



CR 2004/16 - Income tax: Share Buy-Back: Foster's Group Limited

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Class Ruling

Income tax: Share Buy-Back: Foster's Group Limited

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax laws dealt with in this Class Ruling are:

- Section 44 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;
- Paragraph 128B(3)(ga) of the ITAA 1936;
- Section 159GZZZP of the ITAA 1936;
- Section 159GZZZQ of the ITAA 1936;
- Division 1A Part IIIAA of the ITAA 1936;
- Section 177EA of the ITAA 1936;
- Section 118-20 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Section 118-25 of the ITAA 1997;
- Section 202-5 of the ITAA 1997;

- Section 202-40 of the ITAA 1997;
- Section 202-45 of the ITAA 1997;
- Section 204-30 of the ITAA 1997;
- Section 207-20 of the ITAA 1997.

Note: On 27 September 2002, the Minister for Revenue and Assistant Treasurer announced the Government's intention to introduce various consequential amendments with effect from 1 July 2002 dealing with the simplified imputation system [Minister for Revenue and Assistant Treasurer's Press Release C104/02]. This Ruling deals only with the law as presently enacted and does not extend to the application of these proposed laws.

Class of persons

3. The class of persons to which this Ruling applies is the shareholders of Foster's Group Limited ('Foster's') who disposed of shares under the Foster's off-market share buy back ('the Buy-Back') which was announced by Foster's on Thursday 6 November 2003 and described in the Arrangement part of this Ruling.

4. The class of persons to which this Ruling applies does not include Foster's. The Ruling does not deal with how the taxation law applies to Foster's in relation to the Buy-Back. Furthermore, it should be noted that certain information which relates to the affairs of Foster's, but is not in the public domain, has been taken into account in determining the application of certain anti-avoidance provisions in this Ruling. This information cannot be disclosed in the Ruling.

Qualifications

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

6. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 11 to 21.

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

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

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Date of effect

9. This Class Ruling applies to the year ended 30 June 2004. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by Gazette;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

Withdrawal

10. This Class Ruling is withdrawn and ceases to have effect after 30 June 2004. However, the Ruling continues to apply after its withdrawal in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement during the term of the Ruling, subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Arrangement

11. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or

parts of documents incorporated into this description of the arrangement are:

- The application for a Class Ruling dated 1 October 2003 and appendices 1 to 6;
- Letter from Foster's Group Limited dated 15 October 2003;
- Draft Buy-Back Tender document dated 21 October 2003;
- Letter from Foster's Group Limited dated 22 October 2003; and
- Letter from Foster's Group Limited dated 24 October 2003.

Note: Certain information from Foster's has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information Legislation.

12. On 6 November 2003 Foster's announced its intention to make an off-market buyback of its own shares. Foster's announced it would purchase approximately \$800 million of its ordinary shares (around 8% of its issued capital). Foster's, under the terms of the Buy-Back, could choose to buy back a lower number of shares (or none at all).

13. The Buy-Back forms part of Foster's continuing capital management strategy that aims to make its capital structure more efficient by reducing the number of shares on issue and return excess capital to participating shareholders. Moreover the Buy-Back is anticipated over the longer term to have positive effects on earnings per share and return on equity. The Buy-Back is funded from its liquid assets, principally the proceeds of the disposal of the Australian Leisure & Hospitality division.

14. As at 30 September 2003, the Share Capital was comprised of approximately 2,198,000,000 fully paid ordinary shares and a small number of partly paid shares. The shareholders in Foster's are a mix of individuals, companies, superannuation funds and non-residents.

15. The Buy-Back was conducted through a tender process during a specified tender period and was open to all shareholders (but not in respect of any Restricted Employee Shares) if they were registered on 17 November 2003, the record date for the Buy-Back. Participation in the Buy-Back was voluntary. Hence, shareholders not wishing to participate were not required to do anything.

16. The tender period opened on Tuesday 25 November 2003 and closed on Friday 19 December 2003. Under the tender process shareholders were invited to tender up to 100% of their shareholding at specified prices within a specified price range of \$4.00 to \$4.90 per

share. In doing so, shareholders could also submit tenders to sell different parcels of shares at different prices. Alternatively, shareholders could submit a Final Price Tender under which they offered to sell their shares for the price as determined by the tender process.

17. Shareholders who tendered prices above the Buy-Back Price were not accepted. Prices tendered below the Buy-Back Price or at the Final Price Tender were accepted and would receive the Buy-Back price for each share bought back, even if they tendered shares at a lower price. All shares bought back under the Buy-Back are cancelled.

18. Where the number of shares tendered at or below the Buy-Back Price (including the Final Price Tenders) exceeds the number of shares Foster's had determined to buy back, a scale back procedure operated on a pro-rata basis so that Foster's was able to repurchase the required amount of capital.

19. Notwithstanding the scale back, any shareholder who tendered all of their shares at or below the Buy-Back Price or as Final Price Tenders and would have 500 or fewer shares as a result of the scale back, would have all of the shares they tendered bought back in full.

20. Under the Buy-Back offer successful tenderers would receive \$1.81 as a capital amount and the balance of the Buy-Back Price as a fully franked dividend.

21. On Monday 22 December 2003 Foster's announced that:

- Foster's had completed its off-market share buy-back of 167.1 million Foster's ordinary shares, representing 8.2 per cent of Foster's issued shares (the lowest number of Foster's total issued shares during the last 12 months), at a price of \$4.00 per share. The total amount of capital repurchased by Foster's under the Buy-Back was \$668.4 million;
- Foster's cancelled all shares bought back on 22 December 2003;
- Foster's received tenders for approximately 453.7 million shares, of which approximately 167.1 million shares were tendered at the Buy-Back Price of \$4.00 (including final price tenders);
- Shareholders received \$4.00 for each share bought back. The number of shares bought back from each shareholder was determined on the following basis:
- 100 per cent of those shares tendered at \$4.00 or as a final price tender have been bought back; and

- no shares tendered at prices above \$4.00 have been bought back;
- Foster's dispatched proceeds cheques and direct credit bank accounts (as applicable) to all successful shareholders and dispatched new shareholder statements to successful Issuer Sponsored tendering shareholders on Tuesday 6 January 2004.

Ruling

The Dividend Component

22. Participating shareholders will be taken to have been paid a dividend of \$2.19 ('the Dividend Component') for each share bought back out of the profits of Foster's on the date the Buy-Back occurred.

23. 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.

24. Participating non-resident shareholders are not liable for withholding tax on the Dividend Component under paragraph 128B(3)(ga) of the ITAA 1936 because the Dividend Component is a frankable distribution pursuant to section 202-40 of the ITAA 1997, and was fully franked by Foster's.

The Capital Component

25. Participating shareholders are taken to have received \$1.81 ('the Capital Component') as consideration in respect of the sale of each of their Foster's shares on 22 December 2003 for the purposes of section 159GZZZQ of the ITAA 1936.

26. The treatment of this consideration amount for tax purposes will depend on whether the sale is on capital account (where the shares are held for investment) or on revenue account (where the shares are turned over in the course of business). In general, the relevant treatment will be as follows:

(a) Shares held on capital account

- The amount by which the capital proceeds of \$1.81 exceeds the cost base of each share will be a capital gain to the shareholder and included in the shareholder's assessable income. If the share's reduced cost base exceeds \$1.81, the difference will be a capital loss.

(b) Shares held on revenue account

- The amount by which the consideration of \$1.81 exceeds the cost of each share will be included in the shareholder's assessable income. Correspondingly, if the cost exceeds \$1.81, the difference will be an allowable deduction.

The Anti-avoidance Provisions

27. The Commissioner will not make a determination under section 45A or 45B that section 45C applies to the whole, or any part, of the Capital Component of the Buy-Back price received by participating shareholders.

28. 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 under the Buy-Back by participating shareholders.

29. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits received in relation to the Dividend Component under the Buy-Back by participating shareholders.

Explanation**The Dividend and Capital Components**

30. The purchase price received by participating shareholders 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

31. 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 \$4.00 per share and \$1.81 of this was debited to

the share capital account. Thus the dividend amount is \$2.19 per share.

32. The dividend amount of \$2.19 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). As paragraph 202-45(c) does not apply, the dividend amount of \$2.19 is fully frankable.

33. For Australian resident individual and corporate tax entity shareholders, the dividend amount is included in their assessable income under subsection 44(1). Generally, an amount equal to the amount of the franking credit is included in their assessable income under subsection 207-20(1) and they are also entitled to a tax offset under subsection 207-20(2) reflecting the franking credit attached to the dividend.

34. However, it should be noted that there are provisions which may deny a franking credit in certain circumstances. For instance, paragraph 207-145(1)(a) requires that a shareholder receiving a franked distribution be a 'qualified person' for the purposes of Division 1A Part IIIA of the ITAA 1936 in order to obtain a franking credit or tax offset. Broadly speaking, to be a qualified person in relation to a dividend a taxpayer must satisfy both the holding period rule (or certain alternative rules) and the related payments rule.

35. The holding period rule requires shareholders to hold the shares or the interest in the shares on which the dividend is paid at risk for a continuous period of at least 45 days. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and day of disposal of the relevant shares are also not counted.

36. As the dividend component of the consideration received under the Buy-Back is fully franked, a non-resident shareholder is not liable to Australian withholding tax on the dividend component (paragraph 128B(3)(ga)).

The Capital Component

37. Participating shareholders are taken to have disposed of those shares accepted under the Buy-Back on 22 December 2003. The disposal may have different taxation implications for shareholders depending on how the shares were held, for instance:

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

It should be noted that shareholders who have both an income tax and a capital gains tax liability will generally have the amount of the capital gain reduced under the anti-overlap provisions contained in section 118-20 of the ITAA 1997. If the shares are held as trading stock the capital gain or loss is disregarded under section 118-25 of the ITAA 1997.

38. For the purposes of computing the amount of the gain or loss (on capital or revenue account) in these cases, the consideration in respect of the disposal of a share under a buy-back is determined in accordance with section 159GZZZQ of the ITAA 1936.

39. The consideration determined under section 159GZZZQ of the ITAA 1936 is:

- the buy-back price; less
- the reduction amount (within the meaning of subsection 159GZZZQ(4) of the ITAA 1936).

Subsection 159GZZZQ(2) of the ITAA 1936 contains a market value rule which applies if the buy-back price in respect of a share brought back under the buy-back is less than the market value of the share at the time of the time of the buy-back if the buy-back did not occur and was never proposed to occur. The effect of this rule is that the difference between the buy-back price and the market value will be treated as consideration for ordinary income or capital gains tax purposes. For the purposes of calculating the profit or loss on disposal of the shares, under either the income or capital gains tax provisions, participating shareholders are taken to have received \$1.81 per share as consideration in respect of the sale of their shares under the Buy-Back.

The Anti-Avoidance Provisions

Sections 45A and 45B

40. Sections 45A of the ITAA 1936 and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies. The effect of such a Determination is that all or part of the distribution of capital received by the shareholder under the Buy-Back is treated as an unfranked dividend. Accordingly, the application of these two provisions to the Buy-Back must be considered.

41. Section 45A of the ITAA 1936 is an anti-avoidance provision that applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of share capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

42. Although a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936) is provided to participating shareholders under the Buy-Back, the circumstances of the Buy-Back indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly, section 45A of the ITAA 1936 has no application to the Buy-Back.

43. Section 45B of the ITAA 1936 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) of the ITAA 1936);
- (b) under the scheme, a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose), of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

44. 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 shareholder to obtain a tax benefit – by way of capital distribution – was not present.

45. Having regard to the 'relevant circumstances' of the scheme (the Buy-Back), as set out in subsection 45B(8) of the ITAA 1936, it is apparent that the inclusion of a capital element in 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 that have been made by Foster's in the past indicate that the Capital Component was being paid in substitution for a dividend.

Section 177EA

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

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

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the '**relevant taxpayer**') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

48. In the present case the conditions of paragraphs 177EA(3)(a) to (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 Foster's, its shareholders or any other relevant party, there is a purpose more than merely an incidental purpose of conferring an imputation benefit under the scheme. Under this arrangement the relevant taxpayer is the participating shareholder and the scheme comprises the circumstances surrounding the Buy-back.

49. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances 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.

50. The Commissioner has come to the view that section 177EA of the ITAA 1936 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). Among the circumstances of the Buy-Back reflected in those paragraphs are: the delivery of franking credits in excess of what would have otherwise been distributed in the ordinary course of dividend declaration; 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; and the fact that participating shareholders were more likely than not to make an economic gain, but a loss for tax purposes, from their participation.

51. Where section 177EA applies the Commissioner has a discretion, pursuant to subsection 177EA(5) of the ITAA 1936 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 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 shareholders be denied under paragraph 177EA(5)(b).

Section 204-30

52. 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)); and
- (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)).

53. Relevantly, if section 204-30 applies the Commissioner is vested with a discretion under subsection 204-30(3) 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 distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

54. For section 204-30 to apply, 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) by reference to the ability of the members to fully utilise imputation benefits.

55. A significant portion of Foster's shareholding was held by non-residents who do not fully benefit from franking, a feature of the Buy-Back, to the same extent as resident shareholders. Thus, the conditions in subsection 204-30(1) for the provision to apply are met. However, the Commissioner will not make a determination under section 204-30 of the ITAA 1997.

Detailed contents list

56. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

25 February 2004

<i>Previous draft:</i>	- ITAA 1936 45A(3)(b)
Not previously issued as a draft	- ITAA 1936 45B
	- ITAA 1936 45B(2)(a)
	- ITAA 1936 45B(2)(b)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 45B(2)(c)
CR 2001/1; TR 92/1; TR 97/16;	- ITAA 1936 45B(8)
TR 92/20	- ITAA 1936 45C
	- ITAA 1936 128B(3)(ga)
<i>Subject references:</i>	- ITAA 1936 159GZZZP
- dividend streaming arrangements	- ITAA 1936 159GZZZQ
- share buy backs	- ITAA 1936 159GZZZQ(2)
	- ITAA 1936 159GZZZQ(4)
	- ITAA 1936 Div 1A Pt IIIAA
<i>Legislative references:</i>	- ITAA 1936 177EA
- Copyright Act 1968	- ITAA 1936 177EA(3)
- TAA 1953 Pt IVAAA	- ITAA 1936 177EA(3)(a)
- ITAA 1936 44	- ITAA 1936 177EA(3)(b)
- ITAA 1936 44(1)	- ITAA 1936 177EA(3)(c)
- ITAA 1936 45A	- ITAA 1936 177EA(3)(d)
	- ITAA 1936 177EA(3)(e)

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|-------------------------|---------------------------|
| - ITAA 1936 177EA(5) | - ITAA 1997 204-30(1)(a) |
| - ITAA 1936 177EA(5)(a) | - ITAA 1997 204-30(1)(b) |
| - ITAA 1936 177EA(5)(b) | - ITAA 1997 204-30(1)(c) |
| - ITAA 1936 177EA(17) | - ITAA 1997 204-30(3)(a) |
| - ITAA 1997 118-20 | - ITAA 1997 204-30(3)(c) |
| - ITAA 1997 118-25 | - ITAA 1997 204-30(8) |
| - ITAA 1997 202-5 | - ITAA 1997 207-20 |
| - ITAA 1997 202-40 | - ITAA 1997 207-20(1) |
| - ITAA 1997 202-45 | - ITAA 1997 207-20(2) |
| - ITAA 1997 204-30 | - ITAA 1997 207-145(1)(a) |
| - ITAA 1997 204-30(c) | |
| - ITAA 1997 204-30(1) | |
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ATO references

NO: 2004/2573

ISSN: 1445-2014