


CR 2022/102 - McMillan Shakespeare Limited - off-market share buy-back

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Status: **legally binding**

Class Ruling

McMillan Shakespeare 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 income tax consequences for shareholders of McMillan Shakespeare Limited (MMS) who participated in the off-market share buy-back which MMS announced on 29 August 2022 (buy-back).
2. Details of this scheme are set out in paragraphs 39 to 60 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (as detailed in the table in Appendix 2 of this Ruling), unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you are an Australian resident or a New Zealand resident who held ordinary shares (shares) in MMS and participated in the buy-back with some or all of those shares.
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 39 to 60 of this Ruling.

Note: Division 230 will not apply to individuals unless they have made an election for it to apply.

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When this Ruling applies

6. This Ruling applies from 1 July 2022 to 30 June 2023.

Ruling**The buy-back is an off-market purchase**

7. The buy-back is an off-market purchase for the purpose of section 159GZZK.

The Dividend Component

8. MMS is taken to have paid you a dividend of \$10.67 (Dividend Component) on 24 October 2022 for each MMS share you sold in the buy-back (section 159GZZZP).

9. The Dividend Component is a frankable distribution pursuant to section 202-40 and was fully franked in accordance with section 202-5.

10. The difference between the buy-back price of \$11.66 (Buy-Back Price) and the Dividend Component, being \$0.99 (Capital Component), is not taken to be a dividend (subsection 159GZZZP(2)).

Assessability of the Dividend Component and tax offset***Resident shareholders – direct distributions***

11. If you are an Australian-resident individual, corporate tax entity or the trustee of a resident complying superannuation fund who participated in the buy-back, your assessable income in the income year in which the buy-back occurred includes (for each MMS share you sold in the buy-back):

- the Dividend Component of \$10.67, and
- subject to the 'qualified person' rules (see paragraphs 32 to 35 of this Ruling), the amount of franking credits attached to the Dividend Component (subsections 44(1) and 207-20(1)).

12. You are 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)).

Partnerships

13. If you are a partnership who participated in the buy-back, 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 (for each MMS share you sold in the buy-back):

- the Dividend Component of \$10.67 (subsection 44(1) and section 90), and
- subject to the qualified person rules (see paragraphs 32 to 35 of this Ruling), the amount of the franking credits attached to the Dividend Component (subsection 207-35(1) and section 90).

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Trusts

14. If you are a trustee of a trust who participated in the buy-back, 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 (for each MMS share you sold in the buy-back):

- the Dividend Component of \$10.67 (subsections 44(1) and 95(1)), and
- subject to the qualified person rules (see paragraphs 32 to 35 of this Ruling), the amount of the franking credits attached to the Dividend Component (subsections 207-35(1) and 95(1)).

Resident shareholders – indirect distributions

Partners and beneficiaries

15. If you are a partner of a partnership or beneficiary of a trust in which the partnership or trustee of the trust participated in the buy-back and a franked distribution flowed indirectly (within the meaning of Subdivision 207-B) to you, subsections 207-35(3) to (6) set out the circumstances in which you are required to gross up your assessable income for your share of the franking credit on the franked distribution.

16. Where the franked distribution flows indirectly through a trust or partnership to you and you are a resident individual, a resident corporate tax entity (at the time the distribution flows indirectly to it) or a trustee referred to in paragraphs 207-45(c) or (d), you are (subject to being a qualified person) entitled to a tax offset equal to the entity's share of the franking credit on the franked distribution.

Refundable tax offset

17. The franking credit tax offset you are entitled to 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 subsection 67-25(1A) to (1D).

New Zealand-resident shareholders

Dividends attributable to a permanent establishment in Australia

18. If you are a New Zealand-resident shareholder who participated in the buy-back with shares you held in carrying on a business at or through a permanent establishment in Australia, you include in your assessable income:

- the Dividend Component of \$10.67 per MMS share you sold in the buy-back (paragraphs 44(1)(b) and (c)), and
- subject to the qualified person rules, the amount of the franking credits attached to the Dividend Component (subsections 44(1), 207-20(1) and 207-75(2)).

19. You are 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)). However, the franking credit tax offset is not refundable under the refundable tax offset rules (subsection 67-25(1DA)).

20. As you include the Dividend Component in your assessable income, you are not liable to pay Australian withholding tax in respect of the Dividend Component (subsection 128B(3E) and paragraph 128B(3)(ga)).

Status: **legally binding**

Dividends not attributable to a permanent establishment in Australia

21. If you are a New Zealand-resident shareholder who participated in the buy-back and the Dividend Component is not attributable to MMS shares you held in carrying on a business at or through a permanent establishment in Australia, you:

- do not include the Dividend Component in your assessable income for Australian income tax purposes (section 128D)
- do not include the amount of the franking credits attached to the Dividend Component in your assessable income for Australian income tax purposes
- are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70)
- are not subject to the refundable tax offset rules (subsection 67-25(1)), and
- are not liable to Australian withholding tax on the Dividend Component as it is fully franked (paragraph 128B(3)(ga)).

Sale consideration

22. You are taken to have received \$1.55 (Sale Consideration) for each MMS share you sold in the buy-back on 24 October 2022 (Buy-Back Date) (section 159GZZZQ). The Sale Consideration may be adjusted if you are a corporate tax entity to which subsections 159GZZZQ(8) and (9) apply.

Shares held on capital account

23. If you held your MMS shares on capital account, you are taken to have disposed of your MMS shares for capital gains tax (CGT) purposes on the Buy-Back Date (CGT event A1 under section 104-10).

24. The Sale Consideration represents the capital proceeds for CGT purposes (subsection 116-20(1)).

25. If you did not hold your MMS shares through a partnership, you made a:

- capital gain on each MMS 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 MMS 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.

26. Where you made a capital gain, you can treat the capital gain as a 'discounted capital gain' if you acquired your MMS shares on or before 23 October 2021 and the other conditions of Subdivision 115-A are met.

27. If you held the MMS shares through a partnership, any capital gain or capital loss is made by the partners individually. Each partner in a partnership has a separate cost base and reduced cost base for the partner's interest in each MMS share sold in the buy-back by the partnership (subsection 106-5(2)). The partnership would allocate to you an appropriate share of the Sale Consideration which the partnership received for the sale of MMS shares in the buy-back.

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Shares held as trading stock or on revenue account

28. If you held your MMS shares as 'trading stock' (as defined in subsection 995-1(1)) and sold them in the buy-back in the ordinary course of your business:

- you include the Sale Consideration per MMS share you sold in the buy-back in your assessable income (subsection 70-80(1)), and
- you disregard any capital gain or capital loss you made (section 118-25).

29. If you held your MMS shares as revenue assets (as defined in section 977-50), but not as trading stock, you:

- include the amount by which the Sale Consideration exceeds the cost of each MMS share you sold in the buy-back in your assessable income (section 6-5), or
- are entitled to an allowable deduction for the amount by which the cost of each MMS share you sold in the buy-back exceeds the Sale Consideration (section 8-1).

30. If you also made a capital gain in respect of the MMS shares you held on revenue account but not as trading stock, the capital gain on each MMS share is reduced by the amount that is otherwise included in your assessable income (section 118-20). If you made a capital loss in respect of the MMS shares you held on revenue account but not as trading stock, you reduce the reduced cost base of each MMS share by the amount of the allowable deduction (subsection 110-55(9)).

New Zealand-resident shareholders – capital gains tax consequences

31. If you are a New Zealand-resident shareholder who participated in the buy-back, you will only have CGT consequences if the MMS shares you sold under the buy-back were 'taxable Australian property' (section 855-10).

Qualified persons

32. You will satisfy the qualified person rules in relation to the Dividend Component (for the purposes of paragraphs 207-145(1)(a) and 207-150(1)(a)) (which refer to Division 1A of former Part IIIAA) if:

- you acquired the MMS shares which you sold in the buy-back before 5 September 2022, and
- during the period when you held your MMS shares, you had sufficient risks of loss or opportunities for gain in respect of the MMS shares (as defined in former section 160APHM), having regard to any positions you have taken in relation to your MMS shares, for a continuous period of at least 45 days.

33. However, if you were, are, will be or are likely to be under an obligation to make a 'related payment' (as defined in former section 160APHN) in relation to the Dividend Component, the 45 continuous days must be during the period 22 July 2022 to 20 October 2022 inclusive.

34. The announcement of the buy-back, the making of an invitation to you to offer to sell your MMS shares, the making of an offer by you to MMS to sell your MMS shares or your participation in the buy-back do not affect whether the MMS shares bought back under the buy-back were held 'at risk' for the purposes of Division 1A of former Part IIIAA.

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35. 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 MMS shares you acquired on or after 5 September 2022, as these MMS shares did not confer an entitlement to participate in the buy-back.

The anti-avoidance provisions

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 Capital Component of the buy-back price you received.

37. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits you received in relation to the Dividend Component of the buy-back price.

38. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole or any part, of the imputation benefits you received in relation to the Dividend Component of the buy-back price.

Scheme

39. 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.

McMillan Shakespeare Limited

40. MMS is a public company listed on the Australian Securities Exchange (ASX).

41. The financial statements of MMS as at 30 June 2022 disclosed that it had:

- issued share capital of approximately \$76,257,000
- retained earnings of approximately \$222,422,000, and
- total equity of approximately \$291,431,000.

42. As at 30 June 2022, MMS had 77,381,107 fully-paid ordinary shares on issue, held by a mix of individuals, companies, trusts, partnerships and superannuation funds.

Off-market share buy-back

43. On 29 August 2022, MMS announced it intended to undertake the buy-back through a tender process, using existing cash reserves. MMS intended to buy back up to \$86 million of MMS shares, equivalent of up to approximately 10% of issued shares in MMS.

44. Participation in the buy-back was open to all eligible Australian and New Zealand-resident shareholders who were registered on the MMS share register on 6 September 2022 (Record Date).

45. Participation in the buy-back was not open to the following shareholders:

- MMS shareholders who were 'excluded foreign shareholders', being a person who resides in a jurisdiction other than Australia or New Zealand

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- shareholders whose shareholding is worth \$5,000 or less and who do not offer to sell their entire holding
- shareholders under any MMS employee share scheme which are subject to dealing restrictions, or
- shareholders who acquired their shares on or after 5 September 2022 (Buy-Back Ex-entitlement Date).

46. Participation in the buy-back was voluntary. Any MMS shareholder who did not wish to participate was not required to do anything. Non-participating MMS shareholders did not receive any property, dividends or distributions as compensation for not participating in the buy-back.

47. The tender period for the buy-back commenced on 19 September 2022 (Opening Date) and closed on 21 October 2022 (Closing Date).

48. Under the tender process, eligible shareholders could make an offer to sell (tender) some or all of their ordinary shares to MMS at any of the prices within the specified price range, being a discount percentage (tender discount) of up to 14% to the volume-weighted average price (VWAP) of MMS shares sold on the ASX over the last 5 trading days up to and including the Closing Date. Alternatively, eligible shareholders could tender as a final price tender, where the Shareholder was willing to accept the buy-back price at whatever price was determined within the buy-back price range.

49. An eligible shareholder who held 166 MMS shares or less and wished to participate in the buy-back was required to tender all of their shares at one of the specified tender discounts or as a final price offer.

50. If the total number of shares tendered which satisfied the buy-back criteria exceeded the number of shares MMS determined to buy back, MMS was entitled to scale back on a pro-rata basis after taking into account Priority Allocations and Small Residual Holding Tenders. The Priority Allocation referred to a number of shares MMS would buy back from each successful tendering shareholder, with the scale back only applying to tendered shares remaining after the Priority Allocation was acquired. A Small Residual Holding Tender referred to a tender submitted by a shareholder who tendered all of their shares at one of the Tender Discounts greater than or equal to the Buy-back Discount and/or as a Final Price Tender and who was otherwise left with a holding of shares of 41 shares or less as a result of the scale back. Small Residual Holding Tenders were accepted in full.

51. All shares bought back received the same buy-back price per share. None of the shares tendered above the buy-back price were bought back.

52. The buy-back price was subject to 2 overriding limits:

- MMS would not buy back shares at a discount greater than 14% applied to the VWAP of MMS shares sold on the ASX for the 5 trading days leading up to and including the Closing Date, and
- the buy-back price would not exceed the market value of a MMS share 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?*.

53. The buy-back did not qualify as an 'equal access scheme' as defined in subsection 257B(2) of the *Corporations Act 2001* (Corporations Act). MMS obtained an

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exemption from the Australian Securities & Investments Commission pursuant to subsection 257D(4) of the Corporations Act so that it was not required to obtain shareholder approval for the buy-back.

54. The following table is a summary of the key dates of the buy-back.

Table 1: Key dates to the buy-back

Date	Details
29 August 2022	First Announcement Date
5 September 2022	Ex-entitlement Date
6 September 2022	Record Date for buy-back participation
19 September 2022	Opening date for the tender period
21 October 2022	Closing date for the tender period
24 October 2022	Buy-back Date

55. On 24 October 2022, MMS announced that:

- it had successfully completed the buy-back of 7,738,083 MMS shares, representing 10% of the issued shares of MMS
- the total value of the MMS shares brought back under the buy-back was \$90,226,047.78
- the buy-back price was \$11.66 per MMS share
- tenders at a discount of 14% or as a final price tender were successful, subject to any minimum price condition and scale-back
- tenders at discounts of 13% or below were not accepted, and
- due to excess demand for the buy-back, shareholders whose tenders were subject to scale back had a priority allocation of 166 shares bought back before a scale back of 50.713% applied.

56. Under the buy-back, MMS debited \$0.99 per share to its share capital account and the balance of the Buy-Back Price (the Dividend Component) was debited to its retained earnings.

57. The Dividend Component was fully franked by MMS.

58. All shares bought back under the buy-back were cancelled by MMS, as required by subsection 257H(3) of the Corporations Act.

Other information

59. The share capital account of MMS (as defined in section 975-300) was not tainted for the purposes of section 197-50.

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60. As of 29 August 2022, no non-residents, either alone or together with any associates, beneficially held more than 10% of the shares in MMS.

Commissioner of Taxation

9 November 2022

 Status: **not legally binding**

Appendix 1 – Explanation

① *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 purchase

61. For the purposes of Division 16K, where a company buys a share in itself from a shareholder, the purchase is either an 'on-market purchase' (paragraph 159GZZZK(c)) or an 'off-market purchase' (paragraph 159GZZZK(d)).

62. Although MMS' ordinary shares are listed for quotation in the official list of the ASX, the buy-back was not made in the ordinary course of trading on the ASX. Therefore, the buy-back is an off-market purchase within the meaning of paragraph 159GZZZK(d).

The Dividend Component

63. 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 MMS's share capital account is taken to be a dividend which MMS paid to you.

64. The buy-back price was \$11.66. MMS debited \$0.99 per share it purchased in the buy-back against the amounts standing to the credit of its share capital account. As a result, the Dividend component is \$10.67 per MMS share.

65. Where the buy-back price of a share sold in an off-market share buy-back exceeds the share's 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)).

66. The Buy-Back Price for each MMS share purchased under the buy-back was less than the share's market value for the purposes of paragraph 202-45(c), as worked out in accordance with TD 2004/22. Therefore, the entire Dividend Component is frankable.

Status: **not legally binding**

Calculation of sale consideration

67. For the purposes of determining the amount of gain or loss you made on the disposal of your MMS shares in the buy-back, the consideration you are taken to have received in respect of the disposal of a share is worked out in accordance with section 159GZZZQ.

68. The effect of section 159GZZZQ is to adjust the amount of Sale Consideration you received for your MMS shares for either CGT purposes or revenue account purposes.

69. Subsection 159GZZZQ(1) provides that you are taken to have received an amount equal to the purchase price (in this case the buy-back price of \$11.66 received for each MMS share sold) 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.

70. Subsection 159GZZZQ(2) is one of the adjusting provisions. It provides that if the Buy-Back Price is less than the amount that would have been the market value of the MMS share (calculated as if the buy-back did not occur and was never proposed to occur), the consideration is increased to the market value.

71. For the purposes of determining the application of subsection 159GZZZQ(2), the following methodology has been proposed by MMS and accepted by the Commissioner as outlined in TD 2004/22 – the market value of a MMS share on 24 October 2022 is the VWAP of a MMS share on the ASX over the last 5 trading days before the First Announcement Date (29 August 2022), adjusted for the percentage change in the S&P/ASX 200 Index from the commencement of trading on the First Announcement Date to the close of trading on the Closing Date (21 October 2022).

72. Under the methodology outlined in paragraph 71 of this Ruling, the market value of a MMS share bought back was calculated as \$12.22. As a result, you are taken to have instead received consideration of \$12.22 for the sale of each MMS share.

73. Pursuant to subsection 159GZZZQ(3) and (4), the amount is reduced by a 'reduction amount' which is equivalent to the Dividend Component. As a result, the Sale Consideration for each MMS share you disposed of under the buy-back is \$1.55 (being \$12.22 less the Dividend Component).

74. However, if you are a corporate tax entity, and you made a loss as a result of selling your MMS shares in the buy-back, the Sale Consideration is subject to further adjustments pursuant to subsections 159GZZZQ(8) and (9).

75. You are taken to have disposed of your shares accepted under the buy-back on 24 October 2022 (CGT event A1 under section 104-10).

76. The disposal may have different taxation implications depending on how your MMS shares were held; for instance, if you held your MMS shares:

- on capital account, you are subject to the CGT provisions (see paragraphs 23 to 27 of this Ruling), or
- as trading stock or otherwise on revenue account, you are subject to the ordinary income provisions and the CGT provisions (see paragraphs 28 to 30 of this Ruling).

New Zealand-resident shareholders – capital gains tax consequences

77. If you are a New Zealand-resident shareholder, you only have CGT consequences if the MMS shares you sold under the buy-back are taxable Australian property

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(section 855-10). The term 'taxable Australian property' is defined in the table in section 855-15. Your MMS share was not an 'indirect Australian real property interest' (table item 2 of section 855-15). Therefore, your MMS share will constitute taxable Australian property if:

- you used your share in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- your share is a CGT asset that is covered by subsection 104-165(3), which is about you as an individual taxpayer choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident (table item 5 of section 855-15).

Qualified persons – dividend component of buy-back price

78. Paragraph 207-145(1)(a) provides that, for a franked distribution 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. Paragraph 207-150(1)(a) is a similar provision that applies to indirect distributions. Broadly speaking, to be a qualified person in relation to the Dividend Component, you must satisfy the 'holding period rule' (former section 160APHO).

79. The holding period rule requires a shareholder to hold the shares on which the dividend is paid 'at risk' for a continuous period of at least 45 days during the relevant qualification period. The relevant qualification period for MMS shares is:

- in the absence of a related payment, the primary qualification period, which commences on the day after you acquired the shares and ends on the 45th day after the day on which the shares became ex dividend, or
- if a related payment was or will be made (see paragraphs 83 to 84 of this Ruling), the second qualification period, which commences on the 45th day before, and ends on the 45th day after, the day on which the shares became ex dividend.

80. In determining whether you have satisfied the holding period rule, any days during which you have materially diminished risks of loss or opportunities 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.

81. Under former subsection 160APHM(2), you are taken to have materially diminished risks of loss or opportunities for gain in respect of shares or an interest in shares if your 'net position' in respect of the risks and opportunities reduces your exposure to those risks and opportunities to less than 30%.

82. The Commissioner does not regard the announcement of the buy-back, the making of an invitation to shareholders to offer to sell their MMS shares, the making of an offer by a shareholder to MMS in respect of a MMS share or a shareholder's participation in the buy-back as affecting whether MMS shares were held at risk or not.

83. Broadly, a related payment arises under former section 160APHN where you are or were under an obligation to make, or will make, a payment in respect of the dividend, which effectively passes on the economic benefit of the dividend to another person. The rule also applied if an associate of yours is or was under an obligation to, or will, make the payment in respect of the dividend.

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84. There are at least 45 days from 5 September 2022 (the Ex-entitlement Date) to 24 October 2022 (the date tender offers were accepted). If you acquired MMS shares on or before 2 September 2022 that were purchased under the buy-back, you will satisfy the holding period rule as long as you held those shares 'at risk' for at least 45 continuous days. Where a related payment arises in relation to the Dividend Component, the 45 continuous days must be during the period 22 July 2022 to 20 October 2022 inclusive.

85. Generally, under the holding period rule a shareholder is 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 are deemed to have disposed of their most recently acquired shares first for the purposes of applying the rule.

86. If you acquired ex entitlement MMS shares 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 holding period rule to be subject to the last-in first-out rule in former subsection 160APHI(4) in respect of the ex entitlement shares. MMS shares commenced trading on an ex entitlement basis on 5 September 2022 and ex entitlement shares do not constitute 'related securities' for the Dividend Component of the Buy-Back Price for the purposes of former subsection 160APHI(2) in relation to any cum entitlement shares.

87. Therefore, the last-in first-out rule will not apply in relation to any additional MMS shares you acquired on or after 5 September 2022 on an ex entitlement basis.

88. If you are an individual who has received franking credit offsets not exceeding \$5,000 for the 2022–23 income year (and you are not or were not under an obligation to make, or would not or will not be obligated to make, a related payment passing on the benefit of the Dividend Component), you are not required to satisfy the holding period rule in relation to the Dividend Component (former subsection 160APHT(1)).

The anti-avoidance provisions

Sections 45A and 45B

89. Section 45A applies where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the capital benefits than other shareholders and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

90. 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.

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

92. While the conditions of paragraphs 45B(2)(a) and (b) were met in respect of the buy-back, the requisite purpose under paragraph 45B(2)(c) of enabling a person to obtain a tax benefit, by way of a capital distribution, was not present.

93. Having regard to the relevant circumstances (as set out in subsection 45B(8)) of the buy-back, it cannot be concluded that a person entered into, or carried out, the buy-back for a more than incidental purpose of enabling a participating shareholder to obtain a tax benefit from the provision of capital benefits. Therefore, section 45B does not apply to the buy-back.

Status: **not legally binding**

Section 177EA

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

95. It is the Commissioner's view that section 177EA applies to the buy-back, having regard to all the relevant circumstances of the scheme as outlined in subsection 177EA(17). Among the circumstances of the buy-back reflected in subsection 177EA(17) is the greater attraction of the buy-back to resident shareholders than to non-resident shareholders.

96. Where section 177EA applies, the Commissioner has a discretion pursuant to subsection 177EA(5) to make a determination to debit MMS' franking account pursuant to paragraph 177EA(5)(a) or to deny the imputation benefit to each participating shareholder pursuant to paragraph 177EA(5)(b).

97. The Commissioner will exercise their discretion in such a way that they will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits you obtained by participating in the buy-back.

Section 204-30

98. Subsection 204-30(1) empowers the Commissioner to make a determination under paragraph 204-30(3)(c) if an entity streams distributions in a certain way.

99. If section 204-30 applies, the Commissioner may make a determination under subsection 204-30(3) to debit MMS' franking account pursuant to paragraph 204-30(3)(a) and to deny the imputation benefit to each MMS shareholder who participated in the buy-back pursuant to paragraph 204-30(3)(c).

100. The Commissioner considers that the conditions in subsection 204-30(1) are met in the circumstances of the Buy-Back and that the Commissioner can make a determination under subsection 204-30(3), including a determination under paragraph 204-30(3)(c) to deny the imputation benefit to each participating MMS shareholder.

101. However, the Commissioner will not make a determination under paragraph 204-30(3)(c).

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Appendix 2 – Legislative provisions

102. 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>	paragraph 44(1)(b)
<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(c)
<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>	paragraph 45B(2)(c)
<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 90
<i>Income Tax Assessment Act 1936</i>	subsection 95(1)
<i>Income Tax Assessment Act 1936</i>	paragraph 128B(3)(ga)
<i>Income Tax Assessment Act 1936</i>	subsection 128B(3E)
<i>Income Tax Assessment Act 1936</i>	section 128D
<i>Income Tax Assessment Act 1936</i>	Division 16K
<i>Income Tax Assessment Act 1936</i>	section 159GZZZK
<i>Income Tax Assessment Act 1936</i>	paragraph 159GZZZK(c)
<i>Income Tax Assessment Act 1936</i>	paragraph 159GZZZK(d)
<i>Income Tax Assessment Act 1936</i>	section 159GZZZP
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZP(2)
<i>Income Tax Assessment Act 1936</i>	section 159GZZZQ
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(1)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(2)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(3)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(4)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(8)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(9)
<i>Income Tax Assessment Act 1936</i>	Division 1A of former Part IIIAA
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHI(2)
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHI(4)
<i>Income Tax Assessment Act 1936</i>	former section 160APHM
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHM(2)
<i>Income Tax Assessment Act 1936</i>	former section 160APHN

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<i>Income Tax Assessment Act 1936</i>	former section 160APHO
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHT(1)
<i>Income Tax Assessment Act 1936</i>	section 177EA
<i>Income Tax Assessment Act 1936</i>	subsection 177EA(5)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(a)
<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>	section 6-5
<i>Income Tax Assessment Act 1997</i>	section 8-1
<i>Income Tax Assessment Act 1997</i>	Division 67
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1A)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1B)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1C)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1DA)
<i>Income Tax Assessment Act 1997</i>	subsection 70-80(1)
<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>	subsection 104-165(3)
<i>Income Tax Assessment Act 1997</i>	subsection 106-5(2)
<i>Income Tax Assessment Act 1997</i>	subsection 110-55(9)
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-A
<i>Income Tax Assessment Act 1997</i>	subsection 116-20(1)
<i>Income Tax Assessment Act 1997</i>	section 118-20
<i>Income Tax Assessment Act 1997</i>	section 118-25
<i>Income Tax Assessment Act 1997</i>	section 197-50
<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>	subsection 204-30(1)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(3)
<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>	section 207-20
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(1)
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(2)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(1)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(3)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(4)

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<i>Income Tax Assessment Act 1997</i>	subsection 207-35(5)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(6)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-45(c)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-45(d)
<i>Income Tax Assessment Act 1997</i>	section 207-70
<i>Income Tax Assessment Act 1997</i>	subsection 207-75(2)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(a)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-150(1)(a)
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	section 855-10
<i>Income Tax Assessment Act 1997</i>	section 855-15
<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)

Status: **not legally binding**

References

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TD 2004/22

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