



Class Ruling

Income tax: Talent2 International Limited Scheme of Arrangement and payment of Proposed Special Dividend

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① This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

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

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - subsection 44(1) of the ITAA 1936;
 - subparagraph 128B(3)(ga)(i) of the ITAA 1936;
 - section 128D of the ITAA 1936;
 - Division 1A of former Part IIIA of the ITAA 1936;
 - former section 160APHM of the ITAA 1936;
 - former section 160APHN of the ITAA 1936;
 - former section 160APHO of the ITAA 1936;

- paragraph 177EA(5)(b) of the ITAA 1936;
- Division 67 of the Income Tax Assessment Act 1997 (ITAA 1997);
- section 104-10 of the ITAA 1997;
- subsection 116-20(1) of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- paragraph 204-30(3)(c) of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 207-35 of the ITAA 1997;
- section 207-145 of the ITAA 1997;
- section 855-10 of the ITAA 1997; and
- section 855-15 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders in Talent2 International Limited (Talent2) who:

- participate in the Scheme of Arrangement (the Scheme) and/or receive the Special Dividend;
- hold their Talent2 shares on capital account; and
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their Talent2 shares.

(Note - Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 9 to 31 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

8. This Ruling applies from 1 July 2012 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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).

Scheme

9. The following description of the Scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Class Ruling application from PricewaterhouseCoopers dated 4 June 2012;
- Scheme Implementation Deed; and
- Scheme Booklet.

Talent2

10. Talent2 is a human resources business company listed on the Australian Securities Exchange that operates in 31 countries. Talent2 provides end-to-end talent management solutions in areas such as human resources advisory, payroll, recruitment and learning.

11. Talent2 is the head company of an Australian income tax consolidated group.

12. Talent2 had 147,403,701 ordinary shares on issue at 25 May 2012 and each share carried the same rights to vote, receive dividends and receive capital. Talent2 also had 9,742,850 options and 5,038,183 performance rights on issue. As at 26 July 2012 approximately 92% of shareholders were Australian residents.

13. Talent2 expects to have issued ordinary capital at the Special Dividend Record Date of approximately 150,428,134 shares.

14. Under Talent2's dividend policy:

- Directors determine dividend distributions to shareholders having regard to the earnings and cash flow performance and the financial condition of the Company. Directors also consider future capital requirements and prospective operating conditions; and
- Dividends are franked to the maximum extent allowable under Australian tax laws.

MBI

15. Morgan and Banks Investments Pty Limited (MBI) is a privately held company controlled by Andrew Banks and Geoff Morgan, each of whom is a director of Talent2. MBI owns approximately 21.8% of the Talent2 shares.

Allegis

16. Allegis Group Inc. (Allegis) is a privately held staffing company based in the United States which provides recruiting and staffing services in the United States, United Kingdom, Canada, Puerto Rico, Europe, the Middle East, and the Pacific Rim. Allegis employs more than 8,000 internal employees and 90,000 contract employees. Allegis Group Australia Pty Ltd (Allegis Group Australia) is part of the Allegis group.

Perbec

17. Perbec Pty Limited (Perbec) was incorporated on 25 May 2012 for the purpose of acquiring Talent2 Shares not currently held by MBI or its associates (the Excluded Shareholders). Perbec is a wholly owned subsidiary of Pergal Pty Limited (Pergal) which was incorporated on 15 May 2012 for the purpose of holding 100% of the issued capital in Perbec. As at 12 July 2012, the issued share capital of Pergal comprised 100 shares, all of which were held by MBI.

Scheme of Arrangement

18. On 28 May 2012, Talent2 announced that it had executed a Scheme Implementation Deed with Perbec, MBI and Allegis under which it is proposed that Perbec will acquire all of the Talent2 shares not currently held by the Excluded Shareholders, on the Scheme Record Date, by way of a Court approved scheme of arrangement under Part 5.1 of the *Corporations Act 2001*.

19. The Scheme Implementation Deed sets out the terms pursuant to which Perbec would acquire the minority shareholdings in Talent2 pursuant to the Scheme.

20. The Scheme Participants will comprise Talent2 shareholders (other than the Excluded Shareholders) as at the Scheme Record Date.

21. The Scheme Record Date will be 10 September 2012.

22. The Effective Date will be 23 August 2012.

23. The Scheme Participants will transfer their shares to Perbec on the Implementation Date, which is 13 September 2012.

Scheme consideration

24. Under clause 4.3 of the Scheme Implementation Deed, the Scheme consideration will be \$0.78 per Talent2 share, less the amount of any Special Dividend paid or payable per Talent2 share.

The Proposed Special Dividend

25. Under clause 4.9 of the Scheme Implementation Deed, Talent2 may announce, declare and pay a franked special dividend subject to and in accordance with the following:

- the Special Dividend being an amount up to \$0.10 per Talent2 share;
- the payment of the Special Dividend must not result in Talent2's franking account being in deficit immediately after paying the Special Dividend; and
- the Special Dividend will not be paid if the Scheme does not become Effective.

26. Perbec will loan funds to Talent2 to pay the Special Dividend (if any) under a loan facility. Perbec will fund any Special Dividend and the Scheme Consideration using cash provided by Pergal and Allegis. Pergal will fund part of its cash investment in Perbec from equity subscriptions by each of Allegis and MBI. Perbec will fund the balance from a loan that will be provided directly to Perbec by Allegis.

27. In the event that the Special Dividend is paid, the cash consideration payable to a Talent2 shareholder, other than an Excluded Shareholder, for each Talent2 share will be reduced by the amount of the Special Dividend.

28. If the Special Dividend is paid, the Special Dividend Record Date will be 3 September 2012 and the Special Dividend Payment Date will be 7 September 2012. If paid, the special dividend will be fully franked.

Subscription Arrangements

29. If the Scheme becomes Effective, the parties have agreed the terms on which MBI and Allegis Group Australia will each subscribe for and Pergal will issue shares to MBI and Allegis Group Australia. Under the subscription arrangements:

- Allegis Group Australia will subscribe for 37,500,100 ordinary shares in Pergal; and
- MBI will subscribe for 37,500,000 ordinary shares in Pergal.

30. It is the parties' intention that if the Scheme becomes Effective, shares in Pergal will be issued to Allegis Group Australia and MBI such that all Talent2 shares will be held indirectly by MBI as to 50% and Allegis Group Australia as to 50%.

MBI put and call option arrangements

31. If the Scheme becomes Effective, Allegis Group Australia and MBI intend to enter into put and call option arrangements in respect to MBI's shareholding in Pergal. The key terms of the option arrangements will include the following:

- (i) MBI will have the right to put all of its shares in Pergal to Allegis Group Australia prior to the expiry of the period that is two months after the date on which the 2014 financial year accounts for the Talent2 Group of companies are delivered to the Talent2 Board;
- (ii) Allegis Group Australia will have the right to purchase all of the shares in the Pergal held by MBI after the date on which the 2014 financial year accounts for the Talent2 Group are delivered to the Talent2 Board; and
- (iii) the exercise price of the option by either MBI or Allegis Group Australia will be determined at the time of the exercise of the option on the basis of the financial performance and financial position of the Talent2 Group over a preceding 12 month period.

Ruling**The Proposed Special Dividend**

32. The Special Dividend of \$0.10 per Talent2 share will constitute a dividend as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Proposed Special Dividend

33. A Talent2 shareholder who receives the franked Special Dividend and is a resident of Australia as defined in subsection 6(1) of the ITAA 1936 is required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross up and tax offset

34. A Talent2 shareholder who receives the franked Special Dividend directly will:

- include the amount of the franking credit attached to the Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit,

under section 207-20, subject to being a qualified person.

35. A Talent2 shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1), subject to satisfying the qualified person rule.

Qualified persons

36. The payment of the Special Dividend as part of the Scheme of Arrangement will constitute a related payment within the meaning of former section 160APHN of the ITAA 1936.

37. Accordingly, each Talent2 shareholder will need to hold their Talent2 shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person in respect of the Special Dividend.

38. Each Talent2 shareholder will no longer be considered to hold their Talent2 shares 'at risk' for the purposes of Division 1A of former Part IIIA of the ITAA 1936 (former Division 1A) as from the Scheme Record Date of 10 September 2012. Therefore, a Talent2 shareholder will be a qualified person in relation to the Special Dividend if, from 21 July 2012 until 9 September 2012 inclusive, the Talent2 shareholder continued to hold the Talent2 share and did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of the Talent2 share for a continuous period of at least 45 days.

Refundable tax offset

39. The franking credit allocated to the Special Dividend will be subject to the refundable tax offset rules in Division 67, provided the participating Talent2 shareholder is not excluded by the operation of section 67-25.

Non-resident shareholders

40. A Talent2 shareholder who receives the franked Special Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) will not be required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

Capital gains tax (CGT) consequences

CGT event A1

41. CGT event A1 will happen when a Talent2 shareholder disposes of each of their Talent2 shares to Perbec (subsections 104-10(1) and 104-10(2)).

42. The time of CGT event A1 will be the Implementation Date of 13 September 2012 (paragraph 104-10(3)(b)).

43. A Talent2 shareholder will make a capital gain when CGT event A1 happens if the capital proceeds from the disposal of a Talent2 share exceed its cost base. The capital gain is equal to the amount of the excess. A Talent2 shareholder will make a capital loss if those capital proceeds are less than the share's reduced cost base (subsection 104-10(4)). The capital loss is equal to the amount of the difference.

Capital proceeds

44. The capital proceeds received by a Talent2 shareholder will be the money that the shareholder receives or is entitled to receive in respect of the event happening (subsection 116-20(1)).

45. The capital proceeds received by a Talent2 shareholder who disposes of their Talent2 shares under the Scheme of Arrangement and who is entitled to the Special Dividend will be \$0.78 for each Talent2 share.

Anti-overlap provision

46. Any capital gain made by a Talent2 shareholder when CGT event A1 happens can be reduced (but not below zero) by the amount of the Special Dividend that is included in the Talent2 shareholder's assessable income under subsection 44(1) of the ITAA 1936 (section 118-20 of the ITAA 1997). The amount of any capital loss made by a Talent2 shareholder will not be adjusted by the amount of the Special Dividend.

Foreign Resident Talent2 Shareholders

47. A Talent2 shareholder that is a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens disregards under subsection 855-10(1) any capital gain or capital loss made when CGT event A1 happens to the Talent2 shares if the shares are not taxable Australian property as defined in section 855-15.

The anti-avoidance provisions

48. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

49. Section 207-145 will not apply to the whole, or any part, of the Special Dividend received by Talent2 shareholders.

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50. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend paid in relation to a Talent2 share.

Commissioner of Taxation

5 September 2012

Appendix 1 – Explanation

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

The Proposed Special Dividend

51. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders.

52. The payment of the Special Dividend is a distribution of money by Talent2 to its shareholders.

53. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes from the definition of 'dividend' any:

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company...

54. The Special Dividend will be sourced from Talent2's retained earnings and Talent2 will not debit the Special Dividend to its share capital account. Therefore, the exclusions in paragraph (d) will not apply and the Special Dividend will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Proposed Special Dividend

55. Subparagraph 44(1)(a)(i) of the ITAA 1936 includes in the assessable income of an Australian resident shareholder in a company:

dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

56. As the Special Dividend will be paid to Talent2 shareholders out of profits derived by Talent2, each Talent2 shareholder, who is a resident of Australia as defined in subsection 6(1) of the ITAA 1936, is required to include the Special Dividend as assessable income.

Gross up and tax offset

57. Section 207-20 provides:

- (1) If an entity makes a franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the franking credit on the distribution. This is in addition to any other amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a tax offset for the income year in which the distribution is made. The tax offset is equal to the franking credit on the distribution.

58. Therefore, subject to satisfying the qualified person rule, where the franked Special Dividend is received directly by a Talent2 shareholder, the Talent2 shareholder will:

- include the amount of the franking credit attached to the Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit.

59. Where the franked Special Dividend is received by a Talent2 shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

If:

- (a) a franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust – the trust is not a complying superannuation entity or FHSA trust when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the franking credit on the distribution.

60. Therefore, subject to satisfying the qualified person rule, a Talent2 shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1).

Refundable tax offset

61. Shareholders who are entitled to a tax offset under subsection 207-20(2), in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

62. Pursuant to section 67-25, there are a range of taxpayers who are specifically excluded from the operation of the refundable tax offset rules. This range of excluded entities includes:

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A));
- a trustee of a trust who is liable to be assessed under section 98 or 99A of the ITAA 1936 (subsection 67-25(1B) of the ITAA 1997);
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the company on behalf of its shareholders (subsections 67-25(1C) and 67-25(1D)); and
- foreign resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

63. Accordingly, a holder of Talent2 shares will be subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities under section 67-25. Generally, corporate tax entities (including companies, corporate limited partnerships, corporate unit trusts, and public trading trusts) will be excluded from the operation of the refundable tax offset rules.

Non-resident shareholders

64. Subparagraph 44(1)(b)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder in a company:

dividends (other than non-share dividends) paid to the shareholder by the company to the extent to which they are paid out of profits derived by it from sources in Australia.

65. Subsection 128B(1) of the ITAA 1936 imposes Australian withholding tax on income that:

- (a) is derived, on or after 1 January 1968, by a non-resident; and
- (b) consists of a dividend paid by a company that is a resident.

66. However, subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes from subsection 128B(1) of the ITAA 1936 income derived by a non-resident that consists of the franked part of a dividend. As the Special Dividend is fully franked, it will not be subject to Australian withholding tax when derived by non-resident Talent2 shareholders.

67. Section 128D of the ITAA 1936 states that:

Income other than income to which section 128B applies by virtue of subsection (2A), (2C) or (9C) of that section upon which withholding tax is payable, or upon which withholding tax would, but for paragraph 128B(3)(ga) or (jb), section 128F, section 128FA or section 128GB, be payable, is not assessable income and is not exempt income of a person.

68. As the Special Dividend is income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936, it will not be assessable income and will not be exempt income of non-resident Talent2 shareholders pursuant to section 128D of the ITAA 1936.

69. Accordingly, a Talent2 shareholder who receives the fully franked Special Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) will not be required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

Qualified persons

70. Former Division 1A of the ITAA 1936 contains the measures known as the holding period rule and the related payment rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

71. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) of the ITAA 1936 as follows:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a qualified person in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification in relation to the dividend.

72. Former subsection 160APHO(2) of the ITAA 1936 sets out the holding period requirement. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

73. In order to determine the relevant qualification period, it is necessary to determine whether, under the present arrangement, the Talent2 shareholders are considered to be under an obligation to make a related payment.

74. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A of the ITAA 1936. Former subsection 160APHN(2) of the ITAA 1936 provides:

The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

75. Former subsection 160APHN(3) of the ITAA 1936 states:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other person:

- (a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or
- (b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or the other persons; or
- (c) causing services to be provided to, or in accordance with the directions of, the other person or other persons; or
- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or
- (e) allowing any property or money to be used by the other person or other persons or by someone nominated by the other person or other persons; or
- (f) causing an amount or amounts to be set off against or to be otherwise applied in reduction of, a debt or debts owed by the other person or persons; or

- (g) agreeing to treat an amount or amounts owed to the other person or other persons by the taxpayer or associate as having been increased.

76. Former subsection 160APHN(4) of the ITAA 1936 states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to;

the amount of dividend or distribution.

77. In the current circumstances, it is considered that an integral part of the Scheme of Arrangement is the payment of the Special Dividend of \$0.10 cash per share. The payment of the Special Dividend is conditional upon the Scheme of Arrangement proceeding, tying the payment of the Special Dividend to the disposal of the Talent2 shares. The payment of the Special Dividend is a part of the total consideration of \$0.78 per share to be paid to Talent2 shareholders for the disposal of their Talent2 shares to Perbec.

78. In these circumstances, in determining whether a Talent2 shareholder is taken to have made or be likely to make a related payment in respect of the Special Dividend, it is considered that the circumstances surrounding the payment of the Special Dividend would constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936. As such, it can be concluded that a Talent2 shareholder will be taken to have made a related payment in respect of the Special Dividend.

79. As the Talent2 shareholders will be taken, for the purposes of former Division 1A of the ITAA 1936, to have made a related payment in respect of the Special Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

80. The secondary qualification period is defined in former section 160APHD of the ITAA 1936 as follows:

In relation to a taxpayer in relation to shares or an interest in shares, means:

- (a) if the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest becomes ex dividend...

81. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

82. Eligibility for the Special Dividend is determined on the Special Dividend Record Date of 3 September 2012. This is the last day on which acquisition by a person of a Talent2 share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 4 September 2012.

83. The secondary qualification period thus runs from 45 days before the ex-dividend date of 4 September 2012 as determined in paragraph 82 of this Ruling and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 21 July 2012 to 18 October 2012. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Talent2 shares are to be excluded. This would mean that the secondary qualification period would run from 21 July 2012 until the date that Talent2 shareholders are no longer at risk for the purposes of former Division 1A of the ITAA 1936.

84. Entitlement to participate in the Scheme of Arrangement will be determined on the Scheme Record Date which is 10 September 2012. Talent2 shareholders who dispose of their shares under the Scheme of Arrangement will no longer be considered to hold their Talent2 shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 as of 10 September 2012.

85. Accordingly, for a Talent2 shareholder who disposes of their shares under the Scheme of Arrangement, the secondary qualification period will run from 21 July 2012 to 9 September 2012 (inclusive). A Talent2 shareholder who receives the Special Dividend will need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A of the ITAA 1936. Further, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, neither the date of acquisition nor the date of disposal is included in the relevant 45 day period.

Capital gains tax consequences

86. The CGT consequences that arise from the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

87. The application of these provisions however raises one issue of interpretation that requires further explanation. It concerns the proper characterisation of the Special Dividend for CGT purposes.

88. The capital proceeds from a CGT event includes, relevantly, the money received or entitled to be received in respect of the event happening (subsection 116-20(1)).

89. The phrase 'in respect of the event happening' in subsection 116-20(1) requires that the relationship between the event and the receipt of the money, or entitlement to receive the money, must be more than coincidental. An amount is not 'capital proceeds' of an event merely because it is received in association with the event.

90. A Talent2 shareholder who disposes of a Talent2 share under the Scheme of Arrangement and who is entitled to the Special Dividend will receive \$0.78 cash. This is made up of the Special Dividend of \$0.10 from Talent2 and the Scheme Consideration of \$0.68 (being \$0.78 reduced by the amount of the Special Dividend) payable by Perbec.

91. A dividend declared by a company that is subject to a takeover can form part of the vendor shareholders' capital proceeds from the disposal of the shares. Taxation Ruling TR 2010/4 states in paragraph 9 that:

A dividend declared or paid by the target company to the vendor shareholder will be money or property that the vendor shareholder has received, or is entitled to receive, under the contract or the scheme of arrangement, in respect of the transfer of the shares, if the vendor shareholder has bargained for the receipt of the dividend (whether or not in addition to other consideration) in return for giving up the shares. That is to say, if the dividend forms the whole or part of that sum of money or property in return for which the vendor shareholder is willing, and under the contract has promised or under the scheme of arrangement is bound, to transfer the shares in the target company, it will be capital proceeds in respect of the CGT event A1 happening.

92. In this case, the payment of the Special Dividend will not occur independently of the Scheme of Arrangement. This is primarily reflected in the following scheme attributes:

- the Scheme Consideration offered of \$0.78 per Talent2 share is reduced by the amount of the Special Dividend;
- the Special Dividend may only be paid if the Scheme becomes effective; and
- Perbec has consented to the payment of the Special Dividend and, notably, the funds to enable Talent2 to pay the Special Dividend will be funded under a loan facility from Perbec.

93. In light of these factors, it is considered that the Special Dividend is part of the sum of money in return for which the Talent2 shareholders will have, by approving the Scheme of Arrangement, demonstrated their willingness to transfer the shares. Accordingly, the Special Dividend will form part of the capital proceeds which a Talent2 shareholder will receive in respect of CGT event A1 happening.

The anti-avoidance provisions

Section 204-30

94. Section 204-30 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)).

95. Relevantly, if section 204-30 applies, the Commissioner is vested with 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 a distribution that is made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

96. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

97. Pursuant to the payment of the Special Dividend, all Talent2 shareholders will receive an imputation benefit as a result of the dividend; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a)) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders (subsection 204-30(8)).

98. However, the Special Dividend will be paid to all Talent2 Shareholders and will be franked with Australian franking credits.

99. Accordingly, it cannot be argued that Talent2 will direct the flow of distributions in such a manner as to stream the imputation benefits such that one class of members derive a greater benefit from the franking credits attached to the Special Dividend, while the other members receive lesser or no imputation benefits.

100. As the conditions in subsection 204-30(1) for the provision to apply will not be met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

Section 207-145

101. Section 207-145 applies where, inter alia, a franked distribution is made as part of a dividend stripping operation. Section 207-155 defines a dividend stripping operation as being:

- (a) by way of or in the nature of dividend stripping; or
- (b) having substantially the effect of a scheme by way of or in the nature of a dividend stripping.

102. Having regard to the purpose of the scheme under which the shareholders will dispose of their Talent2 shares to Perbec, the scheme will not be a scheme by way of or in the nature of dividend stripping, or a scheme having substantially the effect of a scheme by way of or in the nature of dividend stripping to which subsection 207-145(1) is applicable.

Section 177EA

103. 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.

104. 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, a 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.

105. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a) of the ITAA 1936) or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

106. Talent2 is a corporate tax entity. The disposal of the ordinary shares in Talent2 pursuant to the Scheme is a scheme for the disposition of membership interests. The franked Special Dividend is a frankable distribution that will be paid to Talent2 shareholders as a part of this scheme and who could, therefore, reasonably be expected to receive imputation benefits.

107. In the present case, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(17) of the ITAA 1936), it would be concluded that, on the part of Talent2, its shareholders or any other relevant party, there is a purpose of more than merely an incidental purpose of conferring an imputation benefit under the scheme.

108. 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.

109. The relevant circumstances include the fact that the disposition of the ordinary shares in Talent2 is to be made pursuant to a transfer of shares to Perbec by way of a Scheme of Arrangement under the *Corporations Act 2001* voted upon by Talent2's existing shareholders.

110. The Special Dividend will be franked to the maximum extent possible and will be paid to the existing shareholders of Talent2 in proportion to their shareholding, and irrespective of their ability to utilise the relevant franking credits. The Special Dividend will allow Talent2 shareholders to share in the accumulated profits of Talent2.

111. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by Talent2 or the Talent2 shareholders for more than an incidental purpose of enabling participating shareholders to obtain imputation benefits. The goal of providing imputation benefits to Talent2 shareholders remains incidental, in the sense of being subservient to, to the purpose of transferring their shares to Perbec.

112. Having regard to the relevant circumstances of the scheme, the Commissioner has come to the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit to be received in relation to the dividends.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2010/4

Subject references:

- arrangement
- CGT capital proceeds
- CGT event A1 – disposal of a CGT asset
- distributions
- franking credits
- ordinary shares
- qualified person
- related payment rule

Legislative references:

- | | |
|----------------------------|-----------------------------|
| - ITAA 1936 | - ITAA 1936 177EA(3)(a) |
| - ITAA 1936 6(1) | - ITAA 1936 177EA(3)(b) |
| - ITAA 1936 44(1) | - ITAA 1936 177EA(3)(c) |
| - ITAA 1936 44(1)(a)(i) | - ITAA 1936 177EA(3)(d) |
| - ITAA 1936 44(1)(b)(i) | - ITAA 1936 177EA(5) |
| - ITAA 1936 44(1)(b)(ii) | - ITAA 1936 177EA(5)(a) |
| - ITAA 1936 98 | - ITAA 1936 177EA(5)(b) |
| - ITAA 1936 99A | - ITAA 1936 177EA(17) |
| - ITAA 1936 128B(1) | - ITAA 1997 |
| - ITAA 1936 128B(3)(ga) | - ITAA 1997 Div 67 |
| - ITAA 1936 128B(3)(ga)(i) | - ITAA 1997 67-25 |
| - ITAA 1936 128D | - ITAA 1997 67-25(1A) |
| - ITAA 1936 Pt IIIA Div1A | - ITAA 1997 67-25(1B) |
| - ITAA 1936 160APHD | - ITAA 1997 67-25(1C) |
| - ITAA 1936 160APHE | - ITAA 1997 67-25(1D) |
| - ITAA 1936 160APHE(1) | - ITAA 1997 67-25(1DA) |
| - ITAA 1936 160APHM | - ITAA 1997 104-10 |
| - ITAA 1936 160APHN | - ITAA 1997 104-10(1) |
| - ITAA 1936 160APHN(2) | - ITAA 1997 104-10(2) |
| - ITAA 1936 160APHN(3) | - ITAA 1997 104-10(3)(b) |
| - ITAA 1936 160APHN(3)(d) | - ITAA 1997 104-10(4) |
| - ITAA 1936 160APHN(4) | - ITAA 1997 116-20(1) |
| - ITAA 1936 160APHO(1) | - ITAA 1997 118-20 |
| - ITAA 1936 160APHO(1)(b) | - ITAA 1997 204-30 |
| - ITAA 1936 160APHO(2) | - ITAA 1997 204-30(1) |
| - ITAA 1936 160APHO(2)(a) | - ITAA 1997 204-30(1)(a) |
| - ITAA 1936 160APHO(3) | - ITAA 1997 204-30(1)(b) |
| - ITAA 1936 177EA | - ITAA 1997 204-30(1)(c) |
| - ITAA 1936 177EA(3) | - ITAA 1997 204-30(3) |
| | - ITAA 1997 204-30(3)(a) |
| | - ITAA 1997 204-30(3)(c) |
| | - ITAA 1997 204-30(6)(a) |
| | - ITAA 1997 204-30(6)(e) |
| | - ITAA 1997 204-30(8) |
| | - ITAA 1997 207-20 |
| | - ITAA 1997 207-20(2) |
| | - ITAA 1997 207-35(1) |
| | - ITAA 1997 207-145 |
| | - ITAA 1997 207-145(1) |
| | - ITAA 1997 207-155 |
| | - ITAA 1997 Div 230 |
| | - ITAA 1997 855-10(1) |
| | - ITAA 1997 855-15 |
| | - TAA 1953 |
| | - Copyright Act 1968 |
| | - Corporations Act 2001 |
| | - Corporations Act 2001 411 |
-

ATO references

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