CR 2008/75 - Income tax: conversion by Australian Co-operative Foods Limited to a company registered under the Corporations Act 2001 and subsequent payment of special dividend pursuant to Scheme of Arrangement

Class Ruling

Income tax: conversion by Australian Co-operative Foods Limited to a company registered under the *Corporations Act 2001* and subsequent payment of special dividend pursuant to Scheme of Arrangement

Contents Para

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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 44 of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Division 1A of former Part IIIAA of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 204-30 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 207-20 of the ITAA 1997;

- subsection 207-35(1) of the ITAA 1997; and
- section 207-145 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the existing members (the Existing Members) and Co-Operative Capital Unit holders (the CCU Holders) of Australian Co-operative Foods Limited (ACF Co-op) who:

(a) following the conversion of ACF Co-op to a public company (ACF Company), will hold ordinary shares in ACF Company; and

(b) are 'residents of Australia' as that phrase is defined in subsection 6(1) of the ITAA 1936.

4. Where the Existing Member or CCU Holder (not being an entity that is taxed as a corporate tax entity) is a partnership or a trustee of a trust (not being a complying superannuation fund), this Ruling does not apply to the partners or beneficiaries of that partnership or trust respectively.

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 10 to 34 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.

Date of effect

9. This Ruling applies from 1 July 2008 to 30 June 2009. The Ruling continues to apply after 30 June 2009 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

10. The following 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:

- the application for a Class Ruling from ACF Co-op dated 28 August 2008;
- the Implementation Agreement between ACF Co-op, National Foods Limited (National Foods) and Kirin Holdings Limited, dated 25 August 2008; and
- 2008 Annual Report of ACF Co-op;
- Scheme of Arrangement between ACF Co-op and each holder of shares issued in the capital of ACF Co-op, as updated;
- Draft ACF Co-op Scheme Booklet, dated 2 October 2008;
- ACF Co-op Scheme Booklet Supplement;
- correspondence from PricewaterhouseCoopers (PwC), dated 26 September 2008;
- correspondence from PwC, dated 10 October 2008;
- correspondence from PwC, dated 15 October 2008; and
- email correspondence from PwC, dated 21 October 2008.

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

11. ACF Co-op is a co-operative incorporated under the *Co-operatives Act 1992 (NSW)* (the Co-op Act).

12. ACF Co-op is a franking entity and a resident of Australia for income tax purposes in accordance with subsection 6(1) of the ITAA 1936.

13. ACF Co-op is the head company of the ACF Co-op tax consolidated group. The principle activities of the group are the processing, manufacturing, packaging, distribution and marketing of milk and dairy products.

14. ACF Co-op had 85,050,489 ordinary shares on issue at 30 June 2008 to the Existing Members and each share carries the same rights in relation to dividends and capital distributions. Each active Existing Member only has one vote, irrespective of the number of shares held.

15. In addition to the Existing Members, Qualifying Former Members and CCU Holders also hold rights in respect of ACF Co-op, which are also outlined below.

Existing Members

16. The Existing Members consist of:

(a) current active members of ACF Co-op; and

(b) inactive members of ACF Co-op who have ceased to supply milk to ACF Co-op less than 12 months prior to the scheme.

17. The Existing Members currently hold all of the ordinary shares in ACF Co-op.

18. The Existing Members to whom this ruling applies are residents of Australia for income tax purposes in accordance with subsection 6(1) of the ITAA 1936.

Qualifying Former Members

19. Under the Co-op Act and the ACF Co-op Rules, the membership of an inactive member is cancelled and the member's shares are forfeited contemporaneously after one year of continuous inactivity (that is, non-supply of raw milk or ingredients).

20. Division 5 of Part 6 of the Co-op Act attributes certain statutory rights to the Qualifying Former Members on forfeiture of their shares in ACF Co-op. These statutory rights allow the Qualifying Former Member to participate in various trigger events, including conversion of ACF Co-op to a company, for a period of 5 years after forfeiture. Qualifying Former Members who forfeited their shares more than 5 years ago do not retain any rights.

CCU Holders

21. CCU Holders are former members of ACF Co-op whose shares were forfeited within the 5 years preceding 29 June 2004 and who subscribed for convertible Co-operative Capital Units (CCU) during the 2004-05 financial year that have not yet been repaid.

22. The CCU Holders to whom this Ruling applies are residents of Australia for income tax purposes in accordance with subsection 6(1) of the ITAA 1936.

Conversion of ACF Co-op to a company

23. On 21 November 2008, ACF Co-op will convert from a co-operative to a public company registered in Victoria under the *Corporations Act 2001*.

24. The proposed conversion will not cause any change to the tax attributes of the ACF Co-op tax consolidated group.

25. On conversion of ACF Co-op to a company:

(a) each ACF Co-op share held by an Existing Member will convert into an ordinary B Class (non-voting, participating) share in ACF Company with the exception that one share held by each active Existing Member will convert into one ordinary A Class (voting, participating) share in ACF Company;

(b) the Qualifying Former Members will not receive shares in ACF Company. ACF Co-op has obtained a Ministerial Exemption conditional upon paying a cash sum to each Qualifying Former Member; and

(c) immediately following conversion of ACF Co-op to a company, each convertible CCU that has not yet been repaid will convert into one ordinary B Class (non-voting, participating) share in ACF Company.

Scheme of Arrangement

26. On 25 August 2008 ACF Co-op entered into an agreement (the Implementation Agreement) with National Foods and Kirin Holdings Limited for National Foods to acquire all of the shares in ACF Company under a Scheme of Arrangement under Part 13 of the Co-op Act.

27. The consideration for the Scheme of Arrangement will be in the form of cash. The total cash consideration paid under the Scheme of Arrangement (the Scheme Consideration) will be calculated as a specified amount less the aggregate amount of any special dividend to be paid as part of the scheme. The Scheme Consideration will be reduced on a 1 cent for 1 cent basis for any special dividend paid. In essence, National Foods will pay approximately $5.06 per share instead of approximately $5.65 per share if a 59 cent per share special dividend is paid. Accordingly, the Existing Members and the CCU Holders will receive approximately $5.06 per share from National Foods from the disposal of their shares if a 59 cents per share special dividend is paid.

28. All of the shares in ACF Company will be transferred to National Foods under the Agreement on the Implementation Date, namely 26 November 2008.

29. ACF Co-op will suspend registration of transfers of ACF Co-op shares from 4 November 2008 to 19 November 2008. From this date, in accordance with the Scheme of Arrangement, ACF Co-op and ACF Company will not register any transfer of ACF Co-op or ACF Company shares other than the transfer to National Foods.

Special dividend

30. ACF Company will pay to all Existing Members and CCU Holders a special dividend in respect of all ordinary shares of approximately 59 cents per share. The special dividend will be fully franked.

31. Any person registered on the ACF Company share register at 5pm on 22 November 2008 will be entitled to receive the special dividend.

32. The Existing Members and the CCU Holders will participate equally in the special dividend.

33. Other than the B Class shares and A Class shares mentioned above, no other classes of shares will be on issue at the time of the declaration or payment of the special dividend.

34. The special dividend will be paid from borrowed funds.

Ruling

Special dividend

35. Those Existing Members and CCU Holders (not being a trustee of a trust or a partnership) who receive the fully franked special dividend directly, will be required to include the dividend in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

36. Those Existing Members and CCU Holders who receive the fully franked special dividend directly will also:

- (a) include the amount of the franking credit in their assessable income; and
- (b) be entitled to a franking offset;

under section 207-20 of the ITAA 1997, provided the Existing Member or CCU Holder is a qualified person.

37. Where the fully franked special dividend is received by an Existing Member or CCU Holder (not being an entity taxed as a corporate tax entity) who is a trustee of a trust (not being a complying superannuation fund) or a partnership, the trustee of the trust or the partnership will include:

(a) the dividend in its assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936; and

(b) the amount of the franking credit in its assessable income under subsection 207-35(1) of the ITAA 1997, provided the trustee or the partnership is a qualified person in accordance with former subsection 160APHO(1) of the ITAA 1936.

Qualified persons

38. Those Existing Members and CCU Holders who receive the fully franked special dividend directly as part of the scheme will be taken to have made a related payment for the purposes of former section 160APHN of the ITAA 1936.

39. Accordingly, each of the Existing Members and CCU Holders will need to hold their ACF Company shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person.

40. Therefore, those Existing Members who have held their ACF Co-op shares (which convert into ACF Company shares) ‘at risk’ for a continuous period of at least 45 days from 9 October 2008 to 24 November 2008 will be capable of being qualified persons in accordance with former subsection 160APHO(1) of the ITAA 1936 in respect of the fully franked special dividend. Any taxpayer who acquired their ACF Company shares on or after 9 October 2008 will not be capable of being a qualified person.

41. CCU Holders will not be capable of being qualified persons in respect of the fully franked special dividend as they acquired their ACF Company shares on 21 November 2008. Accordingly, the CCU Holders (not being a trustee of a trust or a partnership) will not include the amount of the franking credit in their assessable income and will not be entitled to a franking offset under section 207-20 of the ITAA 1997.

42. CCU Holders (being either a trustee of a trust or a partnership, as mentioned in paragraph 37 of this Ruling) will not include the amount of the franking credit in their assessable income under subsection 207-35(1) of the ITAA 1997.

43. The Commissioner considers that from, and including, the Scheme Record Date, namely 25 November 2008, ACF Company shareholders will no longer hold their ACF Company shares ‘at risk’.

The anti-avoidance provisions

44. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in relation to the special dividend received by the Existing Members and CCU Holders.

45. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the special dividend received by the Existing Members and CCU Holders.

Commissioner of Taxation
12 November 2008

Appendix 1 – Explanation

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.

Special dividend

46. Subparagraph 44(1)(a)(i) of the ITAA 1936 provides that the assessable income of an Australian resident shareholder in a company includes:

> dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

Therefore, where the special dividend is paid by ACF Company directly to an Existing Member or a CCU Holder, that Existing Member or CCU Holder will include the fully franked special dividend in their assessable income.

47. In addition section 207-20 of the ITAA 1997 provides:

> (1) If an entity makes a *franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the *franking credit on the distribution. This is in addition to another amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
>
> (2) The receiving entity is entitled to a *tax offset for the income year in which the distribution is made. The tax offset is equal to the *franking credit on the distribution.

48. Therefore, subject to satisfying the qualified person rule, where the fully franked special dividend is received directly by an Existing Member or a CCU Holder (not being a trustee of a trust or a partnership), that Existing Member or CCU Holder will:

(a) include the amount of the franking credit in their assessable income; and

(b) be entitled to a tax offset equal to the amount of the franking credit.

49. Where the fully franked special dividend is received by an Existing Member or CCU Holder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) of the ITAA 1997 applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

> If:
>
> (a) a *franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
>
> (b) the entity is not a *corporate tax entity when the distribution is made; and

(c) if the entity is the trustee of a trust – the trust is not a *complying superannuation entity when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the *franking credit on the distribution.

Therefore, subject to the Existing Member or CCU Holder satisfying the qualified person rule, the Existing Member or CCU Holder will include:

(a) the dividend in its assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936; and

(b) the amount of the franking credit in its assessable income under subsection 207-35(1) of the ITAA 1997.

Qualified persons

50. If a franked distribution is made to an entity that is not a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 then subsection 207-145(1) of the ITAA 1997 provides:

(a) the amount of the *franking credit on the distribution is not included in the assessable income of the entity under sections 207-20 or 207-35 of the ITAA 1997; and

(b) the entity is not entitled to a *tax offset under the Subdivision because of the distribution; and

(c) if the distribution *flows indirectly through the entity to another entity – subsection 207-35(3) and section 207-45 of the ITAA 1997 do not apply to that other entity.

51. The test for what constitutes a ‘qualified person’ is provided in former subsection 160APHO(1) of the ITAA 1936 as follows:

> A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a ***qualified person*** in relation to the dividend if:
>
> (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
>
> (b) where the taxpayer or an associate of a taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification period in relation to the dividend.

52. Former subsection 160APHO(2) of the ITAA 1936, referred to in the preceding paragraph, sets out the holding period requirement. Broadly, where the taxpayer is not under an obligation to make a related payment in relation to a dividend, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

53. In order to determine which is the relevant qualification period, it is necessary to determine whether, under the present arrangement, the Existing Members and the CCU Holders are considered to be under an obligation to make a related payment. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Former subsection 160APHN(2) provides:

> The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

54. Former subsection 160APHN(3) of the ITAA 1936 states:

> Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other persons:
>
> (a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or
>
> (b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or other persons; or
>
> (c) causing services to be provided to, or in accordance with the directions of, the other person or other persons; or
>
> (d) causing property to be transferred to, or in accordance with the directions of, the other person or other persons; or
>
> (e) allowing any property or money to be used by the other person or other persons or by someone nominated by the other person or other persons; or
>
> (f) causing an amount or amounts to be set off against, or to be otherwise applied in reduction of, a debt or debts owed by the other person or other persons to the taxpayer or associate; or
>
> (g) agreeing to treat an amount or amounts owed to the other person or other persons by the taxpayer or associate as having been increased.

55. Former subsection 160APHN(4) of the ITAA 1936 states:

> The circumstances referred to in subsection (3), are where:
>
> (a) the amount or the sum of the amounts paid, credited or applied; or
>
> (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
>
> (c) the amount or the sum of the amounts of the set-offs, reductions or increases;
>
> as the case may be:
>
> (d) is, or may reasonably be expected to be, equal to; or
>
> (e) approximates or may reasonably be expected to approximate; or
>
> (f) is calculated by reference to;
>
> the amount of the dividend or distribution.

56. In the current circumstances, an integral part of the arrangement is the payment of the special dividend in respect of the ordinary shares of approximately 59 cents per share. Further, it is clearly contemplated in the current arrangement that the total consideration to be paid by National Foods is to be reduced by an amount equal to the amount of any special dividend paid. This reduction is specifically calculated by reference to the amount of any special dividend paid. In essence, National Foods would pay approximately $5.06 per share instead of approximately $5.65 per share if a 59 cent per share special dividend is paid. Likewise, the Existing Members and the CCU Holders would receive approximately $5.06 per share from National Foods from the disposal of their shares if a 59 cents per share special dividend is paid as against the total consideration of $5.65 per share to be provided pursuant to the Scheme of Arrangement.

57. As the Scheme of Arrangement clearly contemplates the reduction in the consideration for the disposal of an ACF Company share to be calculated by reference to the value of the special dividend paid pursuant to the Scheme of Arrangement, the reduction in the consideration is considered to constitute a notional crediting passing on the benefit of the proposed special dividend from an Existing Member or CCU Holder to National Foods. As such, it is considered to constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

58. As the Existing Members and the CCU Holders are taken, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to be under an obligation to make a related payment in respect of the special dividend, the relevant holding period is therefore the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

59. The 'secondary qualification period' is defined in former section 160APHD of the ITAA 1936 as follows:

> in relation to a taxpayer in relation to shares or an interest in shares, means:
>
> (a) if the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest becomes ex-dividend…

60. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 as follows:

> A share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex-dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

61. ACF Company will determine eligibility for the special dividend on 22 November 2008. Therefore, pursuant to the Scheme of Arrangement, the last day on which the acquisition by a person of an ACF Company share will entitle the person to receive the special dividend is 22 November 2008. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 23 November 2008.

62. The secondary qualification period therefore begins on the 45th day before the ex-dividend date of 23 November 2008 and ends on the 45th day after that date. In practical terms, this means that the secondary qualification period begins on 9 October 2008 and ends on 7 January 2009. Each of the Existing Members and CCU Holders will need to hold their ACF Company shares 'at risk' for a continuous period of at least 45 days in this secondary qualification period in order to be a qualified person.

63. In calculating the number of days for which a taxpayer has continuously held the ACF Company shares, the day of acquisition and the day of disposal are to be excluded. In addition, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which the taxpayer has materially diminished risks of loss or opportunities for gain in respect of the ACF Company shares are also to be excluded. Having regard to the Scheme of Arrangement, the Commissioner considers that from, and including, the Scheme Record Date, namely 25 November 2008, the Existing Members and CCU Holders will have materially diminished risks of loss or opportunities for gain. Accordingly, the Existing Members and CCU Holders will not hold their shares 'at risk' on any day after the 24 November 2008.

64. Therefore, those Existing Members who have held their ACF Co-op shares (which convert into ACF Company shares) 'at risk' for a continuous period of at least 45 days from 9 October 2008 to 24 November 2008 will be capable of being qualified persons in respect of the fully franked special dividend.

65. As the CCU Holders only acquire their ACF Company shares on 21 November 2008, they will not be capable of being qualified persons in respect of the fully franked special dividend. Therefore, the CCU Holders will not include the amount of the franking credit in their assessable income. Further, a CCU Holder (not being a trustee of a trust or a partnership) will not be entitled to a franking offset under section 207-20 of the ITAA 1997 in respect of the special dividend.

The anti-avoidance provisions

Section 204-30

66. 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).

67. 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. As the proposed special dividend is to be fully franked and paid to all shareholders, it cannot be said that ACF Company directed the flow of distributions in such a manner so as to ensure that imputation benefits are received by shareholders who derive greater benefits from franking credits, while other shareholders receive lesser or no imputation benefits.

68. Accordingly, the Commissioner will not make a determination pursuant to subsection 204-30(3) of the ITAA 1997 that section 204-30 of the ITAA 1997 applies to the proposed special dividend.

Section 177EA

69. 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.

70. Specifically, subsection 177EA(3) of the ITAA 1936 provides that section 177EA of the ITAA 1936 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.

71. If section 177EA of the ITAA 1936 applies the Commissioner may make a determination under subsection 177EA(5) that either a franking debit arises to the company in respect of each dividend paid to the relevant taxpayer or, in the alternative, that no franking credit benefit arises in respect of a dividend paid to the relevant taxpayer.

72. Following the conversion of ACF Co-op to a public company, ACF Company will be a corporate tax entity. The sale of the ordinary shares in ACF Company pursuant to a Scheme of Arrangement is a scheme for the disposition of membership interests. ACF Company intends to pay a fully franked special dividend in relation to the sale of all its ordinary shares pursuant to a Scheme of Arrangement, such that it can reasonably be expected that Existing Members will receive an imputation benefit as a result of the special dividend.

73. In the present case, it is considered that 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 ACF Company, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the scheme: pursuant to paragraph 177EA(3)(e) of the ITAA 1936.

74. In arriving at a conclusion one 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 diverse matters which taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the imputation benefit is more than an incidental purpose of the scheme. A purpose is an incidental purpose when it occurs fortuitously or in subordinate conjunction with another purpose, or merely follows another purpose as its natural incident.

75. The relevant scheme is a sale transaction involving shares in ACF Company being sold for market value to a third party in an arm's-length transaction. The relevant circumstances are that the disposition of the ordinary shares in ACF Company is made pursuant to a sale transaction to the unrelated third party. The acquisition of ACF Company by way of a Scheme of Arrangement is one of the alternatives available under the Co-op Act to be voted upon by ACF Co-op Existing Active Members. This particular Scheme of Arrangement is an ordinary commercial transaction and the disposal of shares by ACF Company shareholders is for commercial purposes.

76. There is no intention evidenced in the scheme that the payment of the special dividend is to enable a particular shareholder or class of shareholders (current and future) to obtain imputation benefits. Any imputation benefit obtained is merely incidental to the commercial purpose.

77. Having regard to the relevant circumstances of the scheme, it cannot be concluded that ACF Company or the shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain an imputation benefit.

Appendix 2 – Detailed contents list

78. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- deemed dividends
- dividend income
- dividend streaming arrangements
- imputation system
- franking credits
- qualified persons
- related payment rule

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(1)(a)(i)
- ITAA 1936 Pt IIIAA Div 1A
- ITAA 1936 160APHD
- ITAA 1936 160APHE(1)
- ITAA 1936 160APHN
- ITAA 1936 160APHN(2)
- ITAA 1936 160APHN(3)
- ITAA 1936 106APHN(3)(a)
- ITAA 1936 106APHN(3)(b)
- ITAA 1936 106APHN(3)(c)
- ITAA 1936 106APHN(3)(d)
- ITAA 1936 106APHN(3)(e)
- ITAA 1936 106APHN(3)(f)
- ITAA 1936 106APHN(3)(g)
- ITAA 1936 160APHN(4)
- ITAA 1936 160APHN(4)(a)
- ITAA 1936 160APHN(4)(b)
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