



## Class Ruling

### Income tax: Thinksmart Limited – return of share capital (depository interests)

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#### **📌 Relying on this ruling:**

This publication (excluding appendices) 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 the ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this ruling.

Further, if we think that the ruling disadvantages you, we may apply the law in a way that is more favourable to you.

#### **Summary – what this Ruling is about**

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### **Relevant provisions**

2. Legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* or to provisions of the *Income Tax Assessment Act 1997* as detailed below:

<i>Income Tax Assessment Act 1936</i>	Subsection 6(1)
	Section 45A
	Section 45B
	Section 45C
	Section 47
<i>Income Tax Assessment Act 1997</i>	Part 3-1
	Section 104-135
	Section 104-165
	Section 106-50
	Division 115
	Section 115-25
	Part 3-3
	Division 230

	Section 855-10
	Section 855-15
	Section 975-300
	Section 995-1
	Section 997-50

### Class of entities

3. The class of entities to which this Ruling applies is the beneficiaries of a bare trust where the trustee (who is a CREST member) holds for the benefit of the beneficiary a Depositary Interest issued by Computershare Investor Services Plc which represents the absolute entitlement to a share of Thinksmart Limited (Thinksmart) (beneficiary of a Thinksmart DI) who:

- were the beneficiary of the bare trust on the relevant date for determining entitlements to receive the return of share capital made on 29 March 2019.
- hold their Thinksmart share (as represented by the interest in the bare trust and Depositary Interest) on capital account, that is, neither as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)), and
- were not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their beneficially held share in Thinksmart.

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

### 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 29 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 July 2018 to 30 June 2019. The Ruling continues to apply after 30 June 2019 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 *Public Rulings*).

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## Scheme

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8. The following description of the scheme is based on information 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.

### Thinksmart Limited

9. Thinksmart is a financial technology company incorporated in Australia. The share capital of Thinksmart is comprised solely of one class of fully paid ordinary shares. Thinksmart had 106,041,244 shares on issue as at 15 March 2019.

10. Thinksmart shareholders comprise of:

- Individuals
- Companies, and
- Superannuation funds.

11. Thinksmart shareholders include non-residents.

12. Thinksmart shares are traded through a depositary interest arrangement on the Alternative Investment Market (AIM) of the London Stock Exchange plc in the United Kingdom (UK). Thinksmart was admitted to the AIM on 2 December 2016.

### Depositary Interest arrangement

13. On 16 November 2016 Thinksmart and Computershare Investor Service Plc (as Depositary) entered into the *Deed in respect of Thinksmart Ltd Depositary Interests* (Depositary Deed) which established a mechanism allowing shareholders in Thinksmart to convert their shares into Depositary Interests.

14. Under the Depositary Deed, the Depositary issues, on a one to one basis, a Depositary Interest to a CREST member (the Holder)

for each share in Thinksmart transferred to the Depositary by a shareholder of Thinksmart.

15. The Depositary holds each share in Thinksmart transferred to it on trust as bare trustee on behalf of the relevant Holder.

16. The Holder holds each Depositary Interest as bare trustee on behalf of the shareholder in Thinksmart who transferred legal ownership of the relevant share in Thinksmart to the Depositary to hold under the Depositary Deed.

17. Each shareholder in Thinksmart who has transferred legal ownership of a share in Thinksmart to the Depositary to hold under the Depositary Deed and who has a Depositary Interest held by a Holder at all times:

- beneficially owns and is absolutely entitled to the share in Thinksmart for the purposes of section 106-50
- is entitled to any dividends paid in relation to the share in Thinksmart
- is able to call for the share in Thinksmart to be transferred back to them or transferred at their direction.

## **Thinksmart Europe Limited & ClearPay Finance Limited**

18. Thinksmart Europe Limited (TSEL) is a wholly owned subsidiary of Thinksmart. TSEL was incorporated on 6 December 2002 in, and is a resident of, the UK.

19. Thinksmart has used an intercompany loan to fund the operations of TSEL. The amount loaned by Thinksmart to TSEL is sourced from share capital raisings conducted by Thinksmart as well as dividends received from TSEL.

## **TSEL and disposal of ClearPay Finance Limited**

20. ClearPay Finance Limited (ClearPay) was a wholly owned subsidiary of TSEL which was incorporated on 5 August 2004 in the UK. ClearPay is a resident of the UK.

21. TSEL funded the operations of ClearPay through an initial share capital investment and intercompany loan where TSEL on-loaned funds that it had received through the intercompany loan it held with Thinksmart.

22. TSEL subsequently sold 90% of the shares it held in ClearPay to Afterpay Touch Group Limited (Afterpay) on 24 August 2018. Immediately prior to completion of the sale, the total investment TSEL had made in ClearPay was £2.5M which consisted of £600,000 in share capital and an intercompany loan, waived just prior to settlement, of £1.9M.

23. TSEL received, as consideration for the disposal of 90% of the shares it held in ClearPay to Afterpay, 1,000,000 shares in Afterpay in two tranches on the following dates:

<b>Tranche</b>	<b>Number of shares</b>	<b>Date received</b>
Tranche 1	750,000 shares in AfterPay	23 August 2018
Tranche 2	250,000 shares in AfterPay	25 February 2019

24. TSEL sold the first tranche of 750,000 shares in Afterpay that it received from Afterpay on 28 August 2018 for \$15M.

### **Share capital return and dividend**

25. On 14 November 2018 the shareholders of Thinksmart resolved to return share capital not exceeding \$8,000,000 (with the final amount returned to be determined by the directors of Thinksmart).

26. On 5 March 2019 the directors of Thinksmart resolved to return \$7,999,751.44 to shareholders consisting of a dividend of 3.772 cents (0.440 cents of which will be fully franked, 3.332 cents of which will be declared as attaching conduit foreign income) and a return of share capital of 3.772 cents per share. The record date for shareholders to be entitled to receive the dividend and return of share capital was 15 March 2019 (Record Date).

27. The dividend was paid on 29 March 2019 to each shareholder and was debited against the retained earnings of Thinksmart.

28. The return of share capital was paid on 29 March 2019 (Payment Date) and debited against the share capital account of Thinksmart.

29. Thinksmart's share capital account (as defined in section 975-300) was not tainted within the meaning of Division 197.

## **Ruling**

### **Return of share capital not a dividend**

30. No part of the return of share capital paid to a beneficiary of a Thinksmart DI is a dividend as defined in subsection 6(1).

## **Capital gains tax (CGT) consequences**

31. CGT event G1 (section 104-135) happened to each beneficiary of a Thinksmart DI when Thinksmart paid them the return of share capital in respect of each Thinksmart share that they owned at the Record Date and continued to own at the Payment Date.

## **Non-resident shareholders**

32. A beneficiary of a Thinksmart DI who was a foreign resident just before CGT event G1 happened will disregard any capital gain made when CGT event G1 happened in relation to a Thinksmart share if that share was not 'taxable Australian property' (section 855-10).

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

33. The Commissioner will not make a determination under section 45A or section 45B that section 45C applies to any part of the return of share capital paid to a beneficiary of a Thinksmart DI.

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**Commissioner of Taxation**

3 April 2019

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## **Appendix 1 – Explanation**

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❶ ***This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.***

### **Return of share capital not a dividend**

34. The term 'dividend' is defined in subsection 6(1) and includes any distribution made by a company to any of its shareholders.

35. The payment of the return of share capital was a distribution of money by Thinksmart to its shareholders.

36. However, paragraph (d) of the definition of dividend in subsection 6(1) excludes any:

... moneys paid or credited by a company to a shareholder ... where the amount of the moneys paid or credited, ... is debited against an amount standing to the credit of the share capital account of the company...

37. The term 'share capital account' is defined in section 975-300 as an account which 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.

38. Subsection 975-300(3) provides that an account is generally taken not to be a share capital account if it is tainted. Thinksmart has confirmed that its share capital account was not tainted within the meaning of Division 197.

39. The return of share capital was debited against the share capital account of Thinksmart. As such, paragraph (d) of the definition of dividend in subsection 6(1) applies and the return of share capital is not a dividend as defined in subsection 6(1).

### **Capital gains tax (CGT) consequences**

40. A CGT asset of a trust to which a beneficiary is absolutely entitled as against the trustee (disregarding any legal disability) is treated for CGT purposes as being the beneficiary's asset (rather than an asset of the trust). Furthermore, any act done in relation to the asset by the trustee is taken to be done by the absolutely entitled beneficiary (rather than the trustee) (section 106-50).

41. The Commissioner's preliminary views in respect of the meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 is contained in draft Taxation Ruling TR 2004/D25 *Income tax: capital gains: meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the Income Tax Assessment Act 1997*.

## **CGT event G1**

42. CGT event G1 happens if a company makes a payment to a shareholder in respect of a share they own in the company, some or all of the payment (the non-assessable part) is not a dividend, or an amount that is taken to be a dividend under section 47, and the payment is not included in the shareholder's assessable income (subsection 104-135).

43. CGT event G1 happened to a resident beneficiary of a Thinksmart DI when Thinksmart made the return of share capital to them in respect of a Thinksmart share that they owned at the relevant Record Date and continued to own at the relevant Payment Date (section 104-135). The non-assessable part in respect of the share capital return is 3.772 cents per share.

44. A resident beneficiary of a Thinksmart DI will make a capital gain under CGT event G1 if the non-assessable part is more than the cost base of the beneficiary of a Thinksmart DI's Thinksmart share. The amount of the capital gain is equal to the excess (subsection 104-135(3)).

45. If a resident beneficiary of a Thinksmart DI makes a capital gain from CGT event G1 happening, the cost base and reduced cost base of the beneficiary of a Thinksmart DI's Thinksmart share is reduced to nil. A beneficiary of a Thinksmart DI cannot make a capital loss when CGT event G1 happens (Note 1 to subsection 104-135(3)).

46. A capital gain made when CGT event G1 happened is eligible to be treated as a discount capital gain under Division 115 provided that the beneficiary of a Thinksmart DI acquired their Thinksmart share at least 12 months before the Payment Date (subsection 115-25(1)) and the other conditions are satisfied in Division 115.

47. If the non-assessable part is not more than the cost base of the resident beneficiary of a Thinksmart DI's Thinksmart share, the cost base and reduced cost base of the share are reduced (but not below nil) by the amount of the non-assessable part (subsection 104-135(4)).

48. A beneficiary of a Thinksmart DI that is either a foreign resident whose Thinksmart share is taxable Australian property, or who is a temporary resident, must meet further conditions to be eligible to treat the capital gain as a discount capital gain under Division 115.

## **Non-resident shareholders**

49. Under subsection 855-10(1), an entity disregards a capital gain or capital loss made from a CGT event if:

- just before the CGT event happened, the entity is a foreign resident, or the trustee of a foreign trust for CGT purposes; and



- the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

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

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

51. A beneficiary of a Thinksmart DI, being a foreign resident, or the trustee of a foreign resident trust for CGT purposes, cannot disregard a capital gain or capital loss made when CGT event G1 happened to their Thinksmart share under subsection 855-10(1) if the Thinksmart share:

- was an indirect Australian real property interest (item 2 of the table in section 855-15), or
- had been used at any time by them in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15), or
- was covered by subsection 104-165(3) (item 5 of the table in section 855-15).

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

52. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies to treat all or part of the return of share capital received by a beneficiary of a Thinksmart DI as an unfranked dividend paid by the company out of profits.

#### ***Section 45A – streaming of dividends and capital benefits***

53. Section 45A applies where capital benefits are streamed to some shareholders (the Advantaged Shareholders), who would derive a greater benefit from the receipt of capital than other shareholders (Disadvantaged Shareholders) and the Disadvantaged Shareholders received, or are likely to receive, dividends.

54. A reference to the 'provision of a capital benefit to a shareholder in a company' is defined in paragraph 45A(3)(b) to include the distribution to the shareholder of share capital.

55. Although a 'capital benefit' was provided to Thinksmart shareholders, the circumstances of the return of share capital indicate that there was no streaming of capital benefits to some Thinksmart shareholders and dividends to other Thinksmart shareholders.

56. 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 return of share capital.

### ***Section 45B – scheme to provide capital benefits***

57. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. In broad terms, subsection 45B(2) applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a)); and
- under the scheme, a taxpayer (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 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 (relevant taxpayer) to obtain a tax benefit (paragraph 45B(2)(c)).

58. The return of share capital satisfies the conditions in paragraphs 45B(2)(a) and 45B(2)(b). However, having regard to the relevant circumstances of each scheme (comprising each return of share capital paid) set out in subsection 45B(8), it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling Thinksmart shareholders to obtain a tax benefit.

59. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole, or a part, of the payment of the return of share capital.

## **Appendix 2 – Detailed contents list**

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

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## References

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<i>Previous draft:</i>	- ITAA 1936 47
Not previously issued as a draft	- ITAA 1997
	- ITAA 1997 104-135
<i>Related Rulings/Determinations:</i>	- ITAA 1997 104-135(3)
TR 2004/D25; TR 2006/10	- ITAA 1997 104-135(4)
	- ITAA 1997 104-165(3)
<i>Legislative references:</i>	- ITAA 1997 106-50
- ITAA 1936	- ITAA 1997 Div 115
- ITAA 1936 6(1)	- ITAA 1997 115-25(1)
- ITAA 1936 45A	- ITAA 1997 Div 197
- ITAA 1936 45A(2)	- ITAA 1997 Div 230
- ITAA 1936 45A(3)(b)	- ITAA 1997 855-10
- ITAA 1936 45B	- ITAA 1997 855-10(1)
- ITAA 1936 45B(2)	- ITAA 1997 855-15
- ITAA 1936 45B(2)(a)	- ITAA 1997 975-300
- ITAA 1936 45B(2)(b)	- ITAA 1997 975-300(3)
- ITAA 1936 45B(2)(c)	- ITAA 1997 977-50
- ITAA 1936 45B(3)	- ITAA 1997 995-1(1)
- ITAA 1936 45B(8)	- TAA 1953
- ITAA 1936 45C	

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### ATO references

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