


CR 2007/80 - Income tax: payment of dividend - CCI Holdings Limited

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Class Ruling

Income tax: payment of dividend – CCI Holdings Limited

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ⓘ This publication provides you with the following level of protection:

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.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 204-30 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 177EA of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45A of the ITAA 1936; and
- section 45B of the ITAA 1936.

Class of entities

3. The class of entities to which this Ruling applies are the holders of ordinary shares in CCI Holdings Limited (CCI), an Australian resident company listed on the Australian Stock Exchange (ASX), who receive the proposed dividend in conjunction with the disposal of their shares in CCI to Bureau Veritas Australia Pty Limited (BV) pursuant to the Arrangement described in the Scheme part of this Ruling.

Qualifications

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

5. 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 15 to 29 of this Ruling.

6. 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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Part IVA

8. Part IVA of the ITAA 1936 is a general anti-avoidance rule that can apply if a particular taxpayer obtains a tax benefit in connection with an arrangement and it can be concluded that the arrangement, or any part of it, was entered into or carried out by any person for the dominant purpose of enabling a tax benefit to be obtained by that taxpayer. If Part IVA applies the tax benefit can be cancelled, for example, by including an amount in the taxpayer's assessable income.

9. Consequently, it is necessary to obtain and consider all the relevant circumstances concerning both the arrangement and the position of the particular taxpayer in respect of whom the application of Part IVA of the ITAA 1936 is being considered. In the present circumstances the Commissioner has not been able to fully consider the application of Part IVA to the arrangement as the individual circumstances of the shareholders are unknown. However, on the basis of the information available it does appear that at least in respect of some CCI shareholders there may be a scheme to which Part IVA applies. Individual shareholders can seek a private binding ruling on whether Part IVA would apply to their individual circumstances.

Date of effect

10. This Ruling applies from 15 June 2007 to 30 June 2007. However, the Ruling continues to apply after 30 June 2007 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 entities involved in the scheme.

11. 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.

12. If this 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)).

13. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the 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.

14. 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).

Scheme

15. The scheme that is the subject of this Ruling is described below. This description of the scheme is based on information provided by the applicant. The following documents or relevant parts of them form part of and are to be read with the description.

- Class Ruling application dated 11 April 2007;
- a Merger Implementation Agreement (MIA) executed on 12 March 2007 with annexure;
- Statutory Declaration executed 4 May 2007 from Mr David Gerard Butel, Chief Executive Officer and Director of CCI, in relation to CCI's intention to pay a dividend;
- correspondence received from Forsythes Accounting from 19 April 2007 to 1 June 2007; and
- announcement to ASX of declaration of dividend on 15 June 2007.

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

16. CCI is an Australian incorporated company listed on the ASX. CCI is the head entity of the CCI tax consolidated group.

17. CCI has 135,665,713 ordinary shares on issue as at 31 March 2007.

18. CCI's shareholders as at 30 March 2007 were a mix of individuals, companies and superannuation funds.

19. Non-resident shareholders held approximately 1% of the total CCI's shares on issue.

20. On 12 March 2007, CCI announced on the ASX it had reached an agreement with BV, a subsidiary of a large multinational company incorporated in France, for BV to acquire all of the issued shares in CCI.

21. The proposed transaction will be implemented by way of a Scheme of Arrangement pursuant to the *Corporations Act 2001*. The terms governing the implementation have been provided in a MIA and Scheme of Arrangement.

22. The total consideration an existing CCI shareholder will receive pursuant to the proposed transaction is \$0.58 per share. This consideration is to be reduced by the amount of any fully franked dividend paid by CCI.

23. CCI has declared a fully franked dividend of \$0.03 per share to all of its shareholders subject to section 254T of the *Corporations Act 2001*. Accordingly, CCI's shareholders will transfer their shares in CCI to BV for a cash payment of \$0.55 per share.

24. Pursuant to the terms of the scheme, the cash payment, the transfer of the shares and the payment of the dividend are to occur on or about the same date.

25. In the event CCI cannot pay the entire dividend out of current funds, BV covenants to loan sufficient funds to CCI to enable it to pay the dividend.

26. CCI corporate group does not have a formalised dividend policy. The CCI group has, for the greater part of trading, had retained losses and therefore has been restricted to only declaring dividends from current year profits when earned.

27. CCI shareholders were paid a \$0.01 per share dividend in the 2006 financial year. With the exception of the 2006 financial year, CCI has a history of paying dividends to their shareholders of between 87% and 99% of the company's current year profits after tax. The proposed dividend of \$0.03 per share represents a distribution of 88% of the forecast after tax profit for the 2007 financial year.

28. CCI's distributable profits for the 2007 financial year are projected to be approximately \$4.6 million. The franking account balance is \$2,064,603 and the current share capital account balance is \$25,884,152.

29. The dividend will utilise \$1,744,273 of franking credits.

Ruling

Section 204-30

30. On the basis of the information provided, it is not considered appropriate to make a determination under paragraphs 204-30(3)(a) or (c) of the ITAA 1997 to give rise to a franking debit in the franking account of CCI or to deny the whole, or any part, of the imputation benefits received by the CCI shareholders.

Section 177EA

31. On the basis of all the material referred to 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 shareholders.

Section 45A

32. On the basis of the information provided, as the present scheme does not result in the receipt of a capital benefit as defined in subsection 45A(3) of the ITAA 1936 by the CCI shareholders, section 45A of the ITAA 1936 will have no application.

Section 45B

33. In the absence of provision of any capital benefits as defined in subsection 45B(5) of the ITAA 1936, section 45B of the ITAA 1936 will have no application.

Commissioner of Taxation

29 August 2007

Appendix 1 – Explanation

❶ *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.*

Section 204-30

34. Section 204-30 of the ITAA 1997 is a general anti streaming measure. It is designed to curb the unintended use of franking credits through streaming arrangements. It permits the Commissioner to make determinations where an entity streams one or more distributions whether in a single franking period or in a number of franking periods, in such a manner whereby:

- (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); and
- (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).

35. Streaming is the act of selectively directing the flow of franked distributions and the associated imputation benefits to those members that are best positioned to utilise imputation benefits (favoured members) to the exclusion of those members that are not (disadvantaged members). The result of such action by a company is the reduction or elimination of the intended wastage of franking credits, inherent in the design of the imputation system. Subsections 204-30(7) and (8) of the ITAA 1997 deal with the circumstances in which some members of an entity will derive greater benefits from franking credits than other members.

36. Relevantly, subsection 204-30(8) of the ITAA 1997 identifies a resident member as one who derives a greater benefit from franking credits than a non-resident member. However, a definite strategy designed to achieve this outcome would need to have been put in place by the company before an arrangement could be classified as a streaming arrangement.

37. Based on the information provided, 99% of CCI's shareholders are Australian residents. Under the proposed scheme, all of CCI's shareholders will be required to transfer their shares in CCI to BV in accordance with the MIA dated 12 March 2007, with the dividend (as defined in the agreement) payable to all CCI shareholders. As the vast majority of CCI's shareholders are Australian residents and all its shareholders will receive the fully franked dividend, it cannot be argued that any steps have been taken by the entity to bring about streaming between resident shareholders and non-resident shareholders.

38. On the basis of the information provided, it is not considered appropriate to make a determination under paragraphs 204-30(3)(a) or (c) of the ITAA 1997 to give rise to a franking debit in the franking account of CCI or to deny the whole, or any part, of the imputation benefits received by the CCI shareholders.

Section 177EA

39. 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.

40. Specifically, subsection 177EA(3) of the ITAA 1936 states 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.

41. In the circumstances of CCI 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 CCI, its shareholders, BV or any other relevant party, there is a purpose more than merely an incidental purpose of conferring an imputation benefit under the scheme. For present purposes, the relevant taxpayer is a holder of shares in CCI and the scheme comprises the circumstances surrounding the payment of that dividend, including the transfer of shares to BV.

42. In arriving at a conclusion as to the operation of section 177EA of the ITAA 1936, 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 circumstance 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 given scheme.

43. On the basis of all the material referred to in this Ruling, it would not currently be reasonable to conclude that in entering into the scheme any of the relevant parties demonstrate the objective purpose of securing imputation benefits for shareholders.

Section 45A

44. Section 45A of the ITAA 1936 is an anti-avoidance provision that applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of capital and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

45. The provision of a 'capital benefit' for the purposes of section 45A is defined in subsection 45A(3) of the ITAA 1936 to mean:

- (a) the provision to shareholders of shares in the company;
- (b) the distributions to shareholders of share capital or share premium; or
- (c) the doing of something in relation to a share that has the effect of increasing the value of a share held by the shareholder.

46. Under the proposed scheme, the current shareholders of CCI dispose of their shares to BV at a price no greater than \$0.58 per share. The proposed scheme does not result in a provision of shares in the company to shareholders, merely a transfer of shares from one party to another. The proposed scheme does not result in a distribution out of CCI's share capital or share premium account. Finally, the proposed scheme does not constitute the doing of something in relation to the shares that has the effect of increasing the value of a share held by the shareholder. Therefore, for the purposes of section 45A of the ITAA 1936 no capital benefits will be provided under the proposed scheme.

Section 45B

47. The purpose of section 45B of the ITAA 1936 is to ensure that relevant amounts distributed to shareholders of a company are treated as dividends for tax purposes if certain payments, allocations and distributions are made in substitution for dividends.

48. Section 45B of the ITAA 1936 applies if the following conditions are fulfilled;

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936); and
- (b) under the scheme, a taxpayer (the relevant taxpayer), who may or may not be the person provided with the demerger benefit or capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- (c) 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 enabling a taxpayer (the relevant taxpayer) to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

49. A 'scheme' for the purposes of section 45B of the ITAA 1936 is taken to have the same meaning as provided in subsection 177A(1) of Part IVA of the ITAA 1936 and includes:

- (a) any agreement, arrangement, understanding, promise or undertaking whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- (b) any scheme, plan, proposal, action, course of action or course of conduct.

50. A capital benefit is defined in subsection 45B(5) of the ITAA 1936 to include:

- (a) the provision of ownership interests in a company to the person;
- (b) the distribution to the person of share capital or share premium; or
- (c) something that is done in relation to an ownership interest that has the effect of increasing the value of an ownership interest (which may or may not be the same interest) that is held by the person.

51. Under the proposed scheme, the CCI shareholders dispose of their shares to BV at a price not greater than \$0.58 per share. The proposed scheme does not result in the provision of ownership interests in the company to any person, merely a transfer of shares from one party to another. The proposed scheme does not result in a distribution out of CCI's share capital or share premium account. Finally, the proposed scheme does not constitute the doing of something in relation to an ownership interest that has the effect of increasing the value of an ownership interest that is held by a person. Therefore, for the purposes of section 45B of the ITAA 1936, no capital benefits will be provided under the proposed scheme.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital benefits
- dividend streaming
- dividends
- franking credits
- imputation benefits

Legislative references:

- ITAA 1936 45A
- ITAA 1936 45A(3)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(5)
- ITAA 1936 177A(1)
- ITAA 1936 177EA
- ITAA 1936 177EA(3)
- ITAA 1936 177EA(3)(a)

- ITAA 1936 177EA(3)(b)
 - ITAA 1936 177EA(3)(c)
 - ITAA 1936 177EA(3)(d)
 - ITAA 1936 177EA(5)
 - ITAA 1936 177EA(5)(b)
 - ITAA 1936 177EA(17)
 - ITAA 1936 Part IVA
 - ITAA 1997 204-30
 - ITAA 1997 204-30(1)(a)
 - ITAA 1997 204-30(1)(b)
 - ITAA 1997 204-30(1)(c)
 - ITAA 1997 204-30(3)(a)
 - ITAA 1997 204-30(3)(c)
 - ITAA 1997 204-30(7)
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 - TAA 1953
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ATO references

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