

CR 2006/128 - Income tax: Becton Property Group Restructure: Becton Property Group Limited Share and Becton Property Trust Unit Stapling Arrangement

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Class Ruling

Income tax: Becton Property Group Restructure: Becton Property Group Limited Share and Becton Property Trust Unit Stapling Arrangement

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

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

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

What this Ruling is about

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

2. It should be noted that this Ruling is limited to those questions set out in the Ruling section. There may be other taxation issues relating to the overall arrangement. However, the Commissioner has not been asked to form a view, and has not formed a view, on any such issues.

Relevant provision(s)

3. The relevant provisions dealt with in this Class Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - subsection 44(1) of the ITAA 1936;
 - section 45A of the ITAA 1936;
 - section 45B of the ITAA 1936;

- section 45C of the ITAA 1936;
- section 46M of the ITAA 1936;
- subsection 92(1) of the ITAA 1936;
- subsection 92(2) of the ITAA 1936;
- subsection 95(1) of the ITAA 1936;
- subsection 97(1) of the ITAA 1936;
- subsection 98A(1) of the ITAA 1936;
- subsection 100(1) of the ITAA 1936;
- section 160APHO of the ITAA 1936;
- section 177EA of the ITAA 1936;
- subsection 67-25(1A) of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 104 of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- section 104-135 of the ITAA 1997;
- section 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- subsection 112-25(4) of the ITAA 1997;
- section 202-5 of the ITAA 1997;
- section 202-40 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 207-45 of the ITAA 1997;
- section 207-55 of the ITAA 1997;
- section 207-57 of the ITAA 1997; and
- section 207-145 of the ITAA 1997.

Class of entities

4. The class of entities to which this Ruling applies are those shareholders in Becton Property Group Limited (BPGL) who:

- participate in the scheme that is the subject of this Ruling;
- are Australian residents within the meaning of subsection 6(1) of the ITAA 1936; and

- hold their shares in BPGL as capital assets (and not as trading stock or revenue assets) for income tax purposes.

Qualifications

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

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 14 to 21 of this Ruling.

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

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

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Date of effect

9. This Ruling applies to the income year (as defined in subsection 995-1(1) of the ITAA 1997) ended 30 June 2007 for those persons who are shareholders of BPGL (as defined in paragraph 4 of this Ruling). 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

13. This Ruling is withdrawn and ceases to have effect after the year of income ended 30 June 2007. However, the Ruling continues to apply after its withdrawal in respect of the tax laws ruled upon, to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entity's involvement in the scheme.

Scheme

14. The scheme that is the subject of this Ruling is described below. The 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 the description of the scheme are:

- the application for a Class Ruling from PricewaterhouseCoopers dated 25 September 2006;
- additional information supplied at meetings held on 28 August 2006 and 12 October 2006; and
- emails (including attachments) received between 18 August 2006 and 5 December 2006.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

15. BPGL is an Australian listed public company.

16. The BPGL group operates three core businesses:

- property development and construction;
- property funds management; and
- ownership and management of retirement villages.

17. On 12 September 2006, BPGL announced a restructure of the BPGL group to establish a stapled security comprising a share in BPGL and a unit in Becton Property Trust (BPT) (Becton Property Group Security) and an initial public offering (IPO) of the stapled securities. The IPO is considered in Class Ruling 2006/127.

18. Under the restructure, a new unit trust (BPT) was created by BPGL with BPGL owning 100% of the units in BPT. BPGL also undertook a share consolidation such that for every 4 shares BPGL shareholders held they now hold one share.

19. The scheme involved the following steps:

- On the 'stapling strategy record date' BPGL paid to its shareholders 141.36 cents in respect of each share owned. The distribution consisted of a fully franked dividend of 25.764 cents per share and a distribution from the share capital account (return of capital) of 115.6 cents per share.
- On the implementation date, BPGL distributed all the units in BPT. BPGL applied on behalf of its shareholders 19.709 cents of the dividend and the entire capital return (115.6 cents) as consideration for the distribution of the units in BPT. The balance of the dividend (6.055 cents) was paid directly to BPGL shareholders no later than 30 November 2006.
- The shares in BPGL and the units in BPT distributed to BPGL shareholders were then stapled on a one for one basis, to form a Becton Property Group security. The Becton Property Group security was then offered to the public.
- Trading of the new stapled security commenced on the ASX on 21 November 2006.

20. The total amount of the capital returned was debited to the untainted share capital account of BPGL.

21. BPGL non-resident shareholders hold less than 1% of the total shareholding and none of the major shareholders have any non-resident beneficiaries.

Ruling

Assessability of Dividend and Tax Offset

The Dividend

22. The Dividend of 25.764 cents per ordinary share constitutes a dividend for the purposes of subsection 6(1) of the ITAA 1936.

23. The Dividend is a frankable distribution pursuant to section 202-40 of the ITAA 1997, and is therefore capable of being franked in accordance with section 202-5 of the ITAA 1997.

24. The Dividend paid by BPGL of 25.764 cents per share to its shareholders will not be deemed unfrankable by virtue of section 46M of the ITAA 1936.

Direct distributions

25. The Dividend and an amount equal to the franking credit on the Dividend (gross-up) is included in the assessable income of resident individual, superannuation fund and company shareholders under subsection 44(1) of ITAA 1936 and subsection 207-20(1) of the ITAA 1997. These shareholders will be entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the Dividend (tax offset), subject to being a 'qualified person': see paragraph 31 of this Ruling.

Indirect distributions

Partnerships

26. The Dividend and an amount equal to the franking credit on the Dividend (gross-up) is included in the assessable income of a partnership for the purposes of computing the net income of the partnership under Division 5 of Part III of the ITAA 1936.

27. In a case where an individual partner, corporate partner, or a trustee partner specified by paragraph 207-45(c) or (d) of the ITAA 1997 (certain trustees, and certain superannuation funds, approved deposit funds and pooled superannuation trusts) has an individual interest in the partnership's net income that is covered by paragraph 92(1)(a) or (b) of the ITAA 1936 or has an individual interest in a partnership loss of the partnership that is covered by paragraph 92(2)(a) or (b) of the ITAA 1936, and the partner has a share of the Dividend under section 207-55 of the ITAA 1997 that is a positive amount, the partner is entitled to a tax offset equal to the partner's share of the franking credit on the Dividend under section 207-57 of the ITAA 1997.

Trusts

28. The Dividend and an amount equal to the amount of the franking credit on the Dividend (gross-up) is included in the assessable income of a trustee for the purposes of computing the net income of the trust under subsection 95(1) of the ITAA 1936.

29. In a case where an individual beneficiary, corporate beneficiary, or a trustee beneficiary specified by paragraph 207-45(c) or (d) of the ITAA 1997 (certain trustees, and certain superannuation funds, approved deposit funds and pooled superannuation trusts) has a share of the trust's net income that is covered by paragraph 97(1)(a) of the ITAA 1936 or has an individual interest in the trust's net income that is covered by paragraph 98A(1)(a) or (b) or paragraph 100(1)(a) or (b) of the ITAA 1936, and the beneficiary has a share of the Dividend under section 207-55 of the ITAA 1997 that is a positive amount, the beneficiary is entitled to a tax offset equal to the beneficiary's share of the franking credit on the Dividend under section 207-57 of the ITAA 1997.

Refundable tax offset

30. The tax offsets are 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.

Qualified Persons

31. For the purposes of Division 1A of Part IIIAA of the ITAA 1936 participating shareholders will be considered to satisfy the holding period rule under section 160APHO of the ITAA 1936 and therefore be qualified persons (as long as the related payments rule is also met) in relation to the Dividend if:

- (a) the BPGL shares were acquired at least 47 days before the date of the dividend and held for at least 45 continuous days;
- (b) the shareholder has no other positions (for example an option) in relation to the BPGL shares held; and
- (c) the shareholder or an associate of the shareholder has not made, is not under an obligation to make, nor is likely to make, any related payments.

Return of capital

32. The return of capital of 115.6 cents per share is not a dividend as defined in subsection 6(1) of the ITAA 1936.

33. CGT event G1 happened to a BPGL shareholder when the return of capital was paid (section 104-135 of the ITAA 1997).

34. CGT event C2 happened to a BPGL shareholder who received the return of capital who ceased to own their BPGL shares after the Stapling Strategy Record Date but before the Implementation Date (section 104-25 of the ITAA 1997).

Share consolidation

35. No CGT event in Division 104 of the ITAA 1997 happened as a result of the BPGL share consolidation (subsection 112-25(4) of the ITAA 1997).

Transfer of BPT units

36. The first element of the cost base and reduced cost base of each BPT unit acquired under the arrangement is 135.309 cents (sections 110-25 and 110-55 of the ITAA 1997).

37. Each BPT unit was acquired when they were issued to BPGL shareholders (section 109-10 of the ITAA 1997).

Stapling of securities

38. No CGT event in Division 104 of the ITAA 1997 happened as a result of the stapling of each BPT unit to a BPGL share (subsection 112-25(4) of the ITAA 1997).

The anti-avoidance provisions

39. If the arrangement as finally implemented is not materially different from that described above then the Commissioner will not make a determination under section 45A or 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the Return of Capital received by participating shareholders.

40. Having regard to all the relevant circumstances of the arrangement it could not be concluded that a person or one of the persons that entered into or carried out the scheme or any part of the scheme, did so for a purpose other than an incidental purpose of enabling the relevant taxpayer to obtain an imputation benefit. Therefore, if the arrangement as finally implemented is not materially different from that described above the Commissioner will not seek to make a determination pursuant to paragraph 177EA(5)(b) of the ITAA 1936 in respect of the proposed arrangement. Consequently, paragraph 207-145(1)(b) of the ITAA 1997 will not be satisfied and that paragraph cannot provide the basis for denying shareholders a gross-up and tax offset under section 207-20 of the ITAA 1997.

41. If the arrangement as finally implemented is not materially different from that described above then the Commissioner will not seek to make a determination pursuant to subsection 204-30(3) of the ITAA 1997 in respect of the Dividend. Consequently, paragraph 207-145(1)(c) of the ITAA 1997 will not be satisfied, and that subsection cannot provide the basis for denying shareholders a gross-up and tax offset under section 207-20 of the ITAA 1997.

Commissioner of Taxation20 December 2006

Appendix 1 – Explanation

① *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

The Dividend

42. A 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; and
- any amount credited by a company to any of its shareholders as shareholders,

but does not include moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders, where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company.

43. As the Dividend of 25.764 cents per share paid by BPGL to its shareholders was entirely sourced from the company's current year and retained earnings, the distribution does not fall within any of the exclusions to the 'dividend' definition. This distribution is therefore categorised as a dividend for income tax purposes.

44. Pursuant to section 202-40 of the ITAA 1997, a distribution will be a frankable distribution if it is not unfrankable. A distribution will be unfrankable if it comes within any of the circumstances set out in section 202-45 of the ITAA 1997.

45. In the present circumstances, the only part of section 202-45 of the ITAA 1997 that could potentially apply to the arrangement is paragraph 202-45(e) of the ITAA 1997. This paragraph deems an otherwise frankable distribution to be unfrankable where the distribution is debited wholly or partly against a company's disqualifying account, or where the distribution is debited to a non-disqualifying account but results in a debit to the company's notional disqualifying account (section 46M of the ITAA 1936).

46. In the scheme, the whole of the amount of the dividend was paid out of realised profits and was debited solely to the current and accumulated retained earnings account of BPGL. No part of the dividend was debited to any capital account or reserve account. Therefore no part of the dividend was paid from a disqualifying account of BPGL. Further BPGL has no reserves and has not transferred amounts from its reserves to its share capital account or from its share capital to its reserves. As such BPGL does not have a surplus in its notional disqualifying account and therefore payment of the proposed dividend will not cause a debit to arise in that account. Accordingly, section 46M of the ITAA 1936 has no application and paragraph 202-45(e) of the ITAA 1997 will not treat the Dividend as an unfrankable distribution.

47. An entity will be taken to have franked a distribution if the following conditions are satisfied:

- (a) the entity is a franking entity that satisfies the residency requirement when the distribution is made;
- (b) the distribution is a frankable distribution; and
- (c) the entity allocates a franking credit to the distribution.

48. As a public company, BPGL will represent a corporate tax entity as defined in section 960-115 of the ITAA 1997. As an Australian resident, BPGL also satisfies the residency requirements of section 202-20 of the ITAA 1997. Therefore, as the proposed dividend represents a frankable distribution, it was franked in accordance with section 202-5 of the ITAA 1997 as BPGL allocated franking credits to the distribution.

Assessability of the Dividend and Tax Offset

Direct distributions

49. In the case of Australian resident shareholders (other than a partnership or trust) who directly receive the Dividend:

- the Dividend is included in the assessable income of each shareholder under subsection 44(1) of the ITAA 1936; and
- subject to the 'qualified person' rule, an amount equal to the amount of the franking credit on the Dividend is included in the assessable income of each shareholder under subsection 207-20(1) of the ITAA 1997 (gross-up).

50. Subject to the 'qualified person' rule, these shareholders are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the Dividend.

Indirect distributions

51. The franked distribution may flow indirectly to a partner in a partnership or a beneficiary of certain trusts.

52. In general terms, pursuant to subsection 207-50(2) of the ITAA 1997, a franked distribution will flow indirectly to a partner in a partnership where the partner:

- has an individual interest in the partnership's net income that is covered by paragraph 92(1)(a) or (b) of the ITAA 1936, or has an individual interest in a partnership loss of the partnership that is covered by paragraph 92(2)(a) or (b) of the ITAA 1936; and

- has a share of the franked distribution under section 207-55 of the ITAA 1997 that is a positive amount.

53. In general terms, pursuant to subsection 207-50(3) of the ITAA 1997, a franked distribution will flow indirectly to a beneficiary of a trust where the beneficiary:

- as a share of the trust's net income that is covered by
- paragraph 97(1)(a) of the ITAA 1936 or has an individual interest in the trust's net income that is covered by paragraph 98A(1)(a) or (b) or paragraph 100(1)(a) or (b) of the ITAA 1936; and
- has a share of the franked distribution under section 207-55 of the ITAA 1997 that is a positive amount.

54. In the case of partnerships and certain trusts that received the Dividend the following income tax consequences arise.

Partnerships

55. Pursuant to subsection 44(1) of the ITAA 1936, the Dividend is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90 of the ITAA 1936.

56. Subject to the 'qualified person' rule, pursuant to subsection 207-35(1) of the ITAA 1997, an amount equal to the amount of the franking credit on the Dividend is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90 of the ITAA 1936 (gross-up).

57. In the case where an individual partner, corporate partner, or a trustee partner specified by paragraph 207-45(c) or (d) of the ITAA 1997 (that is, trustees liable to be assessed under section 98, 99 or 99A of the ITAA 1936, or certain superannuation funds, approved deposit funds and pooled superannuation trusts) has an individual interest in the partnership's net income that is covered by paragraph 92(1)(a) or (b) of the ITAA 1936 or has an individual interest in a partnership loss of the partnership that is covered by paragraph 92(2)(a) or (b) of the ITAA 1936, and the partner has a share of the Dividend under section 207-55 of the ITAA 1997 that is a positive amount, the partner is, subject to the 'qualified person' rule, entitled to a tax offset equal to the partner's share of the franking credit on the Dividend under section 207-57 of the ITAA 1997.

Trusts

58. Pursuant to subsection 44(1) of the ITAA 1936, the Dividend is included in the assessable income of a trustee for the purposes of computing the net income of the trust under subsection 95(1) of the ITAA 1936.

59. Subject to the 'qualified person' rule, pursuant to subsection 207-35(2) of the ITAA 1997, an amount equal to the amount of the franking credit on the Dividend is included in the assessable income of the trustee for the purposes of computing the net income of the trust under subsection 95(1) of the ITAA 1936 (gross-up).

60. In the case where an individual beneficiary, corporate beneficiary, or a trustee beneficiary specified by paragraph 207-45(c) or (d) of the ITAA 1997 (that is, trustees liable to be assessed under section 98, 99 or 99A of the ITAA 1936, or certain superannuation funds, approved deposit funds and pooled superannuation trusts) has a share of the trust's net income that is covered by paragraph 97(1)(a) of the ITAA 1936 or has an individual interest in the trust's net income that is covered by paragraph 98A(1)(a) or (b) or paragraph 100(1)(a) or (b) of the ITAA 1936, and the beneficiary has a share of the Dividend under section 207-55 of the ITAA 1997 that is a positive amount, the beneficiary is, subject to the 'qualified person' rule, entitled to a tax offset equal to the beneficiary's share of the franking credit on the Dividend under section 207-57 of the ITAA 1997.

Refundable tax offset

61. The franking credit on the Dividend component will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, provided the participating shareholders are not excluded by subsections 67-25(1A) to (1D) of the ITAA 1997.

Qualified persons

62. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked dividend distribution made to an entity only 'a qualified person in relation to the distribution for the purposes of Division 1A of Part IIIAA of the ITAA 1936' is entitled to a franking credit or tax offset. Broadly speaking, to be a 'qualified person' in relation to the Dividend, the participating shareholder must satisfy both the holding period rule contained in section 160APHO of the ITAA 1936 and the related payments rule contained in section 160APHN of the ITAA 1936.

63. Broadly, a shareholder will not satisfy the related payments rule if the shareholder, or associate of the shareholder, is under an obligation to make, or makes, a payment in respect of the dividend which effectively passes the benefit of the dividend to another person.

64. The holding period rule requires shareholders to hold the shares, or the interest in the shares, on which the dividend is paid at risk for a continuous period of at least 45 days. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

65. Under subsection 160APHM(2) of the ITAA 1936, a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the 'net position' of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares.

66. Under the scheme the BPGL shareholders satisfy the holding period rule if they have held their shares at risk for a period of 45 days at any time in the period between the acquisition of the shares and the 45th day after the day on which the shares become ex dividend.

Return of Capital

Dividend

67. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends, as defined in subsection 6(1) of the ITAA 1936, paid to the shareholder out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

68. The term 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, later paragraphs in that subsection exclude certain items from being a dividend for income tax purposes.

69. Relevantly, paragraph (d) specifically excludes from the definition of 'dividend' in subsection 6(1):

money paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection 6(4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company.

70. Share capital account is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created after 1 July 1998 where the first amount credited to the account was an amount of share capital.

71. Subsection 975-300(3) of the ITAA 1997 states that an account is not a share capital account if it is tainted. Section 197-50 of the ITAA 1997 states that a share capital account is tainted if an amount, to which Division 197 of the ITAA 1997 applies, is transferred to the account and the account is not already tainted.

72. The return of capital of 115.6 cents per share was debited against BPGL's share capital account. There have been no transfers into BPGL's share capital account as defined in section 975-300 of the ITAA 1997. Therefore, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies and the return of capital does not constitute a dividend.

CGT event G1: section 104-135

73. CGT event G1 (section 104-135 of the ITAA 1997) happens if a company makes a payment to a shareholder in respect of a share they own in a company and some or all of the payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997, or an amount that is taken to be a dividend under section 47 of the ITAA 1936.

74. The cost base and reduced cost base of each BPGL share will be reduced (but not below nil) by the amount of the return of capital (subsections 104-135(3) and (4) of the ITAA 1997).

75. A BPGL shareholder may make a capital gain if the return of capital by the company in relation to each BPGL share exceeds the cost base of the share (subsection 104-135(3) of the ITAA 1997). If the BPGL share was acquired by the shareholder at least 12 months before the date of payment, a capital gain from the share may qualify as a discount capital gain (subsection 115-25(1) of the ITAA 1997) if the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

CGT event C2: section 104-25

76. If, after the Stapling Strategy Record Date (17 November 2006) but before the Implementation Date (13 November 2006), a person who was a registered ordinary shareholder of BPGL ceased to own some or all of their BPGL shares in respect of which the 2006 return of capital was paid, the right to receive the payment in respect of each of the shares disposed of is considered to be a separate CGT asset. That right is one of the rights inherent in the share on the Record Date and was retained by the shareholder when the share was sold.

77. CGT event C2 (section 104-25 of the ITAA 1997) happened when the return of capital was paid and the right to payment ends. A capital gain resulted if the capital proceeds for the event are more than the cost base of the right. The capital proceeds were the amount of the 2006 return of capital from BPGL (subsection 116-20(1) of the ITAA 1997). The cost base of the BPGL shareholder's right to receive a payment under the scheme is worked out in accordance with Division 110 of the ITAA 1997. However, the cost base (or reduced cost base) of the right is likely to be nil because the full cost base (or reduced cost base) of the share previously held by the shareholder has been applied in working out the capital gain or loss when a CGT event happened to the share – for example the shareholder disposed of the share.

78. The right to payment from the company was inherent in the share during the time that it was owned. Therefore, for the purposes of Subdivision 109-A of the ITAA 1997 the right is considered to have been acquired at the time when the share was acquired. Consequently, if the share was originally acquired by the former shareholder at least 12 months before the payment, a capital gain from the ending of the right may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

Share consolidation

79. As the share consolidation was undertaken in accordance with section 254H of the *Corporations Act 2001*, no ordinary shares in BPGL will be cancelled as a result of the proposed share consolidation. Shareholders of the BPGL shares did not receive any capital proceeds for the reduction in the number of shares on issue. Also the share consolidation did not result in any change to BPGL's share capital. Accordingly, no CGT event happened as a result of the share consolidation (subsection 112-25(4) of the ITAA 1997).

Transfer of BPT units

80. Sections 110-25 and 110-55 of the ITAA 1997 provide that the first element of the cost base and reduced cost base, respectively, of a CGT asset is the money paid in respect of its acquisition.

81. BPGL shareholders paid 135.309 cents for each BPT unit.

82. Accordingly, the first element of the cost base and reduced cost base of each BPT unit is 135.309 cents.

83. If a company transfers units in circumstances where no contract is entered into in respect of the acquisition, the units are taken to have been acquired at the time of transfer (subsection 104-10(3) the ITAA 1997).

84. Accordingly, BPGL shareholders are taken to have acquired each of their BPT unit on the Implementation Date.

Stapling of securities

85. The effect of the BPGL Property Group Stapling Deed, together with changes to the constitution of BPGL and the deed of BPT, is to apply restrictions to the transferability of the individual securities that make up a BPGL Property Group stapled security. Each individual security (that is, a BPGL share and a BPT unit) retains its legal character without any change in ownership. There is no variation to the rights or obligations attaching to, or to the ownership of, the individual securities that make up the BPGL stapled security as a consequence of stapling.

86. Therefore, no CGT event in Division 104 of the ITAA 1997 happened as a consequence of the stapling of BPGL shares to BPT units (subsection 112-25(4) of the ITAA 1997).

The anti-avoidance provisions

87. Sections 45A and 45B of the ITAA 1936 are two anti-avoidance provisions which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfranked dividend that is paid by the company out of profits to the shareholder.

Streaming of dividends and capital benefit: section 45A

88. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed to advantaged shareholders who would, in the year of income in which the capital benefits are provided, derive a greater capital benefit than the other shareholders (the disadvantaged shareholders) who would receive dividends.

89. BPGL provided all of its shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936), and the capital benefit was provided to all shareholders in direct proportion to their individual shareholding. As all shareholders benefit equally from the return of capital, there is no indication of 'streaming' of capital benefits to some shareholders and not to other shareholders. Accordingly, section 45A does not apply to the return of capital, and the Commissioner will not make a determination under subsection 45A(2) that section 45C of the ITAA 1936 applies to the return of capital.

Schemes to provide capital benefits in substitution for dividends: section 45B

90. Section 45B of the ITAA 1936 applies where certain capital payments, including a return of capital, are paid to shareholders in substitution for dividends. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);

- under the scheme a taxpayer, who may or may not be the person provided with the capital benefit, obtain a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- having regard to the relevant circumstances of the scheme, it would be considered that the person, or one of the persons, entered into the scheme or carried out the scheme, or any part of the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

Each of these conditions is considered below.

91. The return of capital is a 'scheme' within the broad meaning of that term.

92. The phrase 'provided with a capital benefit' is defined at subsection 45B(5) of the ITAA 1936. Relevantly, it includes a distribution to a person of share capital. As BPGL debited the return of capital against its share capital account, its shareholders will be provided with a capital benefit.

93. A shareholder 'obtains' a 'tax benefit', as defined in subsection 45B(9) of the ITAA 1936, where:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

by the taxpayer would, apart from the operation of section 45B:

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

than if the capital benefit had been a dividend.

94. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the share there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the share that a capital gain is made. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a non-resident, subject to dividend withholding tax. Therefore, a shareholder will obtain a tax benefit from the return of capital.

Relevant circumstances

95. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) of the ITAA 1936 to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit.

96. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. The requisite purpose does not have to be the most influential or prevailing purpose but must be more than an incidental purpose.

97. The relevant circumstances under subsection 45B(8) of the ITAA 1936 cover both the circumstances of the company and the shareholders. Paragraphs 45B(8)(c) to (h) of the ITAA 1936 do not incline for, or against, a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and (j) of the ITAA 1936, pertaining to the provision of ownership interests and demerger, are not relevant. The circumstances described in paragraphs 45B(8)(a), (b) and (k) of the ITAA 1936 are the more relevant. In this scheme, the matters are very finely balanced and involve a careful weighing of all relevant factors.

98. While the matter is not free from doubt it is considered having regard to all of the relevant circumstances that on balance it could not be concluded that the persons who will enter into, or carry out, the scheme would do so for a more than incidental purpose of enabling the shareholders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the proposed return of capital.

Section 177EA

99. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares.

100. Specifically, subsection 177EA(3) of the ITAA 1936 provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and

- (d) except for this section, the person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

101. Under the scheme 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 BPGL, its shareholders or any other relevant party, there is a more than incidental purpose of conferring an imputation benefit under the scheme. Under this scheme the relevant taxpayer is the participating shareholder and the scheme comprises the circumstances surrounding the return of capital and stapling of the in specie distributed units in BPT to the shares in BPGL.

102. 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.

103. The Commissioner is of the view that section 177EA of the ITAA 1936 will not apply to this scheme. In coming to this conclusion the Commissioner had regard to all the relevant circumstances of the scheme, as outlined in subsection 177EA(17).

104. Paragraph 177EA(17)(b) of the ITAA 1936 requires consideration of whether the relevant taxpayer would derive a greater benefit from franking credits than other entities who hold membership interests in the corporate tax entity. After considering all of the relevant circumstances it was decided that it could not be concluded that the scheme results in the delivery of a greater benefit from franking credits to particular categories of shareholders. One of the issues considered in reaching this conclusion was the residence for tax purposes of the shareholders. Australian residents may derive a greater benefit from imputation than non-residents, however, BPGL non-resident shareholders comprise less than 1% of the total shareholding and none of the major shareholders have any non-resident beneficiaries.

105. In relation to the scheme set out in this Ruling, it would not be reasonable to conclude that in entering into the scheme, BPGL demonstrates a more than incidental purpose of securing imputation benefits for their shareholders. To the extent that any imputation benefits are secured, those benefits are considered to be incidental to the more significant objective purposes of restructuring the BPGL Group.

Section 204-30

106. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a) of the ITAA 1997);
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b) of the ITAA 1997); and
- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c) of the ITAA 1997).

107. If section 204-30 of the ITAA 1997 applies the Commissioner has a discretion under subsection 204-30(3) to make a determination in writing:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a) of the ITAA 1997); and/or
- (b) that no imputation benefit is to arise in respect of any streamed distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c) of the ITAA 1997).

108. 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) by reference to the ability of the members to fully utilise imputation benefits.

109. All BPGL shareholders received imputation benefits in direct proportion to their shareholding. Australian resident shareholders will receive the benefit of a tax offset under Division 207 of the ITAA 1997 or receive a franking credit to their franking account as a result of the distribution, while non-resident shareholders will not be subject to dividend withholding tax as a result of the franked distribution. Also while Australian residents may derive a greater benefit from imputation than non-residents under paragraph 204-30(8)(a) of the ITAA 1997, BPGL non-resident shareholders comprise less than 1% of the total shareholding and none of the major shareholders have any non-resident beneficiaries.

110. Having regard to all of the relevant circumstances it is considered that section 204-30 of the ITAA 1997 does not apply.

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