

CR 2021/4 - PM Capital Global Opportunities Fund Limited - off-market share buy-back

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Class Ruling

PM Capital Global Opportunities Fund Limited – off-market share buy-back

ⓘ Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the tax consequences for Australian-resident shareholders of PM Capital Global Opportunities Fund Limited (PGF) who participated in the off-market share buy-back (Buy-Back) which was announced on 13 August 2020.
2. Full details of this Buy-Back are set out in paragraphs 27 to 38 of this Ruling.
3. All legislative references are to provisions of the *Income Tax Assessment Act 1997* or the *Income Tax Assessment Act 1936* (as detailed in the table in Appendix 2 of this Ruling).

Who this Ruling applies to

4. This Ruling applies to you if you:
 - participated in the Buy-Back
 - were an Australian resident as defined under subsection 6(1), and
 - held your PGF shares on capital account (that is, you did not hold your PGF shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)).

5. This Ruling does not apply to you if you are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 27 to 38 of this Ruling.

Note: Division 230 will not apply to you if you are an individual, unless you made an election for the Division to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2020 to 30 June 2021.

Ruling

Off-market share buy-back

7. The Buy-Back was an off-market purchase for the purposes of section 159GZZK.

The Dividend Component

8. You are taken to have been paid a dividend of 15.14 cents (Dividend Component) on 26 October 2020 for each PGF share you sold in the Buy-Back (section 159GZZP).

9. A portion of the Dividend Component, being 11.96 cents, is a frankable distribution pursuant to section 202-40 and is capable of being franked in accordance with section 202-5. The remaining 3.18 cents of the Dividend Component is an unfrankable distribution pursuant to paragraph 202-45(c) and is not capable of being franked in accordance with section 202-5.

10. The difference between the Buy-Back Price and the Dividend Component is not a dividend for income tax purposes (subsection 159GZZP(2)).

Assessability of the Dividend Component

Direct distributions

11. If you are an individual, a corporate shareholder, or the trustee of a complying super fund who participated in the Buy-Back, your assessable income for the income year in which the Buy-Back occurred includes:

- the Dividend Component of 15.14 cents per PGF share, and
- subject to the 'qualified person' rules, the amount of the franking credits attached to the Dividend Component (subsection 44(1)).

12. You will be entitled to a tax offset equal to the amount of the franking credits attached to the Dividend Component, subject to the qualified person rules (subsection 207-20(2)).

Indirect distributions***Partnerships***

13. If you are a partnership, your assessable income in the income year in which the Buy-Back occurred for the purposes of calculating the net income of the partnership includes:

- the Dividend Component of 15.14 cents per PGF share, and
- subject to the qualified person rules, the amount of the franking credits attached to the Dividend Component.

Trusts

14. If you are a trustee of a trust, your assessable income in the income year in which the Buy-Back occurred for the purposes of calculating the net income of the trust includes:

- the Dividend Component of 15.14 cents per PGF share, and
- subject to the qualified person rules, the amount of the franking credits attached to the Dividend Component.

Partners and beneficiaries

15. Subsections 207-35(3) to (6) set out the circumstances in which a partner or beneficiary to whom a franked distribution flows indirectly is required to gross up their assessable income for their share of the franking credit on the franked distribution. Where the franked distribution 'flows indirectly' (within the meaning of Subdivision 207-B) through a trust or partnership to a resident that is an individual, a corporate tax entity (at the time the distribution flows indirectly to it) or a trustee mentioned in paragraphs 207-45(c) or (d), the partner or trustee will, subject to the qualified person rules, be entitled to a tax offset equal to the entity's share of the franking credit on the franked distribution.

Refundable tax offset

16. The franking credit tax offset is subject to the refundable tax offset rules in Division 67. Certain trustees and corporate tax entities are not entitled to the refundable tax offset rules in accordance with subsections 67-25(1A) to (1D).

Sale consideration

17. You are taken to have received the Capital Component of 98.74 cents for each PGF share you sold in the Buy-Back on 26 October 2020 as the Sale Consideration (section 159GZZZQ).

Capital gains tax implications

18. You are taken to have sold your PGF shares for capital gains tax (CGT) purposes on 26 October 2020 (CGT event A1 under section 104-10).

19. The Sale Consideration of 98.74 cents per share represents the capital proceeds you received for each PGF share you sold in the Buy-Back (Note 3 following subsection 116-20(1)).

20. If you did not hold your PGF shares through a partnership, you made a:

- capital gain on each PGF share where the Sale Consideration was more than the share's cost base (subsection 104-10(4)) - the amount of the capital gain is the difference
- capital loss on each PGF share where the Sale Consideration was less than the share's reduced cost base (subsection 104-10(4)) - the amount of the capital loss is the difference.

21. Where you made a capital gain, you can treat the capital gain as a 'discounted capital gain' if you held your PGF share since 26 October 2019 and the other conditions of Subdivision 115-A are met.

22. If you held the PGF shares through a partnership, each partner in the partnership has a separate cost base and reduced cost for their interest in a PGF share sold in the Buy-Back by the partnership (subsection 106-5(2)). The partnership would allocate to each partner an appropriate share of the Sale Consideration which the partnership received for the sale of PGF shares in the Buy-Back.

Qualified persons

23. You will satisfy the qualified person rules in relation to the Dividend Component (for the purposes of paragraph 207-145(1)(a) which refers to Division 1A of former Part IIIAA) if:

- you acquired the PGF shares which you sold in the Buy-Back on or before 10 September 2020, and
- during the period you held the PGF shares, you had sufficient risks of loss or opportunities for gain in respect of the shares (as defined in former section 160APHM) for a continuous period of at least 45 days.

24. The 'last-in first-out' rule in former subsection 160APHI(4) has no effect for the purposes of the Buy-Back in respect of any additional PGF shares you acquired after 18 September 2020, as the shares did not confer an entitlement to participate in the Buy-Back.

The anti-avoidance provisions

25. The Commissioner will not make a determination under either subsections 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the Capital Component you received on 26 October 2020.

26. The Commissioner will not make a determination under paragraphs 204-30(3)(c) or 177EA(5)(b) to deny the whole, or any part, of the imputation benefits in relation to the Dividend Component you received on 26 October 2020.

Scheme

27. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

PM Capital Global Opportunities Fund Limited

28. PGF is an Australian-listed investment company which is listed on the Australian Securities Exchange (ASX).

29. As at 30 June 2020, PGF had 354,175,578 shares on issue. Its shareholder equity consisted of \$349,730,412 share capital and \$60,705,915 retained earnings.

30. PGF's share capital account (as defined in section 975-300) was not tainted for the purposes of Division 197.

31. All PGF shares on issue were acquired after 19 September 1985.

32. PGF has paid fully franked dividends to its shareholders since 9 March 2016.

Buy-Back

33. On 13 August 2020, PGF announced that it intended to acquire, under the Buy-Back, up to 5% of its issued shares at a price which would be at a 5% discount to its post-tax net tangible assets per share (excluding deferred tax assets) as at 23 October 2020 (Closing Date).

34. All eligible Australian-resident and New Zealand-resident shareholders who were registered on PGF's share register on 18 September 2020 were entitled to participate in the Buy-Back. Each participating shareholder was entitled to dispose of up to 5% of their PGF shares to the company.

35. The Opening Date for the Buy-Back offer was 23 September 2020 and offers to participate closed on the Closing Date.

36. On 26 October 2020, PGF announced that it had successfully bought back 4,465,411 of its shares for a total consideration of \$5,085,210.05.

37. PGF paid a Buy-Back Price of \$1.1388 for each PGF share it purchased in the Buy-Back comprising of the:

- Capital Component of 98.74 cents which was debited to PGF's share capital account, and
- Dividend Component of 15.14 cents which was debited to PGF's retained earnings.

38. PGF cancelled all the shares it purchased in the Buy-Back.

Commissioner of Taxation20 January 2021

Appendix 1 – Explanation

ⓘ This Explanation 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.

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Off-market share buy-back

39. Although PGF shares were listed on the ASX, the Buy-Back was not undertaken in the ordinary course of trading on the ASX. Therefore, the Buy-Back was an off-market purchase (paragraph 159GZZZK(d)).

The Dividend Component

40. The difference between the Buy-Back Price and the part of the Buy-Back Price which was debited against amounts standing to the credit of PGF's share capital account is taken to be a dividend paid by PGF to you. As a result, the Dividend Component is 15.14 cents per share.

41. Where the buy-back price of a share sold in an off-market share buy-back exceeds the market value worked out as if the buy-back was not announced and did not happen, the Dividend Component is unfrankable to the extent of the excess (paragraph 202-45(c)).

42. The Buy-Back Price for each PGF share bought back under the Buy-Back of \$1.1388 was greater than the market value of a PGF share of \$1.1070 for the purpose of paragraph 202-45(c), as determined in accordance with Taxation Determination TD 2004/22 *Income tax: for Off-Market Share Buy-Backs of listed shares, whether the buy-back price is set by tender process or not, what is the market value of the share for the purposes of subsection 159GZZZQ(2) of the Income Tax Assessment Act 1936?*

43. For the purposes of determining the application of paragraph 202-45(c), PGF proposed adopting the S&P/ASX Emerging Companies Index as allowed for in TD 2004/22 (which the Commissioner accepted).

44. As the Buy-Back Price of \$1.1388 per PGF share exceeds the market value of \$1.1070 per PGF share, 3.18 cents of the Dividend Component is an unfrankable dividend. The remaining 11.96 cents of the Dividend Component is a frankable dividend (section 202-40).

The Capital Component

45. For the purposes of determining the amount of a capital gain or loss you made on the disposal of your PGF shares in the Buy-Back, the consideration you are taken to have received in respect of the disposal is worked out in accordance with section 159GZZZQ.

46. Subsection 159GZZZQ(1) provides that you are taken to have received an amount equal to the purchase price as consideration in respect of the sale of the share bought back. However, this amount is subject to certain adjustments in order to arrive at the Sale Consideration.

47. Subsection 159GZZZQ(2) is one of the adjusting provisions. The subsection provides that if the Buy-Back Price was less than what would have been the market value of the PGF share (calculated as if the Buy-Back did not occur and was never proposed to occur), then the consideration is increased to the market value. However, as the Buy-Back Price per PGF share was greater than the market value per PGF share, subsection 159GZZZQ(2) does not operate to increase the Sale Consideration.

48. Pursuant to subsections 159GZZZQ(3) and (4), the Buy-Back Price of \$1.1388 is reduced by a 'Reduction Amount' which is equivalent to the Dividend Component of 15.14 cents. As a result, the Sale Consideration for each PGF share disposed of under the Buy-Back is 98.74 cents (being \$1.1388 less 15.14 cents).

49. If you are a company, and you made a capital loss, the Sale Consideration is subject to further adjustments pursuant to subsections 159GZZZQ(8) and (9).

Qualified persons

50. Paragraph 207-145(1)(a) 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 required to include the franking credit in its assessable income and is entitled to claim the franking credit as a tax offset. Broadly speaking, to be a qualified person in relation to the Dividend Component paid under the Buy Back, you must satisfy the 'holding period rule' (former section 160APHO).

51. As there is no 'related payment' (former section 160APHN) the holding period rule requires you to hold the shares on which the dividend is paid 'at risk' for a continuous period of at least 45 days during the 'primary qualification period', which commences on the day after the shares are acquired and ends on the 45th day after the day on which they became ex dividend. In determining whether you have satisfied the holding period rule, any days during which there is a materially diminished risk of loss or opportunity for gain in respect of the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

52. Under former subsection 160APHM(2), a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares if the 'net position' in respect of the risks of loss and opportunity for gain of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares. The Commissioner does not regard the announcement of the Buy-Back, the making of an invitation to you to offer to sell your PGF shares, or the making of an offer by you to PGF in respect of your PGF shares as affecting whether the PGF shares were held at risk or not.

53. If you acquired PGF shares on or before 10 September 2020 and participated in the Buy-Back with some or all of those shares, the holding period rule is satisfied as long as you held those shares at risk for at least 45 days.

54. Generally, under the holding period rule a shareholder will be deemed to have disposed of their most recently acquired shares first (former subsection 160APHI(4)). The 45-day rule operates on a last-in first-out basis, so that shareholders will be deemed to have disposed of their most recently acquired shares for the purposes of applying the 45-day rule.

55. Where you:

- acquired ex-entitlement PGF shares (on or after 19 September 2020) (which did not confer an entitlement to participate in the Buy-Back), and
- participated in the Buy-Back with cum entitlement shares (which conferred an entitlement to participate in the Buy-Back),

you will not be considered for the purposes of the 45-day rule to be subject to the last-in first-out rule in former subsection 160APHI(4), and so you will not be taken to have participated with the 'ex-entitlement' shares. Ex-entitlement shares do not constitute 'related securities' for the purposes of former subsection 160APHI(2) in relation to any cum entitlement shares. PGF shares commenced trading on an ex-entitlement basis on 19 September 2020.

56. Accordingly, for any additional PGF shares that you acquired on or after 19 September 2020 on an ex-entitlement basis, the last-in first-out rule in former subsection 160APHI(4) will not apply in relation to those shares regarding the Dividend Component.

The anti-avoidance provisions

Section 45A

57. 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.

58. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) was provided to you under the Buy-Back, the circumstances of the Buy-Back indicate that there was no streaming of capital benefits to some shareholders and dividends to other shareholders. Therefore, section 45A does not apply to the Buy-Back.

Section 45B

59. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends.

60. While the conditions of paragraphs 45B(2)(a) and (b) were met in respect of the Buy-Back, the requisite purpose of enabling a person to obtain a tax benefit, by way of capital distribution, was not present.

61. Having regard to the relevant circumstances (as set out in subsection 45B(8)) of the Buy-Back, it cannot be concluded that a person would have entered into, or carried out, the Buy-Back for a more than incidental purpose of enabling a participating shareholder to obtain a tax benefit. Therefore, section 45B does not apply to the Buy-Back.

Section 177EA

62. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits.

63. While the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) are satisfied in respect of the Buy-Back, the relevant circumstances of PGF's Buy-Back are such that, with regard to the matters as set out in subsection 177EA(17), it cannot be concluded for the purposes of paragraph 177EA(3)(e) that a person who entered into or carried out the Buy-Back did so for a more than incidental purpose of enabling a participating shareholder to obtain an imputation benefit. Therefore, section 177EA does not apply to the Buy-Back and the Commissioner will not make a determination pursuant to paragraph 177EA(5)(b).

Section 204-30

64. Section 204-30 applies where a corporate tax entity streams the payment of dividends to its members in such a way that certain shareholders obtain imputation benefits, and other shareholders obtain lesser or no imputation benefits, whether or not they receive other benefits.

65. If section 204-30 applies, the Commissioner may make a determination to debit PGF's franking account pursuant to paragraph 204-30(3)(a), and/or to deny the imputation benefit to each shareholder who participated in the Buy-Back pursuant to paragraph 204-30(3)(c).

66. Having regard to the circumstances of the Buy-Back, there is no streaming of distributions by PGF. Therefore, section 204-30 does not apply to the Buy-Back and the Commissioner will not make a determination pursuant to paragraph 204-30(3)(c).

Appendix 2 – Legislative provisions

67. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

<i>Income Tax Assessment Act 1936</i>	subsection 44(1)
<i>Income Tax Assessment Act 1936</i>	section 45A
<i>Income Tax Assessment Act 1936</i>	subsection 45A(2)
<i>Income Tax Assessment Act 1936</i>	paragraph 45A(3)(b)
<i>Income Tax Assessment Act 1936</i>	section 45B
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(2)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(2)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(3)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(8)
<i>Income Tax Assessment Act 1936</i>	section 45C
<i>Income Tax Assessment Act 1936</i>	section 159GZZK
<i>Income Tax Assessment Act 1936</i>	paragraph 159GZZK(d)
<i>Income Tax Assessment Act 1936</i>	section 159GZZP
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZP(2)
<i>Income Tax Assessment Act 1936</i>	section 159GZZQ
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZQ(1)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZQ(2)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZQ(3)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZQ(4)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZQ(8)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZQ(9)
<i>Income Tax Assessment Act 1936</i>	former Part IIIAA Division 1A
<i>Income Tax Assessment Act 1936</i>	former section 160APH(2)
<i>Income Tax Assessment Act 1936</i>	former section 160APH(4)
<i>Income Tax Assessment Act 1936</i>	former section 160APHM
<i>Income Tax Assessment Act 1936</i>	former section 160APHM(2)
<i>Income Tax Assessment Act 1936</i>	former section 160APHN
<i>Income Tax Assessment Act 1936</i>	former section 160APHO
<i>Income Tax Assessment Act 1936</i>	section 177EA
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(d)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(e)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 177EA(17)
<i>Income Tax Assessment Act 1997</i>	Division 67
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1A)

<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	section 104-10
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(4)
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-A
<i>Income Tax Assessment Act 1997</i>	subsection 106-5(2)
<i>Income Tax Assessment Act 1997</i>	subsection 116-20(1)
<i>Income Tax Assessment Act 1997</i>	section 202-5
<i>Income Tax Assessment Act 1997</i>	section 202-40
<i>Income Tax Assessment Act 1997</i>	paragraph 202-45(c)
<i>Income Tax Assessment Act 1997</i>	section 204-30
<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(3)(a)
<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(3)(c)
<i>Income Tax Assessment Act 1997</i>	Subdivision 207-B
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(2)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(3)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(6)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(a)
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	section 975-300
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)

References

Previous draft:

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Related Rulings/Determinations:

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ATO references

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