



Class Ruling

Eildon Capital Limited – distribution and creation of a new stapled entity and buy-back of stapled securities

❶ 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.

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

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What this Ruling is about

1. This Ruling sets out the tax consequences for shareholders of Eildon Capital Limited (Eildon) who received the distribution from Eildon in relation to the restructure of Eildon into a stapled entity (the Restructure).
2. This Ruling also sets out the tax consequences for securityholders of Eildon stapled securities (stapled securityholders) whose stapled securities were purchased under the buy-back tender which was announced on 12 March 2020 (the Buy-Back).
3. Full details of this scheme are set out in paragraphs 58 to 71 of this Ruling.
4. All legislative references are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (as detailed in Appendix 2 of this Ruling) unless otherwise indicated.

Who this Ruling applies to

5. This Ruling applies to you if you:
 - are an Australian resident as defined in subsection 6(1)

- were a registered holder of ordinary shares in Eildon on 22 April 2020 (the Record Date)
- received the distribution in respect of the Restructure on 24 April 2020
- do not hold your Eildon shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)) – that is, you hold your Eildon shares on capital account, and
- received Eildon Capital Trust (Eildon Trust) units on 24 April 2020 (the Payment Date).

6. This Ruling will also apply to you if your stapled securities were purchased under the Buy-Back and, for cash consideration:

- you disposed of your Eildon shares (Eildon share Buy-Back), and
- had your units in the Eildon Trust redeemed (Eildon Trust Unit Redemption).

7. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 58 to 71 of this Ruling.

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

When this Ruling applies

8. This Ruling applies from 1 July 2019 to 30 June 2020.

Ruling

Tax consequences of the Restructure

Assessability of the distribution

9. The dividend component of the distribution (Special Dividend) of 13.59c per Eildon share paid to you on 24 April 2020 is a dividend as defined in subsection 6(1) as it is a distribution of money from Eildon that was not debited against its share capital account.

10. You must include the Special Dividend of 13.59c per Eildon share in your assessable income (paragraph 44(1)(a)) for the income year in which it was received.

11. The capital return component of the distribution (Capital Return) of 77.72c per Eildon share is not a dividend as defined in subsection 6(1). As the Capital Return was recorded as being wholly debited to Eildon's untainted share capital account (within the meaning of Division 197), paragraph (d) of the definition of 'dividend' in subsection 6(1) applies.

Gross up and tax offset

Entity other than trust or partnership

12. The Special Dividend is a frankable distribution pursuant to section 202-40 and was fully franked.

13. If you are a qualified person for the purposes of Division 1A of former Part IIIAA who received the Special Dividend, you:

- must include the amount of the franking credit on the Special Dividend in your assessable income, and
- are entitled to a tax offset equal to the amount of the franking credit on the Special Dividend (subsection 207-20(2))

in the income year in which the Special Dividend is paid.

Trust or partnership

14. If you received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, and you are not a corporate tax entity, you are required to include an amount equal to the franking credit on the Special Dividend in your assessable income under subsection 207-35(1), subject to the trustee or the partnership being a 'qualified person' in relation to the Special Dividend.

15. The relevant members of a partnership or trust to whom the Special Dividend flows indirectly are entitled to a tax offset under section 207-45 equal to their share of the franking credit on the Special Dividend included in the assessable income of the partnership or trust under subsection 207-35(1).

16. The franking credit tax offset you are entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25. Entities excluded by section 67-25 include corporate tax entities (such as companies, corporate limited partnerships, corporate unit trusts and public trading trusts), unless they satisfy the requisite conditions in subsections 67-25(1C) or (1D).

Gross up and tax offset cancelled in certain circumstances – qualified person

17. You are taken to have made a 'related payment' in respect of the Special Dividend for the purposes of former section 160APHN.

18. Therefore, you will be a qualified person in relation to the Special Dividend if during the period from 7 March 2020 (being 45 days prior to the day the shares became ex dividend on 21 April 2020) to 5 June 2020 (being 45 days after the day the shares became ex dividend) inclusive, you held your shares at risk (as defined in former section 160APHM) for a continuous period of at least 45 days.

19. If you participated in the Eildon share Buy-Back you will no longer hold your Eildon shares at risk from 25 May 2020, being the date you entered into the contract for the sale of your Eildon shares.

Not a qualified person

20. If you are not a qualified person in relation to the Special Dividend, you:

- do not include the franking credit attached to the dividend in your assessable income (paragraph 207-145(1)(e)), and
- are not entitled to a tax offset equal to the amount of the franking credit attached to the dividend (paragraph 207-145(1)(f)).

Capital gains tax (CGT) consequences of the Restructure***CGT event G1***

21. CGT event G1 happened to your Eildon share to the extent of the Capital Return (77.72c per Eildon share) on 24 April 2020 when Eildon made the distribution to you in respect of an Eildon share that you owned at the Record Date and continued to own at the Payment Date.

Capital gain

22. You made a capital gain from CGT event G1 happening where the amount of the Capital Return was more than the cost base of your Eildon share. If so, the:

- capital gain is equal to the difference, and
- cost base and reduced cost base of your Eildon share is reduced to nil (subsection 104-135(3)). You cannot make a capital loss from CGT event G1 happening (Note 1 to subsection 104-135(3)).

If you do not make a capital gain

23. Where the total amount of the Capital Return was not more than the cost base of your Eildon share, reduce the cost base and reduced cost base of your Eildon share by the amount of the Capital Return (subsection 104-135(4)).

Discount capital gain

24. You are entitled to treat a capital gain you made when CGT event G1 happened as a discount capital gain under Subdivision 115-A if you acquired your Eildon share at least 12 months before 24 April 2020 being when the CGT event happened (subsection 115-25(1)) and the other conditions in that subdivision are satisfied.

Acquisition of Eildon Trust units

25. The first element of the cost base or reduced cost base of your Eildon Trust unit is equal to the amount which was applied to subscribe for the unit, being the distribution from Eildon (paragraph 110-25(2)(a)).

26. You acquired your Eildon Trust units when they were issued to you on the Payment Date (table item 3 in section 109-10).

27. No CGT event in Division 104 happened as a result of the stapling of Eildon shares and Eildon Trust units.

28. Eildon shares and Eildon Trust units are separate CGT assets as defined in section 108-5.

The application of the anti-avoidance provisions to the Restructure

29. The Commissioner will not make a determination under subsection 45A(2) or paragraph 45B(3)(b) that section 45C applies in relation to the whole or to any part of the Capital Return.

30. 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 Special Dividend.

31. 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 Special Dividend.

32. There will be no consequences for you under Divisions 725 and 727.

Tax consequences of the Buy-Back

The Eildon share Buy-Back

33. The Eildon share Buy-Back is an off-market share buy-back as defined in subsection 159GZZZK(d).

Dividends and consideration

34. As the entire Buy-Back Price attributable to each Eildon share acquired through the Buy-Back Tender was debited against Eildon's share capital account, you will not be taken to have been paid a dividend under section 159GZZZP.

35. You are taken to have received 17.69c as consideration in respect of each Eildon share bought back under the Buy-Back Tender (Sale Consideration) pursuant to section 159GZZZQ.

36. The treatment of the Sale Consideration for tax purposes will depend on whether the Buy-Back transaction was on capital account (where you held your stapled security for investment) or on revenue account.

CGT consequences

37. CGT event A1 happened to your Eildon share on 25 May 2020 as a result of the entry into the Buy-Back contract for your stapled security (subsections 104-10(1) and (3)). The proportion of the Buy-Back Price for the stapled security allocated to the Eildon share (being 17.69c) represents the capital proceeds under section 116-20.

38. You will make a capital gain on the disposal of your Eildon share if the capital proceeds exceed the cost base of that share. The cost base of your Eildon share is the cost base as reduced after the Restructure (refer to the second dot point of paragraph 22 and paragraph 23 of this Ruling). Similarly, you will make a capital loss if the capital proceeds are less than the reduced cost base of that share (subsection 104-10(4)).

39. Any capital gain you make will be reduced to the extent that the capital proceeds have otherwise been included in your assessable income under section 6-5 (section 118-20).

40. You are entitled to treat any capital gain you made as a discount capital gain if you acquired your Eildon share at least 12 months before 25 May 2020, being when CGT event A1 happened to your Eildon share (subsection 115-25(1) and the other conditions in that Subdivision are satisfied).

Trading stock

41. If you held your stapled securities as trading stock (as defined in subsection 995-1(1)) disregard any capital gain or capital loss (section 118-25).
42. If you held your stapled securities as trading stock, you must include the Sale Consideration of 17.69c per Eildon share in your assessable income (section 6-5).

Revenue assets

43. If you held your stapled securities as revenue assets (as defined in section 977-50), you must include the amount by which the Sale Consideration of 17.69c per share exceeds the cost of each Eildon share in your assessable income (section 6-5)
44. Correspondingly, if the cost exceeds the Sale Consideration of 17.69c per Eildon share you can claim the difference as an allowable deduction (section 8-1) If you made a capital loss in respect of an Eildon share you held on revenue account, but not as trading stock, reduce the reduced cost base of the share by the amount of the allowable deduction (subsection 110-55(9)).

The Eildon Unit Trust Redemption

45. The redemption of an Eildon Trust unit under the Buy-Back does not constitute an off-market share buy-back within the meaning of Division 16K of Part III.

Dividends and consideration

46. As part of the Buy-Back, your Eildon Trust unit was redeemed at the Redemption Price of 91.31c per unit. You are taken to have received 91.31c as consideration in respect of each Eildon unit redeemed under the Eildon Trust Unit Redemption.
47. The Redemption Price does not satisfy the definition of a dividend under subsection 6(1) as it is not a distribution made by a company to a shareholder. The Redemption Price is also not assessable to you as a beneficiary of the Eildon Trust under subsection 97(1) or subsection 99B(1). The Redemption Price is a return of contributed capital of the trust.
48. The treatment of the Redemption Price for tax purposes will depend on whether the Buy-Back Tender transaction was on capital account (where the stapled securities were held for investment) or on revenue account.

CGT consequences

49. CGT event C2 happened to your Eildon unit on 25 May 2020 as a result of the acceptance of your tender into the Buy-Back of your stapled security and the redemption of each of your Eildon units (subsection 104-25(1). The proportion of the Buy-Back Price for the stapled security allocated to the Eildon units (being 91.31c per Eildon unit) represents the capital proceeds under section 116-20.
50. You will make a capital gain on the redemption of your Eildon unit if the capital proceeds exceed the cost base of that unit. The cost base of your Eildon unit was determined at the time you acquired it under the Restructure (refer to paragraph 25 of this Ruling). You will make a capital loss if the capital proceeds are less than the reduced cost base of that unit (subsection 104-25(3)).

51. Any capital gain you make will be reduced to the extent that the capital proceeds have otherwise been included in your assessable income under section 6-5 (section 118-20).

52. You are not entitled to treat any capital gain you made as a discount capital gain because you have not held your Eildon unit for 12 months before 25 May 2020, being when CGT event C2 happened to your Eildon unit (subsection 115-25(1)).

Trading stock

53. If you held your stapled securities as trading stock (as defined in subsection 995-1(1)), disregard any capital gain or capital loss (section 118-25).

54. If you held your stapled securities as trading stock, you must include the Redemption Price of 91.31c per Eildon unit in your assessable income (section 6-5).

Revenue assets

55. If you held your stapled securities as revenue assets (as defined in section 977-50), you must include the amount by which the Redemption Price of 91.31c per unit exceeds the cost of each Eildon unit in your assessable income (section 6-5).

56. Correspondingly, if the cost exceeds the Redemption Price of 91.31c per Eildon unit you can claim the difference as an allowable deduction (section 8-1). If you made a capital loss in respect of an Eildon unit you held on revenue account, but not as trading stock, reduce the reduced cost base of the share by the amount of the allowable deduction (subsection 110-55(9)).

The application of the anti-avoidance provisions to the Buy-Back

57. The Commissioner will not make a determination under subsection 45A(2) or paragraph 45B(3)(b) that section 45C applies to the whole, or any part, of the Buy-Back Price you received.

Scheme

58. 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.

Background

59. Eildon is a public company limited by shares and listed on the Australian Securities Exchange (ASX).

60. At the time of the Restructure, Eildon's investments were:

- \$33.148 million in loans (six loans in total). These are separated into Senior Debt, Equity investment, and Mezzanine Debt in Queensland, Victoria and New South Wales
- \$4.319 million investment in a unit trust which holds property in Queensland
- \$1.67 million investment in a unit trust which holds a property in Victoria, and

- two call options over property sites in New South Wales which have a carrying value of \$454,000 (cost incurred to date).

61. At the time of the Restructure, Eildon had 45,483,392 shares on issue, share capital of \$43,796,218, retained earnings of -\$5,483,508 and a profit distribution reserve of \$9,872,860.

The Restructure steps

62. Eildon converted its corporate structure to a stapled company and trust structure for a number of commercial reasons, mainly to overcome limitations on the company's ability to compete in its industry.

63. The Restructure occurred in five steps:

- Eildon Trust was settled with the issuing of a special class of initial foundation units to Eildon. In relation to this step,
 - Eildon Trust is a unit trust, a registered scheme, a managed investment trust, and an attribution managed investment trust.
 - Eildon Funds Management Limited (EFM) manages Eildon and is the responsible entity for Eildon Trust.
 - The foundation units were issued by EFM to Eildon for an issue price of \$1.00 per foundation unit.
 - The foundation units
 - o were only issuable to Eildon
 - o did not allow Eildon to vote on any ordinary resolution
 - o did not rank equally with ordinary Eildon Trust units in respect of distributions
 - o were non-transferable (except to related bodies corporate of Eildon), and
 - o could be redeemed by EFM.
- Eildon made a distribution of 91.31c per Eildon share to Eildon shareholders (the distribution) on 24 April 2020. The distribution comprised
 - the Special Dividend – a fully franked dividend of 13.59c per Eildon share paid from Eildon's profit reserve, and
 - the Capital Return of 77.72c per share totalling \$35,349,693 (resulting in a nominal amount of equity remaining in Eildon). The Capital Return was made in respect of each share on issue, on a pro rata basis.
- The distribution was instantly and automatically invested on behalf of Eildon shareholders as trust capital in Eildon Trust in consideration for the issue of new Eildon Trust units. At the same time, the foundation units Eildon held in Eildon Trust were redeemed at the redemption price and cancelled by EFM.

- The Eildon Trust units were stapled to Eildon shares on a one-for-one basis such that the Eildon Trust units and the Eildon shares cannot be sold, traded or otherwise dealt with separately. The Eildon Trust units were admitted for quotation on the ASX on 27 April 2020 and trade as stapled securities, together with the Eildon shares.
- Nominated assets of Eildon were transferred at market value to Eildon Trust for cash.

64. The nominated assets transferred from Eildon to Eildon Trust included all Eildon assets except for the \$4.319 million investment in the unit trust which holds property in Queensland.

The Buy-Back

65. On 12 March 2020, Eildon announced an off-market share buy-back offer, consisting of the Buy-Back and Eildon Trust Unit Redemption, to all of its stapled securityholders.

66. The Restructure, the Buy-Back and the Eildon Trust Unit Redemption were approved in an extraordinary general meeting held on 20 April 2020.

67. The Buy-Back occurred as follows:

- Eildon bought back 10% of its share capital and Eildon Trust redeemed 10% of its unit capital (approximately 4,548,339 stapled securities) on issue. The shares and units were cancelled and redeemed respectively.
- All eligible stapled securityholders could participate in the Buy-Back.
- Shareholders who reside outside of Australia were not permitted to participate in the Buy-Back and Eildon Trust Unit Redemption.
- The Buy-Back was voluntary. Any stapled securityholder who did not wish to participate was not required to do anything.
- In accordance with the Buy-Back tender process, all eligible stapled securityholders were entitled to tender some or all of their Eildon shares and Eildon Trust units for buy-back and redemption.
- Stapled securityholders were able to sell up to 100% of their stapled securities into the Buy-Back. In the event of oversubscription (that is, if greater than 10% of Eildon shares and Eildon Trust units were offered into the tender by stapled securityholders), the Buy-Back would be scaled back. However, if a stapled securityholder tendered their Eildon shares and Eildon Trust units they were required to sell, at a minimum, 1,835 Eildon shares and Eildon Trust units. If a stapled securityholder who chose to participate in the Buy-Back/Redemption had less than 1,835 stapled securities they were required to tender 100% of their stapled securities.
- Stapled securityholders could withdraw or amend their offer to sell their stapled securities before the tender period closed by completing a withdrawal/amendment form.
- The Eildon shares and Eildon Trust units were bought at a fixed market value price of net tangible assets at the Buy-Back date. The fixed market value price of net tangible assets at the Buy-Back date for each stapled security was \$1.09.
- This price was allocated across the stapled security as follows

- Eildon shares – 17.69c per Eildon share (the Buy-Back Price)
- Eildon Trust – 91.31c per Eildon unit (the Redemption Price)
- The entire amount of the Buy-Back Price was debited against Eildon's share capital account. The entire amount of the Redemption Price was debited against the capital of the Eildon Trust.
- No part of the Buy-Back Price constituted a dividend for income tax purposes.
- The Buy-Back occurred on 26 May 2020.

68. After the Restructure, but prior to the Buy-Back, the share capital of Eildon was \$8.45 million, the franking account balance was nil, the profit distribution reserve was nil, and Eildon had a loss of \$370,000 reflected in its retained earnings.

69. The key dates for the Restructure and Buy-Back are:

Activity	Date
Announcement of Restructure and share Buy-Back	12 March 2020
Despatch notice of explanatory memorandum for extraordinary general meeting	12 March 2020
Extraordinary general meeting	20 April 2020
Deferred settlement trading in stapled securities commences Admission of Trusts to the Official List	21 April 2020
Ex dividend date for Restructure	21 April 2020
Record date for Restructure	22 April 2020
Effective date of Restructure distribution including payment of Special Dividend	24 April 2020
Despatch of holding statements for new stapled securities	27 April 2020
Date stapled securities start trading on ASX	27 April 2020
Ex entitlement date for share Buy-Back and unit redemption	28 April 2020
Record date for Buy-Back	29 April 2020
Tender period for Buy-Back opens	1 May 2020
Tender period for Buy-Back closes	22 May 2020
Determination of scale back (if any) for Buy-Back and entry into Buy-Back contracts	25 May 2020
Buy-Back date	26 May 2020
Buy-Back payment date	2 June 2020

70. The journal entries to record the distribution were:

Eildon				
DR		Share Capital – Eildon	\$35,349,693	
DR		Profit Distribution Reserve	\$6,181,194	
	CR	Distribution Payable		\$(41,530,887)
Declaration of Capital Return and Special Dividend				
DR		Distribution Payable	\$41,530,887	
	CR	Nominated Assets		\$(33,148,381)
	CR	Cash		\$(8,382,506)
Transfer of assets to Eildon Trust				
Eildon Trust				
DR		Unitholder Receivable Amounts	\$41,530,887	
	CR	Unitholder Capital		\$(41,530,887)
Investment of Capital Return and Special Dividend into units issued by Eildon Trust				
DR		Nominated Assets	\$33,148,381	
DR		Cash	\$8,382,506	
	CR	Unitholder Receivable Amounts		\$(41,530,887)

71. The Eildon share capital account is not tainted within the meaning of Division 197.

Commissioner of Taxation

8 July 2020

Appendix 1 – Explanation

❶ *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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Tax consequences of the Restructure***Gross up and tax offset cancelled in certain circumstances: qualified persons***

72. In relation to a franked distribution made to an entity, only a 'qualified person' is required to include the franking credit in its assessable income and is entitled to claim the franking credit as a tax offset (paragraph 207-145(1)(a)). The test of what constitutes a qualified person is provided in former subsection 160APHO(1). Broadly, consideration must be given as to whether you satisfy the 'related payments rule' and the 'holding period rule'.

73. You made a related payment when the Special Dividend was immediately and automatically applied in consideration for the newly acquired Eildon Trust units. Therefore, you are required to satisfy the holding period requirement within the secondary qualification period.

74. The holding period rule requires you to hold the shares on which the dividend is paid for a continuous period of at least 45 days during the relevant qualification period. As you are considered to have made a related payment, the relevant qualification period is the secondary qualification period, which commences on the 45th day before (7 March 2020) and ends on the 45th day after (5 June 2020) the day on which the shares became ex dividend (21 April 2020) (former section 160APHE).

75. 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.

76. The requirement to exclude any days on which you have materially-diminished risks of loss or opportunities for gain in respect of your Eildon shares or an interest in Eildon shares is often referred to in positive terms as requiring you to only count the days during the relevant qualification period on which you hold your shares or interest in shares 'at risk'.

Securityholders who did not participate in the Buy-Back

77. If you did not participate in the Buy-Back you will be considered to be a qualified person in relation to the Special Dividend you received if, between the period 7 March 2020 to 5 June 2020, you held your Eildon shares at risk for a continuous period of 45 days or more.

Securityholders who participated in the Buy-Back

78. If you participated in the Buy-Back you will have a diminished risk of loss or opportunity for gain in respect of your shares from 25 May 2020 (being the day you entered into the contract for the sale of your shares). From this date you will not hold your Eildon shares at risk and the days from 25 May 2020 will not be counted towards the satisfaction of the holding period rule.

79. You will be considered to be a qualified person in relation to the Special Dividend you received if, between the period 7 March 2020 to 25 May 2020, you held your Eildon shares at risk for a continuous period of 45 days or more.

Tax consequences of the Buy-Back***The Eildon share Buy-Back***

80. For the purposes of Division 16K of Part III, where a company buys a share in itself from a shareholder, the purchase is a 'buy-back' (paragraph 159GZZZK(a)).

81. Division 16K distinguishes between buy-backs that are an 'on-market purchase' or an 'off-market purchase'.

82. Subsection 159GZZZK(c) defines an on-market purchase as a buy-back where the share bought back is listed for quotation in the official list of a stock exchange in Australia or elsewhere, and the buy-back is made in the ordinary course of trading on that stock exchange. Subsection 159GZZZK(d) defines an off-market purchase as a buy-back that is not an on-market purchase.

83. Eildon has purchased shares that are listed for quotation on the ASX which is an official list of a stock exchange in Australia or elsewhere. However, given the purchase of the shares was not made in the ordinary course of trading on the ASX, this was an off-market share buy-back for Division 16K purposes.

84. For the avoidance of doubt, the Eildon Trust has redeemed units held by stapled securityholders in accordance with the Eildon Capital Trust Deed. Therefore, the redemption of Eildon Trust units will not be treated as a buy-back for the purposes of Division 16K.

Is any part of the Buy-Back Price a dividend?

85. Under section 159GZZZP, the purchase price of each share bought back contains a dividend component only if the buy-back price exceeds the amount debited against the company's share capital account. As the Buy-Back Price of 17.69c per share was debited entirely against Eildon's share capital account, no part of the purchase price will be taken to be a dividend for income tax purposes.

Consideration for the Eildon shares

86. For the purpose of computing the amount of the gain or loss (on capital or revenue account), the consideration in respect of the disposal of a share under a buy-back is determined in accordance with section 159GZZZQ. That is, in respect of a buy-back the seller is taken to have received as consideration for the sale of the share the amount equal to the purchase price in respect of the buy-back.

87. Under subsection 159GZZZQ(2), if the buy-back purchase price is less than the amount that would have been the market value of the share at the time of the buy-back if the buy-back had not occurred, the amount of consideration that the seller is taken to have received in respect of the buy-back is equal to the market value. In this case, the Commissioner agrees that the purchase price of an Eildon share pursuant to the Buy-Back was equal to its market value.

88. Given the purchase price is wholly capital there is no reduction amount that needs to be applied.

89. In this instance you are taken to have received an amount equal to the purchase price (that is, 17.69c per Eildon share) as consideration in respect of the sale of the share bought back.

The Eildon Trust Unit Redemption***Is any part of the Redemption Price a dividend?***

90. As a dividend is a distribution made by a company to its shareholder, the amount paid to a unitholder in respect of the redemption of their units in the Eildon Trust cannot satisfy the definition of a dividend under subsection 6(1).

Net income of the Eildon Trust

91. Division 6 of Part III is the primary scheme for including distributions from trusts in the assessable income of beneficiaries. Under paragraph 97(1)(a), where a beneficiary of a trust estate is presently entitled to a share of the income of the trust estate the assessable income of the beneficiary will include their share of the net income of the trust estate whilst they are a tax resident of Australia.

92. Net income is defined in subsection 95(1) as ‘...the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident...’.

93. As a result of the restructure of Eildon into a stapled company/trust structure, Eildon shareholders were required to reinvest the distribution they received into units in the Eildon Trust. This payment is a contribution of capital or corpus into the Eildon Trust. On redemption (which was to occur shortly after the initial investment into the Eildon Trust) of the Eildon Trust units, the payment would also retain character of capital. In the hands of the beneficiaries the payment for the redemption of Eildon Trust units is income which is the trust estate (that is, a return of corpus). Therefore, the income from the Eildon Trust Unit Redemption is not net income of the trust estate and is not assessable to you as a beneficiary of the Eildon Trust under subsection 97(1).

Return of corpus

94. Subsection 99B(1) provides that:

...an amount, being property of a trust estate, is paid to, or applied for the benefit of, a beneficiary of the trust estate who was a resident at any time during the year of income...

is the assessable income of the beneficiary subject to the exceptions in subsection 99B(2).

95. The exception in paragraph 99B(2)(a) reduces the amount that would otherwise be included in assessable income by the amount that represents corpus of the trust estate and is not attributable to amounts derived by the trust estate that, if they had been derived directly by a taxpayer being a resident, would have been included in the assessable income of that taxpayer.

96. If you participated in the Eildon Trust Unit Redemption, you will have your Eildon Trust unit redeemed at the Redemption Price of 91.31c per Eildon unit. The payment for these units will be a return of corpus. Thus, if the payment would not be assessable to you as a resident taxpayer it will not be included in your assessable income.

Consideration for the Eildon Trust units

97. When you entered into the Buy-Back contract you sold the designated amount of shares and redeemed the equivalent amount of Eildon Trust units. The Eildon Trust units were then cancelled. As such when you entered into the Buy-Back contract, CGT event C2 occurred.

98. If you held your Eildon Trust units on capital account, under subsection 116-20(1) the capital proceeds of a CGT event are the total of the money you will receive or are entitled to receive and the market value of any other property you received or are entitled to receive in relation to the redemption of the Eildon Trust units. In this case the capital proceeds from the redemption of the Eildon Trust units will equal the Redemption Price of 91.31c per Eildon unit.

Capital gains tax consequences for the Buy-Back

CGT Event A1

99. Under subsection 104-10(1) CGT event A1 occurs when you dispose of a CGT asset. You dispose of a CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. However, a change of ownership does not occur if you stop being the legal owner of the asset but continue to be its beneficial owner (subsection 104-10(2)).

100. CGT event A1 happened to each Eildon share when it was disposed of under the Buy-Back Tender on 25 May 2020, being the date when the Buy-Back contract was entered into (paragraph 104-10(3)(a)).

101. The sale consideration of 17.69c in respect of each Eildon share bought back represents the capital proceeds for CGT purposes pursuant to section 116-20. You will make a capital gain on an Eildon share if the sale consideration per share exceeds the cost base of that share (subsection 104-10(4)). The cost base of an Eildon share is the cost base as reduced after the Restructure. The capital gain is the amount of the excess. Similarly, you will make a capital loss on a share if the sale consideration per share is less than the reduced cost base of the share (subsection 104-10(4)).

CGT Event C2

102. CGT event C2 occurs under section 104-25 where your ownership of an intangible CGT asset ends by the asset being redeemed or cancelled. The time the event occurs is when you enter into the contract that results in the asset ending (subsection 104-25(2)).

103. When you entered into the contract to sell your Eildon shares the equivalent amount of Eildon Trust units was also redeemed and cancelled. The Eildon Trust units are considered an intangible CGT asset. Therefore, when you entered into the contract for the Buy-Back on 25 May 2020 CGT event C2 occurred.

104. Subsection 104-25(3) provides that you will make a capital gain in relation to your Eildon Trust units you redeem if the capital proceeds from the ending are more than the cost base of those Eildon Trust units. The cost base of an Eildon Trust unit was determined at the time it was acquired under the Restructure. You will make a capital loss in regard to the Eildon Trust units you redeem where the capital proceeds are less than the units reduced cost base.

Capital gains discount – share buy-back

105. Under Subdivision 115-A an individual, complying superannuation entity, trust, or a life insurance company in respect to CGT asset that is a complying superannuation asset can make a discount capital gain.

106. Where you make a capital gain when CGT event A1 happens, the gain will be eligible to be treated as a discount capital gain under Division 115, provided that the Eildon

share was acquired at least 12 months before the date the contract was entered into for the sale of the Eildon share (subsection 115-25(1)) and the other conditions of that Division are satisfied.

107. Where you redeem your Eildon Trust units and make a capital gain when CGT event C2 happens, the Eildon Trust units will not be held longer than 12 months and any unit holder that participates in the redemption of Eildon Trust units will not be entitled to treat the capital gain as a discount capital gain under Division 115 as subsection 115-25(1) will not be satisfied.

Trading stock

108. If you held your Eildon stapled securities as 'trading stock' (as defined in subsection 995-1(1)), the sale consideration of \$1.09 per stapled security is included in your assessable income pursuant to section 6-5.

109. Unless you are in a partnership, if you held Eildon securities as trading stock, you will also make a capital gain or capital loss calculated as discussed in this Ruling. However, any capital gain or capital loss you make will be disregarded if at the time of the CGT event the Eildon stapled securities were held as trading stock pursuant to section 118-25. There is a similar exemption for partners in partnerships (see paragraph 118-25(1)(b)).

Revenue assets

110. Where Eildon stapled securities were held as 'revenue assets' (as defined in section 977-50), but were not trading stock, the amount by which the sale consideration of \$1.09 per stapled security exceeds the cost of each stapled security is included in your assessable income.

111. If you made a capital gain in respect of the Eildon stapled securities you held on revenue account but not as trading stock, the capital gain is reduced by the amount that is otherwise included in your assessable income (section 118-20).

Allowable deduction

112. Where Eildon stapled securities were held as revenue assets, but were not trading stock, if the cost of each security exceeds the sale consideration of \$1.09 per Eildon stapled security, the difference is an allowable deduction pursuant to section 8-1.

113. If you made a capital loss in respect of the Eildon stapled securities you held on revenue account but not as trading stock, you reduce the reduced cost base by the amount of the allowable deduction (subsection 110-55(9)).

Anti-avoidance provisions

Section 45A

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

115. Although Eildon provided Eildon shareholders with a 'capital benefit' as defined in paragraph 45A(3)(b), the capital benefit was provided to all Eildon shareholders in the same proportion as their shareholdings in Eildon. Consequently, there are no advantaged or disadvantaged shareholders as contemplated by subsection 45A(1).

116. In the Buy-Back, Eildon also provided its shareholders with a capital benefit in the form of the Buy-Back Price, which was sourced from Eildon's share capital account. Participation in the Buy-Back was available to all securityholders on the same basis, albeit that some securityholders chose not to participate in the Buy-Back. Eildon provided an opportunity for all shareholders to participate in the Buy-Back. All Eildon shareholders who participated in the Buy-Back received capital in proportion to the number of shares sold. There is no evidence that Eildon streamed capital benefits in a way that advantaged or disadvantaged any Eildon shareholder/s over another.

117. Accordingly, the Commissioner will not make a determination under subsection 45A(2) that section 45C applies to the whole, or a part, of the Capital Return.

Section 45B

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

119. The arrangement involving the return of capital to Eildon shareholders as part of the Restructure constitutes a scheme for the purpose of section 45B and Eildon shareholders have been provided with a capital benefit (paragraph 45B(5)(b)).

120. The conditions of paragraphs 45B(2)(a) and (b) were also met in respect of the Buy-Back.

121. Having regard to the relevant circumstances of the schemes (being both the Restructure and the Buy-Back) as set out in subsection 45B(8), it cannot be concluded that the scheme were entered into or carried out for a more than incidental purpose of enabling Eildon's shareholders to obtain a tax benefit.

122. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole, or a part of the Capital Return provided under the Restructure or to the Buy-Back.

Section 177EA

123. Section 177EA is a general anti-avoidance provision that applies to schemes designed to obtain imputation benefits. For section 177EA to apply, the conditions of paragraphs 177EA(3)(a) to (e) must be satisfied.

124. Eildon is a corporate tax entity. The scheme involves a disposition of a membership interest as defined in subsection 177EA(14). The Special Dividend is a frankable distribution that was paid to the Eildon shareholders (the relevant taxpayers) as part of this scheme and who could, therefore, reasonably be expected to receive imputation benefits. Therefore, the conditions in paragraphs 177EA(3)(a) to (d) are satisfied.

125. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided by subsection 177EA(17)), it would be concluded that a person, or one of the persons who entered into or carried out the scheme did so for a more than incidental purpose of enabling the relevant taxpayers to obtain an imputation benefit under the scheme, as per paragraph 177EA(3)(e).

126. Considering the circumstances of the scheme, it cannot be concluded that the scheme was entered into or carried out for the purpose of conferring an imputation benefit. Therefore, as paragraph 177EA(3)(e) has not been satisfied, the Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefit received by Eildon shareholders in relation to the Special Dividend.

Section 204-30

127. Section 204-30 applies where a corporate tax entity streams the payment of dividends to its members in such a way that certain shareholders (favoured members) obtain imputation benefits, and other shareholders (disadvantaged members) obtain lesser or no imputation benefits.

128. For section 204-30 to apply, members to whom distributions are provided must derive a greater benefit from imputation benefits than another member. The term 'derive a greater benefit from franking credits' is defined in subsection 204-30(8) by reference to the ability of the member to fully use imputation benefits. Under the scheme, Eildon shareholders received imputation benefits when the Special Dividend was paid. The fully franked Special Dividend was paid equally to all Eildon shareholders regardless of their tax profiles. Accordingly, it cannot be said that Eildon selectively directed, or streamed, the flow of franked distributions to those members who obtained the most benefit from the franking credits.

129. As the conditions in subsection 204-30(1) have not been satisfied, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits received by Eildon shareholders in relation to the Special Dividend.

Appendix 2 – Legislative provisions

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

<i>Income Tax Assessment Act 1936</i>	subsection 6(1)
<i>Income Tax Assessment Act 1936</i>	subsection 44(1)(a)
<i>Income Tax Assessment Act 1936</i>	section 45A
<i>Income Tax Assessment Act 1936</i>	subsection 45A(1)
<i>Income Tax Assessment Act 1936</i>	subsection 45A(2)
<i>Income Tax Assessment Act 1936</i>	subsection 45A(3)(b)
<i>Income Tax Assessment Act 1936</i>	section 45B
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(2)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(2)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(3)
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(3)(b)
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(5)(b)
<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>	Division 6
<i>Income Tax Assessment Act 1936</i>	Division 16K
<i>Income Tax Assessment Act 1936</i>	subsection 95(1)
<i>Income Tax Assessment Act 1936</i>	subsection 97(1)
<i>Income Tax Assessment Act 1936</i>	paragraph 97(1)(a)
<i>Income Tax Assessment Act 1936</i>	subsection 99B(1)
<i>Income Tax Assessment Act 1936</i>	subsection 99B(2)
<i>Income Tax Assessment Act 1936</i>	paragraph 99B(2)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 159GZZZK(a)
<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>	section 159GZZZQ
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(2)
<i>Income Tax Assessment Act 1936</i>	section 177EA
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(b)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(c)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(d)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(e)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 177EA(14)

<i>Income Tax Assessment Act 1936</i>	subsection 177EA(17)
<i>Income Tax Assessment Act 1936</i>	Division 1A of former Part IIIAA
<i>Income Tax Assessment Act 1936</i>	former section 160APHE
<i>Income Tax Assessment Act 1936</i>	former section 160APHM
<i>Income Tax Assessment Act 1936</i>	former section 160APHN
<i>Income Tax Assessment Act 1936</i>	former section 160APHO(1)
<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>	section 67-25
<i>Income Tax Assessment Act 1997</i>	paragraph 67-25(1C)
<i>Income Tax Assessment Act 1997</i>	paragraph 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	Division 104
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(1)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(2)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(3)
<i>Income Tax Assessment Act 1997</i>	paragraph 104-10(3)(a)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(4)
<i>Income Tax Assessment Act 1997</i>	section 104-25
<i>Income Tax Assessment Act 1997</i>	subsection 104-25(2)
<i>Income Tax Assessment Act 1997</i>	subsection 104-25(3)
<i>Income Tax Assessment Act 1997</i>	subsection 104-135(3)
<i>Income Tax Assessment Act 1997</i>	subsection 104-135(4)
<i>Income Tax Assessment Act 1997</i>	section 108-5
<i>Income Tax Assessment Act 1997</i>	section 109-10
<i>Income Tax Assessment Act 1997</i>	paragraph 110-25(2)(a)
<i>Income Tax Assessment Act 1997</i>	subsection 110-55(9)
<i>Income Tax Assessment Act 1997</i>	Division 115
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-A
<i>Income Tax Assessment Act 1997</i>	subsection 115-25(1)
<i>Income Tax Assessment Act 1997</i>	section 116-20
<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>	paragraph 118-25(1)(b)
<i>Income Tax Assessment Act 1997</i>	Division 197
<i>Income Tax Assessment Act 1997</i>	section 202-40
<i>Income Tax Assessment Act 1997</i>	section 204-30
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(1)

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<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(3)(c)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(8)
<i>Income Tax Assessment Act 1997</i>	Division 207
<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>	section 207-45
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(a)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(e)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(f)
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	Division 725
<i>Income Tax Assessment Act 1997</i>	Division 727
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)

References*Previous draft:*

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Income tax ~~ Capital management ~~ Anti avoidance rules – Section 45B
Income tax ~~ Capital management ~~ Anti avoidance rules – Section 45C
International issues ~~ Capital gains tax ~~ Other

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