Status: **legally binding**

Class Ruling

BHP Group Limited – dividend by way of in specie distribution of Woodside Energy Group Ltd shares

Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for shareholders of BHP Group Limited (BHP) who received a dividend by way of an in specie distribution (Special Dividend) of shares in Woodside Energy Group Ltd (Woodside).

2. Full details of this scheme are set out in paragraphs 24 to 37 of this Ruling.

3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:

- held shares in BHP on 26 May 2022 (Distribution Record Date)
- were a resident of Australia, as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), or a non-resident who did not hold BHP shares through a permanent establishment in Australia, and
- held your BHP shares on capital account; that is, your BHP shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)).

5. 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 24 to 37 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

6. This Ruling applies from 1 July 2021 to 30 June 2022.

Ruling

Demerger did not occur

7. A demerger, as defined in section 125-70, did not occur under the scheme.

Special Dividend

8. The Special Dividend is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

9. The Special Dividend is a frankable distribution pursuant to section 202-40.

Assessability of the Special Dividend

Resident shareholders

10. If you are a resident of Australia, the Special Dividend is included in your assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Non-resident shareholders

11. If you are a non-resident and the Special Dividend is not attributable to a permanent establishment in Australia, the Special Dividend is not included in your assessable income (section 128D of the ITAA 1936) and it is not subject to dividend withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

Franking credits and tax offsets

Resident shareholders

12. If you satisfy the residency requirements in section 207-75, you include the franking credits attached to the Special Dividend in your assessable income and you are entitled to a tax offset equal to the amount of those credits (section 207-20), provided you are a 'qualified person' (as defined in Division 1A of former Part IIIAA of the ITAA 1936).

13. 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, the franking credits attached to the Special Dividend are included in your assessable income, provided you are a 'qualified person' (subsection 207-35(1)).

14. If you are a partner in a partnership or a beneficiary of a trust and the Special Dividend flows indirectly through the partnership or trust to you, you include your share of

the Special Dividend in your assessable income. You are entitled to a tax offset equal to your share of the franking credit attached to the Special Dividend, provided both you and the partnership or trust as is relevant are each a 'qualified person' (section 207-45 and former subsection 160APHU(1) of the ITAA 1936).

15. The tax offset is refundable, subject to the refundable tax offset rules in Division 67.

Non-resident shareholders

16. You do not include the amount of the franking credits attached to the Special Dividend in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70).

Cost base and the timing of acquisition of Woodside Energy Group Ltd shares

17. You acquired a Woodside share on 1 June 2022, being the date BHP transferred it to you (table item A1 (case 1) of subsection 109-5(2)) for every 5.340 BHP shares you held, with any entitlement to a fraction of a Woodside share that would have otherwise arisen being rounded down to the nearest whole number. This is also the date you acquired the share for the purposes of the capital gains tax discount provisions in Division 115.

18. The first element of the cost base and reduced cost base of a Woodside share acquired by you is the market value of a Woodside share on the date it was distributed to you (subsection 112-20(1)). The Commissioner accepts that the market value of a Woodside share was $29.76.

Sale of Woodside Energy Group Ltd shares under the sale facility

19. CGT event A1 happened in relation to the Woodside shares you were entitled to receive that were transferred to the sale agent for sale through the sale facility (subsections 104-10(1) and (3)). The time of the CGT event A1 is the time when the shares were transferred to the sale agent on 1 June 2022 (Distribution Implementation Date) (subsection 104-10(3)).

20. The capital proceeds from the disposal of each share are the proceeds you received from the sale agent. The first element of the cost base and reduced cost base is worked out under paragraph 18 of this Ruling.

21. You will make a capital gain if the capital proceeds exceeded your cost base. You will make a capital loss if the capital proceeds were less than your reduced cost base (subsection 104-10(4)).

Anti-avoidance provisions do not apply

22. The Commissioner will not make a determination under either subsection 45A(2) or paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the Special Dividend received by you.

23. The Commissioner will not make a determination under either paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit in relation to the Special Dividend received by you.

Status: **legally binding**

Scheme

24. 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

25. BHP is an Australian incorporated public company listed on the Australian Securities Exchange (ASX) and the head company of an Australian income tax consolidated group.

26. BHP Petroleum International Pty Ltd (BHP Petroleum) and its subsidiaries carry on a business of producing oil and gas. BHP Petroleum is a wholly-owned subsidiary of BHP.

27. Woodside is an Australian incorporated public company listed on the ASX and carries on a business of producing oil and gas.

In specie distribution of Woodside Energy Group Ltd shares

28. On 22 November 2021, BHP and Woodside announced they had entered into a binding share sale agreement under which Woodside would acquire the entire share capital of BHP Petroleum in exchange for Woodside issuing new shares to BHP comprising approximately 48% of all Woodside shares (on a post-issue basis). BHP would then immediately distribute those shares to all BHP shareholders as an in specie fully franked dividend.

29. On 20 May 2022, BHP resolved to pay the Special Dividend to facilitate the in specie distribution of Woodside shares.

30. Entitlements to the Special Dividend were determined on 26 May 2022 (Distribution Record Date).

31. The number of Woodside shares to which each BHP shareholder was entitled to under the Special Dividend was based on the following formula rounded down to the nearest whole number of shares.

$$A = B \times (C \div D)$$

Where:

- **A** is the number of Woodside shares comprising the share consideration to which each BHP shareholder is entitled
- **B** is the total number of new Woodside shares issued as share consideration
- **C** is the number of BHP shares held by the BHP shareholder at the Distribution Record Date
- **D** is the total number of BHP shares on issue at the Distribution Record Date.

32. The remaining Woodside shares held by BHP due to the rounding down were transferred to a nominee (the sale agent) who sold them and remitted the proceeds to BHP. These remaining shares or proceeds from sale did not form part of the Special Dividend.

33. On 1 June 2022 (Distribution Implementation Date), BHP exchanged all its shares in BHP Petroleum in exchange for Woodside issuing 914,768,948 shares to BHP. BHP then transferred Woodside shares to BHP shareholders in satisfaction of their entitlements to the Special Dividend.

34. BHP debited the entire Special Dividend of $27.2 billion against its retained earnings and no part was debited to its share capital account.

35. The market value of each Woodside share on the Distribution Implementation Date was determined by BHP to be $29.76, being the closing price on the last trading day before the Distribution Implementation Date (which the Commissioner accepted).

Sale facility

Ineligible foreign shareholders

36. An Ineligible Foreign Shareholder is a BHP shareholder who had a registered address outside Australia, the United Kingdom or the United States of America, or in a jurisdiction that BHP (acting reasonably and following consultation with Woodside) determined would be unlawful, unduly onerous or unduly impracticable in which to distribute the Woodside shares. Ineligible Foreign Shareholders had all the Woodside shares, to which they were otherwise entitled to, transferred to the sale agent who sold them and remitted the proceeds to those shareholders.

Selling shareholders

37. BHP shareholders with shareholdings of 1,000 or less BHP shares and who elected to participate in the sale facility (Selling Shareholders), had all the Woodside shares to which they were otherwise entitled transferred to the sale agent who sold them and remitted the proceeds to those shareholders.

Commissioner of Taxation
6 July 2022

Status: **not legally binding**

Appendix – Explanation

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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Demerger relief not available

38. For a demerger to happen (as defined in subsection 125-70(1)), there must be a 'demerger group' consisting of one head entity and at least one demerger subsidiary (subsection 125-65(1)). That is, the demerger group to which the restructuring happens is the one that existed before restructuring commenced.

39. Woodside was not a demerger subsidiary of BHP when the restructuring commenced. The disposal of BHP's shares in BHP Petroleum for shares in Woodside and the distribution of those Woodside shares to BHP shareholders occurs under a single restructuring for the purposes of the definition of a 'demerger' in subsection 125-70(1). Therefore, the demerger group to which the restructuring happens is the one that existed before the merger of Woodside and BHP Petroleum, at which time Woodside was not a member of the demerger group. As such, the conditions under subsection 125-70(1) are not satisfied.

Special Dividend

40. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders, whether in money or other property, but excludes a distribution debited against an amount standing to the credit of the share capital account of the company.

41. The in specie distribution of Woodside shares is a dividend as it is a distribution of property by BHP to its shareholders which was not debited against its share capital account.

42. A distribution is a frankable distribution to the extent it is not unfrankable (section 202-40). Section 202-45 sets out the circumstances under which an amount or distribution is taken to be unfrankable.

43. None of the circumstances in section 202-45 apply to the Special Dividend. Therefore, the Special Dividend is a frankable distribution under section 202-40 and capable of being franked in accordance with section 202-5.

Gross-up and tax offset

44. Where a BHP shareholder receives the Special Dividend directly, satisfies the residency requirement in section 207-75 and is a 'qualified person' in relation to the franked distribution, the assessable income of the shareholder includes the amount of the franking credit (subsection 207-20(1)). The shareholder will also be entitled to a tax offset equal to the franking credit on the distribution (subsection 207-20(2)).

45. A shareholder that is not a qualified person in relation to the Special Dividend:

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

46. Subject to satisfying the qualified person rule, the assessable income of a BHP shareholder (not being an entity taxed as a corporate tax entity) that is a partnership or a trustee of a trust (not being a complying superannuation fund), includes the amount of the franking credit attached to the Special Dividend (subsection 207-35(1)).

Qualified person rules

47. An entity must be a qualified person in relation to a dividend in order to be entitled to a tax offset in respect of the franking credit on a dividend (subsection 207-145(1)).

48. Paragraph 207-145(1)(a), which refers to former Division 1A of Part IIIAA of the ITAA 1936, provides the statutory tests a shareholder must satisfy to be a qualified person in relation to a franked distribution they have received in order to be entitled to a tax offset for the franking credit on the distribution.

49. Former section 160APHU of the ITAA 1936 provides that a partner in a partnership or the beneficiary of a trust cannot be a qualified person in relation to a dividend unless the partnership or the trustee of the trust is also a qualified person in relation to the dividend.

50. The test of what constitutes a qualified person is set out in former subsection 160APHO(1) of the ITAA 1936. Broadly, if a shareholder was not under an obligation to make a related payment in relation to the dividend, they will have to satisfy the 'at risk' requirement of the holding period rule in relation to the primary qualification period. If a shareholder was under an obligation to make a related payment in relation to the dividend, they will have to satisfy the 'at risk' requirement of the holding period rule within the secondary qualification period.

51. The small shareholder exception in former section 160APHT of the ITAA 1936 may apply to the Special Dividend. A shareholder, who is an individual and who has franking credit offsets not exceeding $5,000 for the year of income ended 30 June 2022, is a qualified person and is exempt from the holding period requirement in relation to the Special Dividend (former subsection 160APHT(2) of the ITAA 1936).

Holding period rule

52. The holding period rule requires a shareholder to have held their BHP shares, on which the Special Dividend was paid, 'at risk' for a continuous period of at least 45 days during the relevant qualification period (former paragraph 160APHO(2)(a) of the ITAA 1936).

53. The primary qualification period is the period beginning on the day after the day on which the taxpayer acquired the shares or interest and ending on the 45th day after the day on which the shares or interest became ex dividend (former section 160APHD of the ITAA 1936).

54. The secondary qualification period is the period beginning 45 days before, and ending 45 days after, the day on which a share becomes ex dividend (former section 160APHD of the ITAA 1936).

55. Under former subsection 160APHE(1) of the ITAA 1936, a share becomes ex dividend on the day after the last day on which the acquisition by a person of the share entitles them to receive the dividend. In respect of the Special Dividend, eligibility to receive the Dividend was determined on the Distribution Record Date (26 May 2022), being the last day on which the acquisition by a person of a BHP share entitled the person to receive the Special Dividend. It follows that BHP shares became ex dividend on 27 May 2022.

56. During the relevant qualification period, any days on which a shareholder has materially diminished risks of loss or opportunities for gain in respect of the shares are excluded, but the exclusion is not taken to break the continuity of the period for which the shareholder held the shares (former subsection 160APHO(3) of the ITAA 1936).

57. A shareholder will need to determine whether they satisfy the holding period rule having regard to their circumstances. This will require taking into account any positions entered into that have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of BHP shares. This is outside of the scope of this Ruling.

The anti-avoidance provisions

Sections 45A and 45B of the ITAA 1936

58. Sections 45A and 45B of the ITAA 1936 are anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C of the ITAA 1936 applies. The effect of such a determination is that all or part of a capital return received by shareholders is treated as an unfranked dividend paid out of profits of the company.

59. Section 45A of the ITAA 1936 generally applies where a company streams capital benefits to some shareholders who would benefit more from them than other shareholders and dividends to those other shareholders. As the Special Dividend was paid to all BHP shareholders that held BHP shares on the Distribution Record Date, no such streaming occurred.

60. Section 45B of the ITAA 1936 generally applies where, having regard to the relevant circumstances of the scheme (as set out in subsection 45B(8) of the ITAA 1936), a company provided certain capital payments to its shareholders for a more than incidental purpose of enabling a taxpayer to obtain a demerger benefit or a tax benefit.

61. Having had regard to the relevant circumstances of the scheme, the Commissioner has not concluded that the scheme was entered into for a more than incidental purpose to enable a taxpayer to obtain a tax benefit.

62. Therefore, the Commissioner will not make a determination under either subsection 45A(2) or paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the Special Dividend received by BHP shareholders.

Section 177EA of the ITAA 1936

63. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. As the necessary conditions for applying subsection 177EA(3) of the ITAA 1936 are not satisfied, 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 under the Special Dividend.

Section 204-30

64. Subsection 204-30(1) is an anti-avoidance provision which allows the Commissioner to make a determination under paragraph 204-30(3)(c) where an entity streams the payment of dividends to its members in such a way that certain shareholders, referred to as favoured members, obtain imputation benefits, and other shareholders, referred to as disadvantaged members, obtain lesser or no imputation benefits, whether or not they receive other benefits. The favoured members are those that derive a greater benefit from imputation benefits than disadvantaged members.

65. As the Special Dividend was paid to all BHP shareholders in proportion to the number of shares held on the Distribution Record Date, there was no streaming of dividends. Therefore, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny imputation benefits to BHP shareholders.

References

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44(1)(a)(i)
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45B
- ITAA 1936 45B(3)(b)
- ITAA 1936 45B(8)
- ITAA 1936 45C
- ITAA 1936 128B(3)(ga)
- ITAA 1936 128D
- ITAA 1936 177EA
- ITAA 1936 177EA(3)
- ITAA 1936 177EA(5)(b)
- ITAA 1936 Pt IIIAA Div 1A
- ITAA 1936 former 160APHD
- ITAA 1936 former 160APHE(1)
- ITAA 1936 former 160APHM
- ITAA 1936 former 160APHO(1)
- ITAA 1936 former 160APHO(2)(a)
- ITAA 1936 former 160APHO(3)
- ITAA 1936 former 160APHT
- ITAA 1936 former 160APHT(2)
- ITAA 1936 former 160APHU
- ITAA 1936 former 160APHU(1)
- ITAA 1997 Div 67
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(3)
- ITAA 1997 104-10(4)
- ITAA 1997 109-5(2)
- ITAA 1997 112-20(1)
- ITAA 1997 Div 115
- ITAA 1997 125-65(1)
- ITAA 1997 125-70
- ITAA 1997 125-70(1)
- ITAA 1997 202-5
- ITAA 1997 202-40
- ITAA 1997 202-45
- ITAA 1997 204-30
- ITAA 1997 204-30(1)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 207-20
- ITAA 1997 207-20(1)
- ITAA 1997 207-20(2)
- ITAA 1997 207-70
- ITAA 1997 207-35(1)
- ITAA 1997 207-45
- ITAA 1997 207-75
- ITAA 1997 207-145(1)
- ITAA 1997 207-145(1)(a)
- ITAA 1997 207-145(1)(e)
- ITAA 1997 207-145(1)(f)
- ITAA 1997 Div 230
- ITAA 1997 977-50
- ITAA 1997 995-1(1)

ATO references

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