 1997 (CGT event A1).

34. The Sale Consideration of 22 cents per share represents the capital proceeds for CGT purposes pursuant to section 116-20 of the ITAA 1997. A participating shareholder 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 will make a capital loss on a share if the Sale Consideration per share is less than the reduced cost base of that share (subsection 104-10(4) of the ITAA 1997).

***Foreign residents***

35. A participating ONC shareholder who was a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happened disregards any capital gain or capital loss made from CGT event A1 unless the ONC Share:

- has been used at any time by the participating ONC shareholder in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
- is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

**The application of sections 45A, 45B and 45C**

36. The Commissioner will not make a determination under subsection 45A(2) or subsection 45B(3) that section 45C applies to the whole or any part of the distribution received under the Share Buy-back by ONC shareholders.

## 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.*

### **Off-market Share Buy-back**

37. The effect of share buy-backs for income tax purposes is covered in Division 16K of Part III.

38. Section 159GZZZK provides that where a company buys a share in itself from a shareholder in the company, the purchase is a buy-back. Section 159GZZZK distinguishes between a buy-back that is an on-market purchase and an off-market purchase.

39. The ONC Share Buy-back was an off-market purchase as defined in paragraph 159GZZZK(d), as the Share Buy-back was not made in the ordinary course of trading in ONC shares on the ASX.

40. The purchase price for the participating ONC shareholders under paragraph 159GZZZM(a) was 22 cents per share.

### **Distribution is not a dividend**

#### **Section 159GZZZP**

41. The Share Buy-back price of 22 cents per share was debited entirely against ONC's share capital account. Therefore, no part of the purchase price is taken to be a dividend for income tax purposes under section 159GZZZP.

#### **Subsection 6(1)**

42. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholders 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).

43. The term 'dividend' which is defined in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition excludes a distribution from the meaning of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

44. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account that the 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. However, if the company's share capital account is tainted, within the meaning given in section 197-50 of the ITAA 1997, that account is taken not to be a share capital account (subsection 975-300(2) of the ITAA 1997).

45. In this case, ONC's share capital account is untainted as no amount has been transferred in to ONC's share capital account from its other accounts.

46. As mentioned above, the distribution was recorded as a debit to ONC's share capital account. Paragraph (d) of the definition of 'dividend' in subsection 6(1) will apply. Accordingly, no part of the buy-back price is a dividend as defined in subsection 6(1).

### **Capital gains tax**

#### ***CGT event A1 – section 104-10 of the ITAA 1997***

47. The shares are taken to have been disposed of for capital gains tax (CGT) purposes on 26 June 2015 pursuant to section 104-10 of the ITAA 1997 (CGT event A1).

48. The Sale Consideration of 22 cents per share represents the capital proceeds for CGT purposes pursuant to section 116-20 of the ITAA 1997. A participating shareholder 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 will make a capital loss on a share if the Sale Consideration per share is less than the reduced cost base of that share (subsection 104-10(4) of the ITAA 1997).

### ***Foreign residents***

49. Under subsection 855-10(1) of the ITAA 1997, a participating ONC shareholder who was a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens disregards a capital gain or capital loss from a CGT event if the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

50. CGT assets that are 'taxable Australian property' are set out in the table in section 855-15 of the ITAA 1997. The five categories of CGT assets are:

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
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)

51. Items 1 and 4 of the table in section 855-15 of the ITAA 1997 do not apply to ONC shares.

52. ONC Shares held by a participating ONC shareholder who was a foreign resident are not an indirect Australian real property interest under section 855-25 of the ITAA 1997 at the time of CGT event A1 as the ONC shares do not pass the principal asset test (section 855-30 of the ITAA 1997).

53. Accordingly, a participating ONC shareholder who was a foreign resident, or the trustee of a foreign trust, disregards a capital gain or capital loss made from CGT event A1 unless the ONC share disposed of is taxable Australian property because:

- it had been used at any time by the foreign resident or the trustee of a foreign trust in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
- it is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

### **The application of sections 45A, 45B and 45C**

54. Sections 45A and 45B are two anti-avoidance provisions which, if either applies, 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 shareholder under the Share Buy-back is treated as an unfranked dividend that is paid by the company. Accordingly, the application of these two provisions to the Share Buy-back must be considered.

### **Section 45A**

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

56. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) was provided to participating ONC shareholders under the Share Buy-back, the circumstances of the Share Buy-back indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders.

57. Accordingly, the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the distribution received under the Share Buy-back.

### **Section 45B**

58. Section 45B applies where certain capital payments are provided to shareholders in substitution for dividends. Specifically, the provision applies 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 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)).

59. In the case of the Share Buy-back, whilst the conditions of paragraphs 45B(2)(a) and 45B(2)(b) have been met, paragraph 45B(2)(c) was not satisfied. Having regard to the relevant circumstances of the scheme as set out in subsection 45B(8) it could not 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, other than a merely incidental purpose, of enabling ONC shareholders to obtain a tax benefit.

60. Consequently, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole, or part, of the distribution received by participating ONC shareholders under the Share Buy-back.

## Appendix 2 – Detailed contents list

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

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## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Subject references:*

- CGT event A1 – disposal of a CGT asset
- CGT taxable Australian property
- deemed dividends
- dividend streaming arrangements
- dividend substitution
- share buy-backs

### *Legislative references:*

- TAA 1953
- 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)(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 III Div 16K
- ITAA 1936 159GZZZK
- ITAA 1936 159GZZZK(d)
- ITAA 1936 159GZZZM
- ITAA 1936 159GZZZM(a)
- ITAA 1936 159GZZZP
- ITAA 1936 159GZZZQ
- ITAA 1997
- ITAA 1997 104-10
- ITAA 1997 104-10(4)
- ITAA 1997 104-165(3)
- ITAA 1997 116-20
- ITAA 1997 Div 197
- ITAA 1997 197-50
- ITAA 1997 Div 230
- ITAA 1997 Div 855
- ITAA 1997 855-10
- ITAA 1997 855-10(1)
- ITAA 1997 855-15
- ITAA 1997 855-25
- ITAA 1997 855-30
- ITAA 1997 975-300
- ITAA 1997 975-300(2)

### ATO references

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