Status: **legally binding**

Class Ruling

McGrath Limited – scheme of arrangement and special dividend

Relying on this Ruling

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

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

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What this Ruling is about

1. This Ruling sets out the income tax consequences for the former shareholders of McGrath Limited (McGrath) in relation to their receipt of the special dividend of $0.016 per share on 19 June 2024 (Permitted Dividend) and the consideration from the scheme of arrangement (Scheme Consideration) implemented on 27 June 2024 (Scheme Implementation Date) where they received cash or shares in RPAA Investments Limited (Rollco), or cash and Rollco shares, in exchange for their McGrath shares (Scheme of Arrangement).

2. Details of this scheme are set out in paragraphs 53 to 93 of this Ruling.

3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* (ITAA 1936) or the *Income Tax Assessment Act 1997* (ITAA 1997) (as detailed in the table in Appendix 2 to this Ruling), unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you were a McGrath shareholder who:

- held your McGrath shares on
  - 12 June 2024 (Permitted Dividend Record Date) and received the Permitted Dividend on 19 June 2024 (Permitted Dividend Payment Date)

  - 20 June 2024 (Scheme Record Date) and participated in the Scheme of Arrangement, and

- held your McGrath shares on capital account – that is, you did not hold your McGrath shares as 'revenue assets' (as defined in section 977-50) or as 'trading stock' (as defined in subsection 995-1(1)).

5. This Ruling does not apply to you if you:

- are an 'exempt entity' (as defined in subsection 995-1(1))
- are a 'temporary resident' of Australia (as defined in subsection 995-1(1))
- acquired your McGrath shares under a McGrath employee share scheme, option or rights plan
- are a 'non-resident' (as defined in subsection 6(1)) and held, together with your associates, more than 10% of McGrath's shares
- previously applied roll-over relief in connection with the acquisition of your McGrath shares
- are subject to the investment manager regime in Subdivision 842-I in relation to your McGrath shares, or
- are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 53 to 93 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 2023 to 30 June 2024.

Ruling

Dividend and frankable distribution

7. The Permitted Dividend is a 'dividend' (as defined in subsection 6(1)).

8. The Permitted Dividend is a 'frankable distribution' under section 202-40.

Assessability of the Permitted Dividend, franking credit and tax offset

Resident shareholders

9. If you are a 'resident of Australia' (as defined in subsection 6(1)), you include the Permitted Dividend in your assessable income (subparagraph 44(1)(a)(i)).

10. If you are an individual or a 'corporate tax entity' (as defined in section 960-115), and you:

- satisfy the residency requirement in section 207-75, and
- are a 'qualified person' (as defined in Division 1A of former Part IIIAA) in relation to the Permitted Dividend,

Status: **legally binding**

the franking credit attached to the Permitted Dividend is included in your assessable income and you are entitled to a tax offset equal to the amount of that credit (sections 207-20, 207-70 and 207-145).

11. If you are a resident of Australia who received the Permitted Dividend as a trustee of a trust (the trust not being a complying superannuation entity) or as a partnership, and you:

- are not a corporate tax entity, and
- are a qualified person,

the franking credit attached to the Permitted Dividend is included in your assessable income (subsection 207-35(1)).

12. If you are a resident of Australia who is a partner in a partnership or a beneficiary of a trust, and:

- the Permitted Dividend flows indirectly through the partnership or trust to you, and
- both you and the partnership or trust, as is relevant, are each a qualified person,

you include your share of the Permitted Dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credit attached to the Permitted Dividend (subparagraph 44(1)(a)(i), section 207-45 and former subsection 160APHU(1)).

13. The tax offset is refundable (table item 40 of section 63-10), unless you are a:

- trustee of a non-complying superannuation fund or non-complying approved deposit fund (subsection 67-25(1A))
- trustee of a trust who is liable to be assessed under sections 98 or 99A (subsection 67-25(1B)), or
- corporate tax entity (unless you are an exempt institution that is eligible for a refund or a life insurance company that received the Permitted Dividend on the McGrath shares that were not held by you on behalf of your shareholders)(subsections 67-25(1C) and 67-25(1D)).

Non-resident shareholders

Permitted Dividend attributable to a permanent establishment in Australia

14. If you are a non-resident and the Permitted Dividend is attributable to a permanent establishment in Australia (and you did not receive the Permitted Dividend in your capacity as a trustee):

- you include the Permitted Dividend in your assessable income (paragraphs 44(1)(b) and (c)) and you are not liable to pay withholding tax in respect of the dividend (subsection 128B(3E))
- if you are also a qualified person, you include the amount of the franking credit attached to the Permitted Dividend in your assessable income and you are entitled to a tax offset equal to the amount of that franking credit (sections 207-20, 207-70, and subsection 207-75(2)), and
- the tax offset is not refundable (subsection 67-25(1DA)).

Status: **legally binding**

Permitted Dividend not attributable to a permanent establishment in Australia

15. If you are a non-resident and the Permitted Dividend is not attributable to a permanent establishment in Australia:

- the Permitted Dividend is not included in your assessable income (subsection 44(1) and section 128D) and you are not liable to pay withholding tax in respect of the dividend (paragraph 128B(3)(ga)), and
- you do not include the amount of the franking credit that is attached to the Permitted Dividend in your assessable income and you are not entitled to a tax offset for that franking credit (sections 207-20 and 207-70).

Qualified persons

16. As you have not made a related payment in respect of the Permitted Dividend (former section 160APHN), you are a qualified person in relation to the Permitted Dividend if you satisfy the holding period rule in respect of the primary qualification period (paragraph 207-145(1)(a) and former paragraph 160APHO(1)(a)).

17. The primary qualification period begins on the day after the day you acquired your McGrath shares and ends 45 days after the day your McGrath shares became ex dividend (former section 160APHD).

18. As your McGrath shares became ex dividend on 13 June 2024, the primary qualification period ends on 28 July 2024.

19. The holding period rule requires you to hold your McGrath shares at risk for a continuous period (not counting the day on which you acquired your McGrath shares or the day you disposed of your McGrath shares) of at least 45 days during the primary qualification period (former paragraph 160APHO(2)(a)).

20. In working out the number of days you continuously held your McGrath shares at risk, do not count any days on which you have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM) in respect of your McGrath shares (former subsection 160APHO(3)). The exclusion is not taken to break the continuity period during which you held your McGrath shares (former subsection 160APHO(3)).

21. You no longer held your McGrath shares at risk on the Scheme Record Date as you became committed to disposing your McGrath shares in exchange for the Scheme Consideration. This means that the days on and after 20 June 2024 are excluded (former subsection 160APHO(3)).

22. Accordingly, you will be a qualified person in relation to the Permitted Dividend if you held your McGrath shares at risk for at least 45 days continuously (not counting the day on which you acquired your McGrath shares) prior to 20 June 2024 (former paragraph 160APHO(2)(a)).

23. You will not be a qualified person if you acquired your McGrath shares on or after 6 May 2024 as you would have held your McGrath shares for less than 45 days (former paragraph 160APHO(2)(a)).

24. The small shareholder exception in former subsection 160APHT(1) may apply. If you are an individual and you receive no more than $5,000 in franking credits from dividends that you own directly, or indirectly via a partnership or trust, during the income year then you are a qualified person in relation to the Permitted Dividend.

Status: **legally binding**

Exempting entity and former exempting entity

25. When the Permitted Dividend was paid to you, McGrath was not an 'exempting entity' (as defined in section 208-20) nor was McGrath a 'former exempting entity' (as defined in section 208-10), therefore sections 208-195 and 208-225 will not apply.

Anti-avoidance and integrity provisions

Section 177EA

26. We will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefit you received in relation to the Permitted Dividend.

Section 204-30

27. We will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit you received in relation to the Permitted Dividend.

Dividend stripping operation, distribution washing, foreign income tax deduction

28. Paragraphs 207-145(1)(d) (about dividend stripping operations) and 207-145(1)(da) (about dividend washing) will not apply to deny the gross-up of your assessable income by the amount of the franking credit attached to the Permitted Dividend, nor to deny the tax offset to which you are otherwise entitled to under Division 207.

29. If you are entitled to a 'foreign income tax deduction' (as defined in section 832-120) in relation to the Permitted Dividend, the amount of the franking credit attached to the Permitted Dividend is not included in your assessable income and you will not be entitled to a tax offset under Division 207 (paragraphs 207-145(1)(db), (e) and (f)).

Capital gains tax consequences

CGT event A1

30. CGT event A1 happened to you on the Scheme Implementation Date when you disposed of your McGrath shares to RPAA Holdings Pty Ltd (RPAA Holdings) in accordance with the Scheme of Arrangement (section 104-10).

Resident shareholders

31. The capital proceeds you received in respect of CGT event A1 happening to your McGrath shares is $0.60 for each McGrath share (subsection 116-20(1)).

32. You made a capital gain if the capital proceeds from the disposal of your McGrath share exceeded its cost base (subsection 104-10(4)). The capital gain is the amount of the excess.

33. Generally, if you make a capital gain, you can treat the capital gain as a discount capital gain provided you:

- are an individual, a complying superannuation entity or a trust subject to the rules in Subdivision 115-C (section 115-10), and
- acquired, or are taken to have acquired, your McGrath share on or before 26 June 2023 (subsection 115-25(1)).

Status: **legally binding**

34. You made a capital loss if the capital proceeds from the disposal of your McGrath share is less than its reduced cost base (subsection 104-10(4)). The capital loss is the amount of the difference.

Foreign-resident shareholders

35. If you were a 'foreign resident' or the trustee of a 'foreign trust for CGT purposes' (as defined in subsection 995-1(1)) just before the Scheme Implementation Date, any capital gain or capital loss you made as a result of CGT event A1 happening to your McGrath shares is disregarded under subsection 855-10(1), provided your McGrath shares:

- had not been used at any time by you in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- were not covered by subsection 104-165(3) (about individuals choosing to disregard capital gains upon ceasing to be Australian residents) (table item 5 of section 855-15).

Availability of scrip for scrip roll-over if a capital gain is made

36. If you received Rollco shares as the whole or part of your Scheme Consideration, and you made a capital gain from the disposal of your McGrath shares, you may choose scrip for scrip roll-over relief to disregard the capital gain (sections 124-780, 124-785 and 124-790).

37. However, you cannot choose roll-over relief if any capital gain you might have made from the disposal of your McGrath share would otherwise be disregarded (other than because of a roll-over) (paragraph 124-795(2)(a)).

38. If you were a foreign resident just before the Scheme Implementation Date, you cannot choose roll-over relief unless the Rollco shares you received were 'taxable Australian property' (as defined in section 855-15) just after the Scheme Implementation Date (subsection 124-795(1)).

If you received only RPAA Investments Limited shares as your Scheme Consideration and choose scrip for scrip roll-over relief

39. Where you only received Rollco shares as your Scheme Consideration (that is, you did not receive any cash consideration) and you choose scrip for scrip roll-over, the capital gain you made from your McGrath shares is disregarded (subsection 124-785(1)).

40. The first element of the cost base and reduced cost base of each Rollco share you received is worked out by reasonably attributing to it the cost base and reduced cost base (respectively) of the McGrath shares you exchanged for those Rollco shares (subsections 124-785(2) and (4)).

41. We accept a reasonable method of attribution would be to calculate the first element of the cost base and reduced cost base of each Rollco share by dividing the total cost bases and total reduced cost bases (respectively) of your McGrath shares by the number of Rollco shares you received (subsections 124-785(2) and (4)).

42. For the purposes of determining your eligibility to make a discount capital gain, you are taken to have acquired your replacement Rollco shares on the date you acquired your original McGrath shares (table item 2 of subsection 115-30(1)).

Status: **legally binding**

If you received RPAA Investments Limited shares and cash as your Scheme Consideration and choose scrip for scrip roll-over relief

43. Where you received a combination of Rollco shares and cash as your Scheme Consideration and you choose scrip for scrip roll-over, the part of the capital gain from the disposal of your McGrath shares that is attributable to the receipt of Rollco shares is disregarded (subsections 124-785(1) and 124-790(1)).

44. Any part of the capital gain that is attributable to the receipt of cash consideration is not disregarded because it is ineligible proceeds for which roll-over is not available (subsection 124-790(1)).

45. The first element of the cost base and reduced cost base of each Rollco share is worked out by reasonably attributing to it the cost base and reduced cost base (respectively) of the McGrath shares you exchanged for those Rollco shares, as reduced by so much of the cost bases and reduced cost bases (respectively) of your McGrath shares as is attributable to the cash consideration (subsections 124-785(2), (3) and (4)).

46. We accept a reasonable method of attribution would be to calculate the first element of the cost base and reduced cost base of each Rollco share by dividing the total cost bases and total reduced cost bases (respectively) of your McGrath shares (as reduced by so much of the total cost bases and total reduced cost bases (respectively) of your McGrath shares as is attributable to the cash consideration) by the number of Rollco shares you received (subsections 124-785(2), (3), (4) and section 124-790).

47. For the purposes of determining your eligibility to make a discount capital gain, you are taken to have acquired your replacement Rollco shares on the date you acquired your original McGrath shares (table item 2 of subsection 115-30(1)).

Consequences if you do not, or cannot, choose scrip for scrip roll-over relief

48. If you do not, or cannot, choose scrip for scrip roll-over, you must account for any capital gain or capital loss from CGT event A1 happening on the disposal of your McGrath shares in working out your net capital gain or net capital loss for the income year in which CGT event A1 happened (sections 102-5 and 102-10).

49. If you made a capital gain, you can treat the capital gain as a discount capital gain if the conditions in Subdivision 115-A are met (see paragraph 33 of this Ruling). In particular, the McGrath shares you disposed of must have been acquired at least 12 months before the Scheme Implementation Date (section 115-25).

50. The first element of the cost base and reduced cost base of your Rollco shares is equal to the market value of the McGrath shares you exchanged in respect of acquiring the Rollco shares (paragraph 110-25(2)(b) and subsection 110-55(2)).

51. The market value of your McGrath shares is worked out at the time you acquired your Rollco shares, which is on the Scheme Implementation Date (paragraph 110-25(2)(b) and subsection 110-55(2)). We accept the market value of a McGrath share at that time was $0.60.

52. You are taken to have acquired your Rollco shares on the Scheme Implementation Date (table item 2 of section 109-10).

Status: **legally binding**

Scheme

53. 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.

McGrath Limited

54. McGrath is an Australian company limited by shares.

55. McGrath carries on a business in providing residential real estate services in Australia.

56. McGrath became listed on the Australian Securities Exchange (ASX) on 7 December 2015, and remained publicly listed on the ASX until 18 June 2024 when it was delisted as a result of the Scheme of Arrangement.

57. McGrath is an Australian resident for tax purposes and was the head company of the McGrath income tax consolidated group.

58. At 30 June 2023, McGrath had:

- 160,064,187 ordinary shares on issue (the only class of shares on issue)
- $80.635 million in accumulated losses
- $27.065 million in profits reserve, and
- a franking account balance of $4,991,676.

59. As at 4 August 2023, McGrath had 1,716 shareholders, with its top 20 shareholders beneficially holding 72.04% of its ordinary shares.

RPAA Holdings Pty Ltd, RPAA Investments Limited, Knight Frank group and Bayleys group

60. RPAA Holdings is an Australian company limited by shares that was incorporated for the purpose of acquiring all of the McGrath shares.

61. Rollco is an unlisted Australian company limited by shares. Rollco owns all the shares in RPAA Holdings.

62. Rollco was jointly owned and controlled by Knight Frank Australia Holdings Pty Ltd (KFA) and BCL Aus Holdings Limited. (BCL) prior to the implementation of the Scheme of Arrangement.

63. KFA is a wholly owned subsidiary of Knight Frank LLP, a real estate consultancy and agency headquartered in London, England.

64. BCL is a wholly owned subsidiary of Bayley Corporation Limited. Bayley Corporation Limited is the parent company for the Bayleys group, a New Zealand property group.

65. Rollco, RPAA Holdings, KFA and BCL did not own any of the ordinary shares in McGrath prior to the implementation of the Scheme of Arrangement.

Status: **legally binding**

Scheme of Arrangement

66. On 24 March 2024, McGrath entered into a Scheme Implementation Deed with RPAA Holdings, KFA and BCL, subject to shareholder and court approval in accordance with Part 5.1 of the *Corporations Act 2001*.

67. Under the Scheme of Arrangement, each McGrath share held by a McGrath shareholder was transferred to RPAA Holdings, resulting in McGrath becoming a wholly owned subsidiary of RPAA Holdings and Rollco. In exchange, McGrath shareholders received as their Scheme Consideration:

- where a valid election was made, one Rollco share per McGrath share (Rollco Scrip Alternative)
- where no valid election was made, $0.60 cash per McGrath share (All-Cash Alternative), or
- a combination of the Rollco Scrip Alternative and All-Cash Alternative.

68. On 4 June 2024, McGrath announced that, as at 3 June 2024, 23 McGrath shareholders, representing 26.66% of McGrath's shares, had made elections to receive the Rollco Scrip Alternative.

69. The Scheme Consideration was considered fair according to the independent expert's report prepared by Lonergan Edwards & Associates Limited.

70. On 11 June 2024, McGrath shareholders approved the Scheme of Arrangement at a shareholder meeting.

71. On 14 June 2024, the Scheme of Arrangement was approved by order of the Supreme Court of New South Wales for the purposes of paragraph 411(4)(b) of the *Corporations Act 2001*. McGrath shares were suspended from trading on the ASX from the close of 17 June 2024.

72. On the Scheme Record Date, each McGrath shareholder's entitlement to the Scheme Consideration was determined.

73. Rollco issued shares to KFA and BCL, in equal proportions, prior to the Scheme Implementation Date to fund the All-Cash Alternative.

74. On the Scheme Implementation Date, the Scheme Consideration was provided to McGrath shareholders and their McGrath shares were transferred to RPAA Holdings. Hence, RPAA Holdings acquired 100% of the shares in McGrath on the Scheme Implementation Date.

Permitted Dividend

75. Clause 6.7 of the Scheme Implementation Deed states that McGrath may (in its absolute discretion) declare and pay the Permitted Dividend, provided its net cash reserves on the Determination Date (as defined in the Scheme Implementation Deed) were not below $23 million after deducting the aggregate amount of the Permitted Dividend.

76. On 5 June 2024, the directors of McGrath declared the Permitted Dividend (being $0.016 per share). The Permitted Dividend was fully franked.

77. McGrath shareholders who held their shares on the Permitted Dividend Record Date were paid the Permitted Dividend on the Permitted Dividend Payment Date.

Status: **legally binding**

78. Each McGrath shareholder received the Permitted Dividend proportionate to the number of the McGrath shares they held.

79. The entire amount of the Permitted Dividend was funded by McGrath's existing cash reserves and debited to McGrath's profits reserve account.

80. Neither RPAA Holdings, RollCo, KFA, BCL, or any of their associates, facilitated or financed the payment of the Permitted Dividend.

81. The Permitted Dividend was paid at the discretion of the directors of McGrath. Neither RPAA Holdings, Rollco, KFA, BCL, or any of their associates, had any influence or control over the declaration and payment of the Permitted Dividend.

82. The payment of the Permitted Dividend was not conditional on the Scheme of Arrangement becoming effective and did not reduce the Scheme Consideration.

Other matters

83. The Scheme of Arrangement was not conditional on the Permitted Dividend being declared and paid and neither RPAA Holdings, Rollco, KFA or BCL had any right to terminate the Scheme Implementation Deed if McGrath did not declare and pay the Permitted Dividend.

84. On the Permitted Dividend Payment Date, McGrath was not effectively owned by 'prescribed persons' (as defined in section 208-40).

85. On the Permitted Dividend Payment Date, McGrath was not a former exempting entity (as defined in section 208-10) as it had never been an exempting entity (as defined in section 208-20) before that date.

86. On the Scheme Implementation Date, the sum of the market values of McGrath's assets that were taxable Australian real property did not exceed the sum of the market values of its other assets for the purposes of section 855-30.

87. No member of the wholly owned group which RPAA Holdings and Rollco are members of, issued equity (other than the Rollco shares as part of the Scheme Consideration) or raised new debt under the arrangement, to an entity that is not a member of the group in relation to the issue of Rollco shares to McGrath shareholders under the Scheme of Arrangement.

88. There was no 'significant stakeholder' or 'common stakeholder' in McGrath within the meaning of those terms in section 124-783.

89. Just before the Scheme Implementation Deed was entered into, and just before the Scheme Implementation Date, McGrath had more than 300 shareholders. McGrath is not treated as if it did not have at least 300 members under section 124-810.

90. A McGrath shareholder, McGrath and RPAA Holdings were not all members of the same 'linked group' (within the meaning of section 170-260) just before the Scheme Implementation Deed was entered into on 24 March 2024.

91. Rollco did not make a choice under subsection 124-795(4) that the McGrath shareholders could not obtain the roll-over in Subdivision 124-M for CGT event A1 happening in relation to the exchange of the McGrath share.

92. The following facts are relevant for the purposes of section 207-159:

- McGrath has paid fully franked dividends to its shareholders biannually since the 2021 income year. Ordinary and special dividends were paid in March and September of each year to align with its statutory reporting cycle.

Status: **legally binding**

- Special dividends were paid in the 2022 and 2024 income years that ranged between $0.015 and $0.025 per share.
- McGrath last issued shares in the 2023 income year to fund the acquisition of a 30% stake in its Central Coast franchisee, McGrath Central Coast. 3.146 million shares (worth $1.298 million) were issued to the principals of McGrath Central Coast on 5 October 2022 and 15 November 2022.

Key dates

93. The following table is a summary of the key dates for the Scheme of Arrangement and the Permitted Dividend:

Table 1: Summary of the key dates for the Scheme of Arrangement and Permitted Dividend

Date	Event
24 March 2024	Scheme Implementation Deed executed
7 May 2024	First court hearing and release of scheme booklet
3 June 2024	Rollco Scrip Alternative election deadline
12 June 2024	Permitted Dividend Record Date
14 June 2024	Second court hearing
17 June 2024	Last date of trading for McGrath shares
19 June 2024	Permitted Dividend Payment Date
20 June 2024	Scheme Record Date
27 June 2024	Scheme Implementation Date

Commissioner of Taxation
7 August 2024

Status: **not legally binding**

Appendix 1 – 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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Dividend and frankable distribution

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

95. The Permitted Dividend is a dividend under subsection 6(1) as it was a distribution of money made by McGrath to its shareholders and was debited against its profits reserve account which is not a 'share capital account' (as defined under section 975-300).

96. 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.

97. The Permitted Dividend is a frankable distribution under section 202-40 as none of the circumstances in section 202-45 apply.

Assessability of the Permitted Dividend

Resident shareholders

98. The assessable income of resident shareholders in a company includes dividends paid to them by the company out of profits derived by it from any source (subparagraph 44(1)(a)(i)).

99. As the Permitted Dividend was paid by McGrath to its resident shareholders out of profits derived by it, the resident shareholders are required to include the Permitted Dividend in their assessable income.

Non-resident shareholders

Permitted Dividend attributable to a permanent establishment in Australia

100. The assessable income of non-resident shareholders in a company includes dividends paid to them by the company out of profits derived from sources in Australia (subparagraph 44(1)(b)(i)).

101. To the extent that the dividends are paid out of profits derived from sources outside Australia, subparagraph 44(1)(c)(i) includes dividends in the assessable income of a non-resident shareholder that is carrying on business in Australia at or through a permanent establishment where the dividends are attributable to the permanent establishment.

102. Subsection 128B(1) imposes withholding tax on income which consists of a dividend paid by a resident company to a non-resident on or after 1 January 1968.

103. Subsection 128B(3E) states that section 128B does not apply to dividend income that is:

- paid to a person who is a non-resident carrying on business in Australia at or through a permanent establishment of the person in Australia
- attributable to the permanent establishment, and
- not paid to the person in the person's capacity as trustee.

104. Accordingly, if you are a non-resident McGrath shareholder carrying on a business in Australia at or through a permanent establishment who received the Permitted Dividend (otherwise than in your capacity as trustee), you include the dividend in your assessable income to the extent to which the dividend was attributable to the permanent establishment (subparagraphs 44(1)(b)(i) and (c)(i)) and you will not be liable to pay withholding tax in respect of the dividend (subsection 128B(3E)).

Permitted Dividend not attributable to a permanent establishment in Australia

105. Where the Permitted Dividend is not attributable to a permanent establishment in Australia, subparagraph 44(1)(b)(i) includes the dividend in a non-resident shareholder's

assessable income to the extent that the dividend is paid by the company out of profits derived from sources in Australia.

106. However, subsection 44(1) does not apply to a dividend to the extent that it is included in, or excluded from, the shareholder's assessable income by another provision of the ITAA 1936 or the ITAA 1997 that expressly deals with dividends.

107. Where a dividend would have been subject to withholding tax but for paragraph 128B(3)(ga), section 128D operates to treat the dividend as non-assessable non-exempt income. Subparagraph 128B(3)(ga)(i) excludes from subsection 128B(1) income derived by a non-resident that consists of the franked part of a dividend.

108. As the Permitted Dividend was fully franked, it will not be subject to withholding tax, and because paragraph 128B(3)(ga) applies, the Permitted Dividend will be treated as non-assessable non-exempt income.

109. Accordingly, a non-resident McGrath shareholder, who received the fully franked Permitted Dividend that is not attributable to a permanent establishment in Australia, is not required to include the dividend as assessable income (subsection 44(1) and section 128D) and is not liable to pay withholding tax in respect of the dividend (subparagraph 128B(3)(ga)(i)).

Gross-up and tax offset

110. Where a shareholder receives a franked distribution 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 (sections 207-20, 207-70 and 207-145). The shareholder will also be entitled to a tax offset equal to the amount of the franking credit on the distribution (subsection 207-20(2)).

Refundable tax offset

111. Your entitlement to the franking credit tax offset under Division 207 in relation to the Permitted Dividend is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25.

112. Relevantly, under section 67-25, the following entities are excluded from the operation of the refundable tax offset rules:

- trustees of non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A))
- trustees of a trust who are liable to be assessed under sections 98 or 99A (subsection 67-25(1B))
- corporate tax entities, unless you are an exempt institution that is eligible for a refund, or a life insurance company that has received the Permitted Dividend on McGrath shares that were not held by you on behalf of your shareholders (subsections 67-25(1C) and (1D)), and
- non-resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

113. Where a tax offset that is subject to the refundable tax offset rules in Division 67 exceeds your income tax liability, you are entitled to a refund of the difference (table item 40 in subsection 63-10(1)). Division 63 sets out the rules on how, and in what order, tax offsets are applied against your income tax liability.

Status: **not legally binding**

Qualified person, related payment rule and holding period rule

Qualified person

114. 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 the dividend (paragraph 207-145(1)(a)).

115. The test of what constitutes a qualified person is set out in former subsection 160APHO(1). Broadly, you will be a qualified person in relation to a dividend if:

- where you were not under an obligation to make a related payment in relation to the dividend – you satisfy the holding period rule in relation to the primary qualification period, or
- where you were under an obligation to make a related payment in relation to the dividend – you satisfy the holding period rule in relation to the secondary qualification period.

116. A partner in a partnership or a 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 (former section 160APHU).

Related payment rule

117. In order to determine the relevant qualification period, it is necessary to determine whether, under the Scheme of Arrangement, you or an associate of you have made, were under an obligation to make, or are likely to make, a related payment in respect of the Permitted Dividend (former subsection 160APHN(2)).

118. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA are set out in former section 160APHN. Broadly, a related payment is where a scheme shareholder has done, or is obliged to do, anything which has the effect of passing the benefit of the dividend to one or more other persons.

119. Under the terms of the Scheme Implementation Deed, the Scheme Consideration was not reduced by the amount of the Permitted Dividend which McGrath paid to its shareholders. The Scheme of Arrangement does not exhibit any other features which would otherwise constitute a related payment pursuant to the former subsection 160APHN.

120. Therefore, you (or a partner in a partnership or a beneficiary of a trust that has an interest in McGrath shares) are not taken to have made a related payment in respect of the Permitted Dividend.

121. The relevant qualification period is thus the primary qualification period (former paragraph 160APHO(1)(a)).

Primary qualification period

122. The primary qualification period is the period beginning on the day after the day on which a taxpayer acquired the shares and ending 45 days after the day the shares (which are not preference shares) became ex dividend (former section 160APHD).

123. 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 (former subsection 160APHE(1)).

124. In respect of the Permitted Dividend, the last day on which a person who held a McGrath share was entitled to receive the Permitted Dividend was the Permitted Dividend Record Date (12 June 2024). It follows that McGrath shares became ex dividend (for the purposes of former subsection 160APHE(1)) on 13 June 2024.

125. Accordingly, the primary qualification period ends 45 days after 13 June 2024, namely on 28 July 2024.

Holding period rule

126. The holding period rule requires that you hold your McGrath shares, on which the Permitted Dividend was paid, at risk for a continuous period (not counting the day on which you acquired your McGrath shares or the day you disposed of your McGrath shares) of at least 45 days during the relevant qualification period (former paragraph 160APHO(2)(a)).

127. Any days on which you have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM) in respect of your McGrath shares are excluded, but the exclusion is not taken to break the continuity period during which you held your shares (former subsection 160APHO(3)). You are taken to have materially diminished risks of loss or opportunities for gain on a particular day with respect to your McGrath shares if your net position on that day in relation to the shares has less than 30% of those risks and opportunities (former subsection 160APHM(2)).

128. Under the Scheme of Arrangement, you ceased to hold your McGrath shares at risk on the Scheme Record Date of 20 June 2024 because you became committed to disposing your McGrath shares in exchange for the Scheme Consideration on that day (former subsection 160APHO(3)).

129. Therefore, you will be a qualified person in relation to the Permitted Dividend if you held your McGrath shares at risk for at least 45 days continuously (not counting the day on which you acquired your McGrath shares) prior to 20 June 2024. You will need to determine, having regard to your personal circumstances, whether during that period there were any days where you had materially diminished risks of loss or opportunities for gain in respect of your McGrath shares, resulting in the holding period rule not being satisfied.

130. You will not be a qualified person in relation to the Permitted Dividend if you acquired your McGrath shares on or after 6 May 2024 as you would have only held your McGrath shares for less than 45 days (former paragraph 160APHO(2)(a)).

131. As no related payment had been made in respect of the Permitted Dividend, the small shareholder exception in former subsection 160APHT(1) may apply. If you are an individual and you received no more than $5,000 in franking credits from dividends on shares that you own directly, or indirectly via a partnership or trust, during the income year then you are qualified person in relation to the Permitted Dividend.

Exempting entity and former exempting entity

132. You are not entitled to a tax offset in respect of the franking credit on a dividend if the dividend was a distribution by an exempting entity (section 208-195).

133. You are not entitled to a tax offset in respect of the exempting credit on a dividend if the dividend was a distribution by an former exempting entity (section 208-225).

134. On the Permitted Dividend Payment Date, McGrath was not an exempting entity as it was not effectively owned by prescribed persons (section 208-20), nor was McGrath a former exempting entity on that date as McGrath had never been an exempting entity before that date (sections 208-10 and 208-50).

135. Accordingly, sections 208-195 and 208-225 will not apply.

Anti-avoidance and integrity provisions

Section 177EA

136. Section 177EA is a general anti-avoidance provision that applies if one of the purposes (other than an incidental purpose) of a particular scheme is to enable a taxpayer to obtain an imputation benefit (paragraph 177EA(3)(e)).

137. It is considered that the conditions for applying section 177EA are not satisfied in relation to McGrath's payment of the Permitted Dividend. In particular, having regard to the relevant circumstances of the scheme (as prescribed by subsection 177EA(17)), it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling McGrath shareholders to obtain an imputation benefit.

138. Therefore, we will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits received by McGrath shareholders in relation to the Permitted Dividend.

Section 204-30

139. Section 204-30 applies where a corporate tax entity streams the payment of dividends to its members in such a way that members to whom distributions are streamed derive a greater benefit from franking credits than another member entity (subsection 204-30(1)). The term 'derive a greater benefit from franking credits' is defined in subsection 204-30(8) by reference to the ability of the members to fully use imputation benefits.

140. You received an imputation benefit when the Permitted Dividend was paid to you. The Permitted Dividend was paid equally to all McGrath shareholders and was fully franked regardless of the tax profiles of McGrath's shareholders. Accordingly, it cannot be said that McGrath streamed the payment of franked dividends to certain members.

141. As the conditions in subsection 204-30(1) are not met, we will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit you received in relation to the Permitted Dividend.

Capital gains tax consequences

CGT event A1

142. CGT event A1 happens if there is a change in the ownership of a CGT asset (section 104-10). The event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

Status: **not legally binding**

143. RPAA Holding's acquisition of your McGrath shares was under a court-approved scheme of arrangement which does not involve a disposal of shares under a contract (Taxation Determination TD 2002/4 *Income tax: capital gains: what is the first element of the cost base and reduced cost base of a share in a company you acquire in exchange for a share in another company in a takeover or merger?*).

144. Therefore, CGT event A1 happened when there was a transfer of ownership of your McGrath shares to RPAA Holdings under the Scheme Implementation Deed. The change of ownership occurred on the Scheme Implementation Date (paragraph 104-10(3)(b)).

145. You made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of your McGrath share exceeded its cost base (subsection 104-10(4)). You made a capital loss if the capital proceeds is less than its reduced cost base (subsection 104-10(4)).

Capital proceeds

146. The capital proceeds you received from a CGT event is the money and the market value of any property you received or which were entitled to be received (worked out at the time of the event happening) in respect of the event happening (subsection 116-20(1)).

147. The term 'in respect of the event happening' in subsection 116-20(1) requires the relationship between the event and the receipt of the money, or the entitlement to receive the money, to be more than coincidental. An amount is not capital proceeds received or entitled to be received in respect of a CGT event merely because it is received in association with the CGT event (Taxation Ruling TR 2010/4 *Income tax: capital gains: when a dividend will be included in the capital proceeds from a disposal of shares that happens under a contract or a scheme of arrangement*).

148. The payment of the Permitted Dividend was not conditional on the Scheme of Arrangement becoming effective and did not reduce the Scheme Consideration. The Scheme of Arrangement was not conditional on the declaration and the payment of the Permitted Dividend. The Permitted Dividend was funded by McGrath's existing cash reserves and debited to McGrath's profits reserve account, and was not dependent on RPAA Holdings or a third-party financing or facilitating payment of the dividend, or RPAA Holdings or a third party being obliged to bring about the result that the dividend would be paid to existing shareholders.

149. Therefore, the Permitted Dividend was not received by the McGrath shareholders in respect of the disposal of the McGrath shares under the Scheme of Arrangement. Accordingly, the Permitted Dividend does not form part of the capital proceeds in respect of CGT event A1 happening.

150. Therefore, the capital proceeds that you received from CGT event A1 happening on the disposal of each McGrath share is the Scheme Consideration of $0.60 per McGrath share.

Foreign-resident shareholders

151. If you are a foreign resident, or the trustee of a' foreign trust for CGT purposes' (as defined in subsection 995-1(1)) just before the CGT event happens, you disregard a capital gain or capital loss you make from the CGT event provided the CGT event happens in relation to a CGT asset that is not taxable Australian property (subsection 855-10(1)).

Status: **not legally binding**

152. The term 'taxable Australian property' is defined in section 855-15 to include an indirect Australian real property interest (table item 2 in section 855-15). A membership interest held by an entity in another entity at a time is an indirect Australian real property interest at the time if the interest passes the non-portfolio interest test and the principal asset test (subsection 855-25(1)).

153. As the sum of the market values of McGrath's taxable Australian real property assets did not exceed the sum of the market value of its non-taxable Australian real property assets at the time the CGT event occurred, the principal asset test is not satisfied (section 855-30).

154. As the principal asset test is not passed, your McGrath shares are not indirect Australian real property interests, and therefore not taxable Australian property.

155. However, you cannot disregard a capital gain or capital loss you made when CGT event A1 happened to your McGrath share, if, relevantly, your McGrath share:

- was used at any time in carrying on a business through a permanent establishment in Australia (table item 3 in section 855-15), or
- was covered by subsection 104-165(3) (about individuals choosing to disregard capital gains upon ceasing to be Australian residents) (table item 5 of section 855-15).

156. For completeness, table items 1 and 4 in section 855-15 are not relevant in respect of the Scheme of Arrangement.

Availability of scrip for scrip roll-over if a capital gain is made

157. Scrip for scrip roll-over under Subdivision 124-M enables a shareholder to disregard a capital gain from a share that is disposed of if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost bases and reduced cost bases of the replacement shares.

158. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the Scheme of Arrangement are:

- an entity exchanges shares in a company for shares in another company (paragraph 124-780(1)(a))
- the exchange is in consequence of a single arrangement that satisfies subsections 124-780(2) or (2A)
- conditions for the roll-over in subsection 124-780(3) are satisfied
- further conditions in subsection 124-780(5), if applicable, are satisfied, and
- exceptions for the scrip for scrip roll-over in section 124-795 are not applicable.

159. The Scheme of Arrangement satisfies the requirements for roll-over under Subdivision 124-M.

Appendix 2 – Legislative provisions

160. This paragraph sets out the details of the provisions of the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* ruled upon or referenced in this Ruling.

Table 2: Provisions of the Income Tax Assessment Act 1936 and the Income Tax Assessment Act 1997 ruled upon or referenced in this Ruling

Income Tax Assessment Act 1936	subsection 6(1)
Income Tax Assessment Act 1936	subsection 44(1)
Income Tax Assessment Act 1936	subparagraph 44(1)(a)(i)
Income Tax Assessment Act 1936	paragraph 44(1)(b)
Income Tax Assessment Act 1936	subparagraph 44(1)(b)(i)
Income Tax Assessment Act 1936	paragraph 44(1)(c)
Income Tax Assessment Act 1936	subparagraph 44(1)(c)(i)
Income Tax Assessment Act 1936	section 98
Income Tax Assessment Act 1936	section 99A
Income Tax Assessment Act 1936	section 128B
Income Tax Assessment Act 1936	subsection 128B(1)
Income Tax Assessment Act 1936	paragraph 128B(3)(ga)
Income Tax Assessment Act 1936	subparagraph 128B(3)(ga)(i)
Income Tax Assessment Act 1936	subsection 128B(3E)
Income Tax Assessment Act 1936	section 128D
Income Tax Assessment Act 1936	Division 1A of former Part IIIAA
Income Tax Assessment Act 1936	former section 160APHD
Income Tax Assessment Act 1936	former subsection 160APHE(1)
Income Tax Assessment Act 1936	former section 160APHM
Income Tax Assessment Act 1936	former subsection 160APHM(2)
Income Tax Assessment Act 1936	former section 160APHN
Income Tax Assessment Act 1936	former subsection 160APHN(2)
Income Tax Assessment Act 1936	former subsection 160APHO(1)
Income Tax Assessment Act 1936	former paragraph 160APHO(1)(a)
Income Tax Assessment Act 1936	former paragraph 160APHO(2)(a)
Income Tax Assessment Act 1936	former subsection 160APHO(3)
Income Tax Assessment Act 1936	former subsection 160APHT(1)
Income Tax Assessment Act 1936	former section 160APHU
Income Tax Assessment Act 1936	former subsection 160APHU(1)
Income Tax Assessment Act 1936	section 177EA
Income Tax Assessment Act 1936	paragraph 177EA(3)(e)
Income Tax Assessment Act 1936	paragraph 177EA(5)(b)
Income Tax Assessment Act 1936	subsection 177EA(17)
Income Tax Assessment Act 1997	Division 63
Income Tax Assessment Act 1997	section 63-10
Income Tax Assessment Act 1997	subsection 63-10(1)
Income Tax Assessment Act 1997	Division 67
Income Tax Assessment Act 1997	section 67-25
Income Tax Assessment Act 1997	subsection 67-25(1A)
Income Tax Assessment Act 1997	subsection 67-25(1B)

Status: **not legally binding**

Income Tax Assessment Act 1997	subsection 67-25(1C)
Income Tax Assessment Act 1997	subsection 67-25(1D)
Income Tax Assessment Act 1997	subsection 67-25(1DA)
Income Tax Assessment Act 1997	section 102-5
Income Tax Assessment Act 1997	section 102-10
Income Tax Assessment Act 1997	section 104-10
Income Tax Assessment Act 1997	subsection 104-10(3)
Income Tax Assessment Act 1997	paragraph 104-10(3)(b)
Income Tax Assessment Act 1997	subsection 104-10(4)
Income Tax Assessment Act 1997	subsection 104-165(3)
Income Tax Assessment Act 1997	section 109-10
Income Tax Assessment Act 1997	subsection 110-25(2)
Income Tax Assessment Act 1997	paragraph 110-25(2)(b)
Income Tax Assessment Act 1997	subsection 110-55(2)
Income Tax Assessment Act 1997	Subdivision 115-A
Income Tax Assessment Act 1997	section 115-10
Income Tax Assessment Act 1997	section 115-25
Income Tax Assessment Act 1997	subsection 115-25(1)
Income Tax Assessment Act 1997	subsection 115-30(1)
Income Tax Assessment Act 1997	Subdivision 115-C
Income Tax Assessment Act 1997	subsection 116-20(1)
Income Tax Assessment Act 1997	Subdivision 124-M
Income Tax Assessment Act 1997	section 124-780
Income Tax Assessment Act 1997	paragraph 124-780(1)(a)
Income Tax Assessment Act 1997	subsection 124-780(2)
Income Tax Assessment Act 1997	subsection 124-780(2A)
Income Tax Assessment Act 1997	subsection 124-780(3)
Income Tax Assessment Act 1997	subsection 124-780(5)
Income Tax Assessment Act 1997	section 124-783
Income Tax Assessment Act 1997	section 124-785
Income Tax Assessment Act 1997	subsection 124-785(1)
Income Tax Assessment Act 1997	subsection 124-785(2)
Income Tax Assessment Act 1997	subsection 124-785(3)
Income Tax Assessment Act 1997	subsection 124-785(4)
Income Tax Assessment Act 1997	section 124-790
Income Tax Assessment Act 1997	subsection 124-790(1)
Income Tax Assessment Act 1997	section 124-795
Income Tax Assessment Act 1997	subsection 124-795(1)
Income Tax Assessment Act 1997	paragraph 124-795(2)(a)
Income Tax Assessment Act 1997	subsection 124-795(4)
Income Tax Assessment Act 1997	section 124-810
Income Tax Assessment Act 1997	section 170-260
Income Tax Assessment Act 1997	section 202-40
Income Tax Assessment Act 1997	section 202-45
Income Tax Assessment Act 1997	section 204-30
Income Tax Assessment Act 1997	subsection 204-30(1)
Income Tax Assessment Act 1997	paragraph 204-30(3)(c)
Income Tax Assessment Act 1997	subsection 204-30(8)

Status: **not legally binding**

Income Tax Assessment Act 1997	Division 207
Income Tax Assessment Act 1997	section 207-20
Income Tax Assessment Act 1997	subsection 207-20(2)
Income Tax Assessment Act 1997	subsection 207-35(1)
Income Tax Assessment Act 1997	section 207-45
Income Tax Assessment Act 1997	section 207-70
Income Tax Assessment Act 1997	section 207-75
Income Tax Assessment Act 1997	subsection 207-75(2)
Income Tax Assessment Act 1997	section 207-145
Income Tax Assessment Act 1997	paragraph 207-145(1)(a)
Income Tax Assessment Act 1997	paragraph 207-145(1)(d)
Income Tax Assessment Act 1997	paragraph 207-145(1)(da)
Income Tax Assessment Act 1997	paragraph 207-145(1)(db)
Income Tax Assessment Act 1997	paragraph 207-145(1)(e)
Income Tax Assessment Act 1997	paragraph 207-145(1)(f)
Income Tax Assessment Act 1997	section 207-159
Income Tax Assessment Act 1997	section 208-10
Income Tax Assessment Act 1997	section 208-20
Income Tax Assessment Act 1997	section 208-40
Income Tax Assessment Act 1997	section 208-50
Income Tax Assessment Act 1997	section 208-195
Income Tax Assessment Act 1997	section 208-225
Income Tax Assessment Act 1997	Division 230
Income Tax Assessment Act 1997	section 832-120
Income Tax Assessment Act 1997	Subdivision 842-I
Income Tax Assessment Act 1997	subsection 855-10(1)
Income Tax Assessment Act 1997	section 855-15
Income Tax Assessment Act 1997	subsection 855-25(1)
Income Tax Assessment Act 1997	section 855-30
Income Tax Assessment Act 1997	section 960-115
Income Tax Assessment Act 1997	section 975-300
Income Tax Assessment Act 1997	section 977-50
Income Tax Assessment Act 1997	subsection 995-1(1)

Status: **not legally binding**

References

Related Rulings/Determinations:

TD 2002/4; TR 2010/4

Legislative references:

- Corporations Act 2001 Pt 5.1
- Corporations Act 2001 411(4)(b)

ATO references

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