



# ***CR 2005/114 - Income tax: Permanent Investment Management Ltd as Trustee for DCA Funding Trust - Hybrid Equity-Linked Trust-issued High-Yield Securities***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 November 2005*



## Class Ruling

### Income tax: Permanent Investment Management Ltd as Trustee for DCA Funding Trust – Hybrid Equity-Linked Trust-issued High-Yield Securities

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#### **Preamble**

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

## What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

#### **Tax law(s)**

2. The tax laws dealt with in this Ruling are:

- Division 1A of Part IIIAA of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 177EA of the ITAA 1936;
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 202-5 of the ITAA 1997;
- section 202-40 of the ITAA 1997;
- section 202-45 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- Subdivision 207-B of the ITAA 1997;
- Subdivision 207-F of the ITAA 1997;
- section 960-130 of the ITAA 1997;
- section 960-135 of the ITAA 1997; and
- Division 974 of the ITAA 1997.

## Class of persons

3. The class of persons to which this Ruling applies is the Australian resident investors (referred to as 'Holders') who were allocated trust units called Hybrid Equity-Linked Trust-issued High-Yield Securities (HEALTHYS) by Permanent Investment Management Limited (PIML), the Responsible Entity (RE) of the DCA Funding Trust (the Trust).

4. The class of persons to which this Ruling applies does not include investors in HEALTHYS who acquired them otherwise than by subscription. The Ruling does not deal with how the taxation law applies to PIML or DCA Group Limited (DCA) in relation to the issue of HEALTHYS.

## Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

6. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 11 to 35.

7. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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9. This Ruling applies from 1 November 2005. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by *Gazette*;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

## Withdrawal

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10. This Ruling is withdrawn and ceases to have effect after 30 June 2011. However, the Ruling continues to apply after its withdrawal in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement during the term of the Ruling, subject to there being no change in the arrangement or in the person's involvement in the arrangement.

## Arrangement

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11. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- an application for Private Ruling dated 29 July 2005 and attachments;
- the application for the Class Ruling dated 6 September 2005 and attachments;
- correspondence from Greenwood and Freehills Pty Limited dated 16 August 2005 and attachments;
- correspondence from Greenwood and Freehills Pty Limited dated 1 September 2005 and attachments;
- correspondence from Greenwood and Freehills Pty Limited dated 7 September 2005;
- correspondence from Greenwoods and Freehills Pty Limited dated 1 December 2005;

- Loan Note Deed between DCA Agedcare Management Pty Ltd (DCAAM) and DCA and PIML dated 16 September 2005;
- Trust Deed for the DCA Funding Trust between PIML and DCA dated 31 August 2005;
- HEALTHYS Product Disclosure Statement issued by PIML dated 19 September 2005; and
- Guarantee Deed Poll by DCA dated 16 September 2005.

**Note:** certain information which relates to the affairs of PIML, DCAAM or DCA that is not in the public domain has been taken into account in determining the Commissioner's opinion set out in this Ruling (including the application of certain anti-avoidance provisions). This information has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

12. The Trust was registered as a managed investment scheme on 13 September 2005, and the HEALTHYS were issued pursuant to a Product Disclosure Statement dated 19 September 2005 (the PDS).

13. HEALTHYS were allotted on 1 November 2005. PIML issued 2,000,000 HEALTHYS units and raised A\$200 million from the issue. Fifty five percent (55%) of HEALTHYS units were issued to Australian resident retail unit holders, with the remainder of the units issued to predominantly Australian resident institutional unit holders.

14. Distributions on the HEALTHYS will be funded by payments to the Trust in respect of Loan Notes (Notes) issued to it by the New Zealand Branch (NZ Branch) of DCAAM, an Australian resident company that is a 100% subsidiary and member of the DCA consolidated group.

15. HEALTHYS are listed on the Australian Stock Exchange.

16. DCA advised that the offer of HEALTHYS has the sole purpose of providing funding to DCA for the acquisition of one of New Zealand's residential aged care businesses and to retire a component of DCA's senior debt facilities.

17. DCA's planned funding package for the acquisition was in two steps, and as follows:

Firstly, DCA entered into a short term bridging facility of A\$180 million which was on-lent to the NZ Branch of DCAAM. This loan together with a further NZ \$100 million comprising other loans and equity was used to acquire the New Zealand residential aged care business.

Secondly, within 6 months of the acquisition of the New Zealand residential aged care business, DCA sought to refinance this acquisition finance. The A\$200 million via the HEALTHYS issue which was on-lent to the NZ Branch of DCAAM through the issue of Notes, and then applied by DCAAM to repay DCA, which will in turn enable DCA to repay the short-term bridging facility.

18. The HEALTHYS were issued at an Issue Price of \$100 each, subject to a minimum application requirement of 50 HEALTHYS (or \$5,000).

19. HEALTHYS entitle the holder to quarterly, non-cumulative distributions at a pre-determined distribution rate. The rate is a floating rate and is calculated at a percentage per annum over the days in each quarter as follows:

$$\text{Distribution Rate} = [(90 \text{ Day Bank Bill Swap Rate} + \text{Margin}) \times (1 - \text{current company tax rate})]$$

The Distribution Entitlement is calculated as follows:

$$(\text{Distribution Rate} \times \text{Face Value} \times \text{Number of days in the Distribution Period}) / 365$$

Distribution payments are payable unless DCA notifies the issuer that a Distribution Payment will not be payable. Where the DCA board makes such a determination, no entitlement or right to receive distributions accrues to the holder of the HEALTHYS.

20. If an amount equal to the Distribution Entitlement is not paid on the HEALTHYS in full within 5 Business Days after the Distribution Payment Date, DCA must not (except with the approval of Holders by Special Resolution):

- (a) declare or pay dividends or make any distribution on any capital over which Preference Shares, if issued, would rank in priority for participation in profits; or
- (b) redeem, reduce buy back, cancel or acquire, any capital securities other than capital ranking with or in priority to Preference Shares (if Preference Shares were on issue) until:  

an amount (if any) equal to the aggregate amount of any unpaid Distribution Entitlements in respect of the preceding 12 months has been paid in full.

21. DCA will provide a subordinated guarantee (Subordinated Guarantee) of amounts which become due and payable to Holders. All claims under the Subordinated Guarantee will represent unsecured and subordinated obligations of DCA, subordinated to all obligations of DCA other than the claims of ordinary shareholders, or in respect of obligations which are expressly stated to rank *pari passu* with, or subordinated to, entitlements to Holders under the Subordinated Guarantee. DCA will not enter into a negative pledge, that is, there will be no limitation on DCA's ability to create additional indebtedness, whether senior or subordinated.

22. The Subordinated Guarantee may be terminated by DCA where:

- (i) the responsible entity of the Trust is changed and such change occurs following a meeting of unitholders which was requisitioned by Holders where the business of the meeting included the consideration of a resolution to approve the change of responsible entity of the Trust, and the holder of the ordinary units (DCA) voted against the appointment of the new responsible entity;
- (ii) the terms of the Trust constitution or HEALTHYS terms are amended and DCA forms the view that the Constitution or HEALTHYS terms as amended are unsatisfactory to it having regard to its position as guarantor;
- (iii) DCA forms the view that the terms applicable to the HEALTHYS following a Reset Date or the number of HEALTHYS remaining on issue following a Reset Date results in its obligations as guarantor being unsatisfactory; or
- (iv) DCA determining on reasonable grounds that a change in law, regulation, Australian Accounting Standard or other accounting standard or principle, interpretation or ruling by any relevant government body or a change in the foregoing by a court of law or other tribunal or accounting standard setting body, has occurred or is announced at any time after the Issue Date and that change is likely to result in either the HEALTHYS or Notes being classified as debt rather than equity in the consolidated accounts of DCA or PIML not being permitted or being unable to frank Distribution Payments at a Franking Rate of 100%.

23. HEALTHYS may be exchanged in particular circumstances, or at particular times for DCA ordinary shares or DCA preference shares. However, a Holder has no right to require an exchange of HEALTHYS in any circumstance and only has a limited right to require redemption of HEALTHYS.

24. The terms applicable to the HEALTHYS or the Notes may be changed on a reset date (in respect of the HEALTHYS) and on a roll-over date (in respect of the Notes).

25. The first reset date is the first day of the distribution period commencing after the 5th anniversary of the Issue Date of the HEALTHYS. The first reset date is 1 January 2011. Prior to a Reset Date, PIML may conduct a Remarketing Process to determine a new Margin, and may propose that certain other terms of the HEALTHYS be varied. The Remarketing Process for the HEALTHYS will be in conjunction with a Reset Process for the Notes. This remarketing (if any) will operate as follows:

- as regards the Notes, the NZ Branch will issue a Reset Process Invitation to the RE, including the proposition (if any) of allowed term amendments (for example, frequency of distributions, time to next Rollover Date);

- as regards the HEALTHYS, the RE will issue a Remarketing Process Invitation to the market (in consultation with DCA, having regard to the Loan Note Remarketing Invitation and with a likely view to aligning the Trust's assets and obligations);
- as regards the HEALTHYS, the RE will collate remarketing responses from the market;
- as regards the Notes, the RE (in consultation with DCA) will respond to the Loan Note Remarketing Process;
- as regards the Notes, the NZ Branch will give notice to the Trust in relation to the outcome of the Note Reset Process, defining:
  - the amount of redemptions (if any);
  - the amount of exchanges (if any); and
  - the new margin on the Note to the next Rollover Date; and
- as regards the HEALTHYS, the RE (in consultation with DCA) will give notice to the market in relation to the outcome of the HEALTHYS Remarketing Process, defining:
  - the amount of redemptions (if any);
  - the amount of exchanges (if any);
  - the amount of resales (if any); and
  - the new margin on the HEALTHYS to the next Remarketing Date.

The Trust may only cause HEALTHYS redemptions or exchanges to the extent that a corresponding number of Notes have been redeemed or exchanged (respectively);

26. Holders may respond to a HEALTHYS Remarketing Process as follows:

- Hold at Step-Up Margin: cease holding the HEALTHYS if the new Margin does not increase to the Step-Up Margin (which is the original Margin plus 2.25%);
- Hold: continue to hold the HEALTHYS at the new Margin; or
- Bid: actively participate in the Remarketing Process and indicate a desired new Margin (which must be less than the Step-Up Margin).

27. Holders who do not respond will be deemed to have given a Hold response.



28. Following receipt of Holder responses, the RE may:

- set a new Margin if there are sufficient active Hold and Bid responses to constitute a Valid Remarketing Process, and Redeem, Exchange or Resell any HEALTHYS held by Non-Rollover Holders. In this instance the new Remarketing Terms will apply;
- set a new Margin equal to the Step-Up Margin;
- not set a new Margin and redeem some or all outstanding HEALTHYS for cash, or Exchange some of all outstanding HEALTHYS for Ordinary Shares in DCA; or
- in managing the HEALTHYS Remarketing Process, the RE has discretion to conduct the process as it sees fit, having regard to the interests of both the ordinary and preferred unit holders. As noted above, DCA as guarantor under the Subordinated Guarantee (the Guarantor) has the right to revoke the Subordinated Guarantee, inter alia, if it forms the view (within five business days after a Reset Date) that the terms applicable to the HEALTHYS following a Reset Date are unsatisfactory. Under the terms of the HEALTHYS, if DCA revokes the Subordinated Guarantee then Holders will have the right to seek the redemption or exchange (at the RE's option) of the Notes. With this possible revocation and redemption/exchange in mind, the RE will consult the Guarantor throughout the HEALTHYS Remarketing Process.

29. Under the terms of the Notes, if Holders seek a redemption/exchange of the HEALTHYS in these circumstances the NZ Branch of DCAAM must either redeem or exchange (in its discretion) the Notes to enable PIML, as responsible entity of the Trust, to redeem or exchange the HEALTHYS.

30. The Notes issued to PIML on 1 November 2005 and it is contemplated that no further Notes will issue in respect of this arrangement.

31. The Notes are unsecured obligations of DCAAM. They are automatically redeemed by DCAAM paying the face value of the Notes to PIML and PIML applying the redemption proceeds to the subscription for Preference Shares in DCA (securities paying non-cumulative dividends) on behalf of the Holders on either of the following events:

- 50 years from the Issue Date; or
- a Winding-Up Event in respect of the Trust.

Upon the Holders being issued with Preference Shares in these circumstances all HEALTHYS on issue will be deemed to have been redeemed on the date of issue of the Preference Shares.

32. In certain circumstances the Notes may be exchanged for DCA ordinary shares or may be redeemed for cash equivalent to the issue price.

33. The issue price of the Notes, payment dates, rollover dates and certain other features are consistent with the terms of the HEALTHYS.

34. DCAAM advised that it intends to continue to fully frank all frankable distributions made by it (via DCA's franking account as head entity of the DCA consolidated group).

35. This Ruling is made on the basis that:

- (i) PIML has not and will not have any positions (within the meaning of section 160APHJ of the ITAA 1936) in relation to the Notes, apart from its holding of the Notes themselves;
- (ii) PIML, or an associate, has not made and will not make any related payments (within the meaning of section 160APHN of the ITAA 1936), in relation to the interest paid on the Notes;
- (iii) PIML will be a qualified person (within the meaning of subsection 995-1(1) of the ITAA 1997) in relation to any interest payments received on the Notes;
- (iv) Holders have not and will not have any positions (within the meaning of section 160APHJ of the ITAA 1936) in relation to the Notes, apart from their holding of the HEALTHYS themselves;
- (v) Holders, or their associates, have not made and will not make any related payments (within the meaning of section 160APHN of the ITAA 1936) in relation to the interest paid on the Notes;
- (vi) upon acquisition, Holders will not dispose of their HEALTHYS for a period of at least ninety days (excluding the days of acquisition and disposal), beginning the day after acquisition;
- (vii) DCA will not debit any of its disqualifying accounts when paying interest pursuant to the Notes;
- (viii) DCA will have a zero balance in its notional disqualifying account when paying interest pursuant to the Notes;
- (ix) all the income of the Trust will be sourced either from the interest payable on the Notes from the NZ Branch, or from an interest bearing account with a financial institution, and the Trust will not derive income from other sources;
- (x) all the net income of the Trust will be distributed to Holders as distributions on the HEALTHYS held by them and to DCA as sole holder of the ordinary unit in the Trust;

- (xi) to the extent that the interest paid on the Notes is a non-share dividend, that interest will be fully franked;
- (xii) immediately before the payment of a non-share dividend DCA will have available frankable profits sufficient to pay the dividend;
- (xiii) the terms and conditions under which the Notes were originally issued will not be altered in any material way during the period to which the ruling applies; and
- (xiv) throughout the period to which this Ruling applies the material supplied to the Commissioner, and taken into account in determining the application of the tax laws discussed in this Ruling, remains an accurate description of all of the activities of PIML, DCA, DCAAM and any other member of the DCA consolidated group, that are a material or relevant consideration in respect of any of those tax laws.

## Ruling

### **Interest paid to the Trust are non-share dividends and may be franked**

36. On the basis of the information provided, and having regard to the assumptions and qualifications set out in this Ruling:

- the Notes issued to the Trust by the NZ Branch are equity interests under Division 974 of the ITAA 1997;
- interest payments on the Notes made by the NZ Branch to the Trust will constitute non-share dividends pursuant to section 974-120 of the ITAA 1997, provided that the Notes continue to be treated as equity interests under section 974-70 of the ITAA 1997 and that the interest payments are not debited to DCA's non-share capital account or DCA's capital account; and
- the non-share dividend is a frankable distribution pursuant to subsection 202-40(2) of the ITAA 1997, provided the Notes continue to have the treatment set out above.

37. Where DCA franks a non-share dividend in accordance with section 202-5 of the ITAA 1997, the non-share dividend will be a franked distribution.

### **Franked distributions flow indirectly to the Holders of HEALTHYS**

38. For the purposes of section 207-50 of the ITAA 1997, any franked distribution made by the NZ Branch to the Trust flows indirectly to the Holders of the HEALTHYS.

39. Where a Holder of the HEALTHYS receives a distribution from the Trust which is included in the Holder's assessable income, the Holder's assessable income also includes the Holder's share of the franking credit on the distribution under subsection 207-35(3) of the ITAA 1997.

#### **Tax offset**

40. A Holder who is an individual, corporate tax entity, or a trustee (specified by paragraphs 207-45(c) or (d) of the ITAA 1997 being certain trustees, and certain superannuation funds, approved deposit funds and pooled superannuation trusts) and has a share of, or an individual interest in, the net income of the Trust is entitled to a tax offset pursuant to section 207-45 of the ITAA 1997 equal to the Holder's share of the franking credit on the distribution.

41. The tax offsets will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997. Certain trustees and corporate tax entities are not entitled to the refundable tax offset rules because of subsections 67-25(1A) to (1D) of the ITAA 1997.

#### **The anti-avoidance provisions**

##### ***Section 204-30 of the ITAA 1997***

42. On the basis of the information provided, and having regard to the assumptions and qualifications set out in this Ruling it is not considered appropriate to make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by Holders.

##### ***Section 177EA of the ITAA 1936***

43. On the basis of the information provided, and having regard to the assumptions and qualifications set out in this Ruling it is not considered appropriate to make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received by Holders.

## **Explanation**

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#### **Interest paid to the Trust may be franked**

44. On the basis of the information provided, and having regard to the assumptions and qualifications set out in this Ruling, the Notes issued to the Trust by the NZ Branch satisfy the basic test for an equity interest contained in subsection 974-75(1) of the ITAA 1997, and are not characterised as a debt interest. Accordingly, the Notes will be non-share equity interests pursuant to the definition of that term in section 995-1 of the ITAA 1997.

45. While the Notes continue to be equity interests under section 974-70 of the ITAA 1997, a payment of interest on the Notes by the NZ Branch to the Trust will be a non-share distribution under section 974-115 of the ITAA 1997. Provided that the interest is not debited to DCA's non-share capital account or DCA's capital account, the payment of interest will constitute a non-share dividend pursuant to section 974-120 of the ITAA 1997.

46. Subsection 202-40(2) of the ITAA 1997 provides that a non-share dividend is a frankable distribution to the extent that it is not made unfrankable under section 202-45 of the ITAA 1997.

47. None of paragraphs 202-45(a) to 202-45(j) of the ITAA 1997 apply, and accordingly the non-share dividend is a frankable distribution.

48. Where DCA franks a non-share dividend to the Trust under section 202-5 of the ITAA 1997, the non-share dividend is a franked distribution.

## **A franked distribution flows to the Holders of HELTHYS**

49. In general terms, a franked distribution will flow indirectly to a beneficiary of a trust where:

- (i) the distribution is made to, or flows indirectly to, the trustee;
- (ii) the beneficiary has a share or individual interest in the net income of the trust; and
- (iii) the beneficiary's share of the distribution is a positive amount.

Consequently, a franked distribution made to the Trust is treated as flowing indirectly to the Holders pursuant to subsection 207-50(3) of the ITAA 1997.

50. Pursuant to section 6-5 of the ITAA 1997, interest on the Notes paid by the NZ Branch to the Trust is included in the assessable income of PIML, as trustee, for the purposes of computing the net income of the Trust under subsection 95(1) of the ITAA 1936.

51. Pursuant to subsection 207-35(1) of the ITAA 1997, an amount equal to the amount of the franking credit on the interest payment is included in the assessable income of PIML, as trustee, for the purposes of computing the net income of the Trust under subsection 95(1) of the ITAA 1936 (the gross-up).

52. Where the Holder of the HELTHYS is an individual, company, the trustee of a complying superannuation fund, approved deposit fund or pooled superannuation trust and is assessable in respect of a share of the net income of the Trust, the Holder is entitled to a tax offset equal to the Holder's share of the franking credit on the interest payment pursuant to section 207-45 of the ITAA 1997.

**Refundable tax offset**

53. The franking credit on the distribution will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, provided the Holders are not excluded by subsections 67-25(1A) to (1D) of the ITAA 1997. Those exclusions apply to certain trustees (of non-complying superannuation funds or non-complying approved deposit funds, and trustees liable to be assessed under sections 98, 99 or 99A of the ITAA 1936) and corporate tax entities (not including exempt institutions eligible for a refund or life insurance companies in some circumstances).

**Gross-up and tax offset denied in certain circumstances**

54. Pursuant to Subdivision 207-F of the ITAA 1997 the gross-up and tax offset are denied in the circumstances set out in section 207-145 of the ITAA 1997 and section 207-150 of the ITAA 1997. These circumstances include the following:

- the Holder is not a qualified person in relation to the interest paid on the Notes for the purposes of Division 1A of Part IIIAA of the ITAA 1936 ('the holding period rules');
- the Commissioner has made a determination under subsection 204-30(3) of the ITAA 1997 that no imputation benefit is to arise for the receiving entity in respect of the distribution; and
- the Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in respect of the distribution.

**Qualified person**

55. The recipient of a franked distribution that is a non-share dividend must be a qualified person in relation to that non-share dividend. 'Qualified person' is defined in subsection 995-1(1) of the ITAA 1997 by reference to the holding period rules as in force on 30 June 2002. By virtue of section 160AOA of the ITAA 1936, the holding period rules apply to non-share equity interests, equity holders and non-share dividends in the same way as they apply to shares, shareholders and dividends respectively.

56. A beneficiary of a trust can be a qualified person in relation to a dividend (or non-share dividend) only if the trustee of the trust is also a qualified person. On the basis of the information provided, and having regard to the assumptions and qualifications set out in this Ruling, PIML is a qualified person in relation to the non-share dividends paid on the Notes.

57. On the basis of the information provided, and having regard to the assumptions and qualifications set out in this Ruling, the Holders have held their HEALTHYS at risk for a period of at least 90 days and are qualified persons in relation to the non-share dividend paid on the Notes.

58. The application of section 204-30 of the ITAA 1997 and section 177EA of the ITAA 1936 is discussed at paragraphs 59 to 71.

## **The anti-avoidance provisions**

### ***Section 204-30 of the ITAA 1997***

59. Section 204-30 of the ITAA 1997 applies where an entity streams one or more distributions in such a way that the imputation benefits attaching to the distribution are received by members of the entity who derive a greater benefit from them and other members receive lesser imputation benefits, or no imputation benefits. Holders are members of the Trust pursuant to Item 3 of the table in subsection 960-130(1) of the ITAA 1997.

60. If section 204-30 of the ITAA 1997 applies, then the Commissioner may make a determination pursuant to paragraph 204-30(3)(c) of the ITAA 1997, that no imputation benefit is to arise in respect of the distribution to those members who derive a greater benefit.

61. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from imputation benefits than other members. The words 'derives a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8) of the ITAA 1997 by reference to the ability of the members to fully utilise imputation benefits.

62. Having regard to the information provided by DCA, it cannot be said that there exists, in relation to the members of the Trust, a group of members that have a greater ability to use the franking credits than other members within the meaning of the words in subsection 204-30(8) of the ITAA 1997. There are no identifiable characteristics attaching to the membership of the Trust that indicates that part of that membership would presently benefit more or less from franking credits. Any franking credits included in the assessable income of the Trust currently flow to a single class of membership interest, proportional to the number of interests held by each member. This class is composed almost solely of resident investors.

63. Accordingly, section 204-30 of the ITAA 1997 currently has no application.

**Section 177EA of the ITAA 1936**

64. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes seeking to obtain a tax advantage in relation to imputation benefits. Subsection 177EA(3) provides that section 177EA of the ITAA 1936 applies if:

- there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity (paragraph 177EA(3)(a));
- a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests (subparagraph 177EA(3)(b)(i)); or
- a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be (subparagraph 177EA(3)(b)(ii));
- the distribution was, or is expected to be, a franked distribution (paragraph 177EA(3)(c));
- except for section 177EA, a person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution (paragraph 177EA(3)(d)); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit (paragraph 177EA(3)(e)).

65. Under subsection 177EA(14) of the ITAA 1936 a scheme for a disposition of membership interests is defined widely and includes the issuing of a membership interest or creating an interest in membership interests.

66. It is noted that paragraph 177EA(3)(a) of the ITAA 1936 refers to a disposition of membership interests in a corporate tax entity. Pursuant to section 960-115 of the ITAA 1997, a corporate tax entity is a company, a corporate limited partnership, a corporate unit trust or a public trading trust. Subsection 177EA(12) of the ITAA 1936 provides that section 177EA of the ITAA 1936 applies to non-share equity interests, equity holders and non-share dividends in the same way as it applies to membership interests, members and distributions. The Notes issued by the NZ branch will constitute a non-share equity interest, and therefore membership interest, in a company. Therefore, the issue of the Notes would represent a disposition of a membership interest.



67. Under subsection 177EA(13), a person has an interest in membership interests if:

- the person has any legal or equitable interest in the membership interests (paragraph 177EA(13)(a)); or
- the person is a beneficiary of a trust (including a potential beneficiary of a discretionary trust) and:
  - (i) the membership interests form, or will form, part of the trust estate (subparagraph 177EA(13)(c)(i)); or
  - (ii) the trust derives, or will derive, income indirectly through interposed companies, trusts or partnerships, from distributions made on the membership interests (subparagraph 177EA(13)(c)(ii)).

68. As the Trust will hold the Notes, the issue of the HEALTHYS to beneficiaries means that the Holders have an interest in membership interests.

69. In the present case the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of PIML, the Holders of HEALTHYS, DCA or any other relevant party, there is a purpose more than merely an incidental purpose of conferring an imputation benefit under the scheme. Under this arrangement the relevant taxpayer is the HEALTHYS Holder and the DCA consolidated group and the scheme comprises the circumstances surrounding the issue of the HEALTHYS.

70. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances some may not be present at any one time in any one scheme.

71. On the basis of the information provided, and having regard to the assumptions and qualifications set out in this Ruling, it would not currently be reasonable to conclude that in entering into the scheme, DCA, PIML and/or the Holders of HEALTHYS demonstrate the objective purpose of securing imputation benefits for either the Trust estate, the HEALTHYS Holders or DCA. To the extent that any imputation benefits are secured, those benefits are considered to be incidental to the more significant objective purposes of providing funding to DCA for the acquisition of one of New Zealand's residential aged care businesses and to retire a component of DCA's senior debt facilities using the most cost effective form of balance sheet equity, and thereby enhancing efficiency and maximising shareholder value.

## Detailed contents list

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**Commissioner of Taxation**

21 December 2005

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*Related Rulings/Determinations:*CR 2001/1; TR 92/1; TR 92/20;  
TR 97/16*Subject references:*

- dividend streaming arrangements

*Legislative references:*

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