

# ***CR 2010/32 - Income tax: off market takeover of Corporate Express Australia Limited and Special Dividend***

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## Class Ruling

### Income tax: off market takeover of Corporate Express Australia Limited and Special Dividend

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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, 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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 44(1) of the ITAA 1936;
- subsection 128B(3) of the ITAA 1936;
- section 128D of the ITAA 1936;
- former section 160APHN of the ITAA 1936;
- subsection 177EA(5) of the ITAA 1936;
- Division 1A of former Part IIIAA of the ITAA 1936 (former Division 1A);

- Division 67 of the of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 67-25 of the ITAA 1997;
- section 104-10 of the ITAA 1997;
- subsection 116-20(1) of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- subsection 204-30(3) of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- subsection 855-10(1) of the ITAA 1997; and
- section 855-15 of the ITAA 1997.

## Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Corporate Express Australia Limited (Corporate Express), excluding a Staples Inc subsidiary, who hold Corporate Express shares on capital account and:

- receive the Special Dividend; or
- accept the offer made by Staples Australia Pty Ltd (Staples Australia) to acquire their Corporate Express shares or have their shares compulsorily acquired pursuant to Part 6A.1 of the *Corporations Act 2001* (Corporations Act), and who also receive the Special Dividend; or
- accept the offer made by Staples Australia to acquire their Corporate Express shares or have their shares compulsorily acquired pursuant to Part 6A.1.

## Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 9 to 26 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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## Date of effect

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8. This Ruling applies from 1 July 2009 to 30 June 2011. 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

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9. 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:

- Class Ruling Application from KPMG dated 22 March 2010;
- Bidder's Statement lodged with the Australian Securities and Investments Commission (ASIC) on 19 March 2010;
- Implementation Agreement dated 17 March 2010;
- Target's Statement lodged with ASIC on 19 April 2010;
- Corporate Express' Annual Report for the 12 months ended 31 January 2010;
- Correspondence from KPMG dated 20 April 2010, 23 April 2010, 3 May 2010, 4 May 2010 and 9 July 2010;
- First Supplementary Bidder's Statement lodged with ASIC on 24 May 2010;
- Supplementary Target Statement No.2 lodged with ASIC on 26 May 2010;

- Bidder's extension of offer to 7 July 2010 lodged with ASIC 26 May 2010;
- Second Supplementary Bidder's Statement lodged with ASIC 28 May 2010;
- Declaration of special dividend lodged with ASIC on 28 June 2010;
- Bidder's announcement lodged with ASIC 28 June 2010;
- Bidder's extension of offer lodged with ASIC on 29 June 2010; and
- Bidder's notice declaring offer unconditional lodged with ASIC on 9 July 2010.

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

### Corporate Express

10. Corporate Express is an Australian incorporated company listed on the Australian Securities Exchange (ASX). It is the main operating company within a consolidated group operating predominantly in Australia and New Zealand.

11. The shareholders in Corporate Express are a mix of individuals, companies, superannuation funds and other institutional investors, some of which are non-residents. The major shareholders in Corporate Express and their respective interests as at 27 January 2010 were as follows:

Shareholders	Holdings
Wholly owned subsidiary of Staples Inc.	58.65%
JP Morgan Nominees Australia Limited	5.56%
Citicorp Nominees Pty Limited	4.81%

12. The remaining shares in Corporate Express are widely held by over 5,000 ordinary shareholders.

### Staples

13. Staples Inc (Staples) is incorporated in Delaware, United States and is listed on NASDAQ GS.

14. At the time of the Bidder Statement, Staples (through an indirect subsidiary) holds 98,600,656 shares comprising 58.65% of Corporate Express.

15. Staples Australia is an Australian company incorporated in Victoria. Staples Australia offers to acquire and hold the shares of Corporate Express for Staples, its ultimate parent company.

### **The Staples Offer**

16. On 17 March 2010, Corporate Express and Staples made announcements to the market stating that the independent directors of Corporate Express (Independent Directors) and Staples have agreed key terms under which Staples (through Staples Australia) will acquire all of the issued shares in Corporate Express that it does not already own for an offer consideration of \$5.60 per share (the Staples Offer).

17. Immediately prior to the announcements on 17 March 2010, Staples and the Independent Directors signed an Implementation Agreement setting out the key terms of the Staples Offer.

18. The Offer Period commenced on 6 April 2010 and ended at 7pm (Australian Eastern Standard Time) on 26 July 2010.

19. The Staples Offer is subject to a number of conditions including:

- a condition precedent to the formation of the contract – Foreign Investment Review Board (FIRB) approval (which was received on 23 April 2010); and
- a condition precedent to the performance of the contract – ‘90% minimum acceptance’. During the Offer Period, Staples Australia must receive acceptances under the Staples Offer that give Staples a relevant interest in at least 90% of all shares in the capital of Corporate Express.

20. Under section 661A of the Corporations Act, Staples Australia is entitled to compulsorily acquire any Corporate Express shares for which it had not received acceptances on the same terms as the Staples Offer if during, or at the end of, the Offer Period Staples Australia and its associates had a relevant interest in at least 90% by number of Corporate Express shares.

21. Staples Australia established an acceptance facility (Acceptance Facility) open to professional investors (as defined in section 9 of the Corporations Act) who hold at least 100,000 Corporate Express shares (Eligible Shareholders).

22. Eligible Shareholders who wished to take advantage of the Acceptance Facility were advised to lodge acceptance instructions (Acceptance Instructions) with the facility operator.

23. Eligible Shareholders who lodged acceptance instructions retained all rights in relation to and full control over their shares and could withdraw their acceptance instructions at any time until the facility operator received a confirmation notice (Confirmation Notice) from Staples Australia stating that:

- (i) Staples Australia has declared the Staples Offer free from all conditions that have not been fulfilled; or
- (ii) Staples Australia has announced to the ASX that on a certain date (being no more than 15 days from the date of the announcement) Staples will declare the offer free from all conditions that have not been fulfilled (Announcement); or
- (iii) Staples Australia will make the Announcement to the ASX that all the delivered Acceptance Instructions are validly implemented or processed (as appropriate).

## **The Special Dividend**

24. Corporate Express determined on 28 June 2010 that a special dividend of \$0.74 per share was payable in connection with the takeover offer (Special Dividend). The Special Dividend record date was 7 July 2010 and the payment date was 16 July 2010. Staples Australia agreed to provide funding for the Special Dividend. The Special Dividend became payable upon Staples Australia and its associates acquiring at least a 90% interest in Corporate Express and the Staples Offer being declared unconditional.

25. Pursuant to clause 12.6(c)(i) of the Bidder's Statement, where a Special Dividend is paid to eligible Corporate Express shareholders, Staples Australia will deduct from the consideration otherwise due to the Corporate Express shareholder the amount of the Special Dividend with no other adjustment for the value of any franking credits attributable to the Special Dividend.

26. Under clause 2.1(b) of the Implementation Agreement, Staples consented to the payment of the Special Dividend. Under clause 2.1(d) of the Implementation Agreement, Staples Australia was required to lend to Corporate Express on arm's length terms the funds in cash to enable Corporate Express to fund the Special Dividend.

## **Ruling**

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### **The Special Dividend**

27. The Special Dividend of \$0.74 per share paid to Corporate Express shareholders will constitute a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

**Assessability of the Special Dividend**

28. Corporate Express shareholders who received the fully franked Special Dividend and are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

**Gross up and tax offset**

29. Corporate Express shareholders who received the fully franked Special Dividend directly will:

- include the amount of the franking credit attached to the Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit,

under section 207-20 of the ITAA 1997, subject to being a qualified person.

**Qualified persons**

30. The payment of the Special Dividend as part of the takeover offer will constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

31. Accordingly, each Corporate Express shareholder will need to hold their Corporate Express shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person.

32. Corporate Express shareholders who accepted the takeover will no longer be considered to hold their Corporate Express shares 'at risk' for the purposes of former Division 1A as of 9 July 2010, which is the date the takeover offer was declared unconditional. Corporate Express shareholders who did not accept the bid but have their shares compulsorily acquired pursuant to the Corporations Act will no longer be considered to hold their Corporate Express shares 'at risk' when the shares are acquired by Staples Australia. Those Corporate Express shareholders who have held their Corporate Express shares 'at risk' for a continuous period of not less than 45 days during the period 24 May 2010 to 8 July 2010 will be qualified persons with respect to the fully franked Special Dividend.

**Refundable tax offset**

33. The franking credit allocated to the Special Dividend will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, provided the participating Corporate Express shareholders are not excluded by the operation of section 67-25 of the ITAA 1997.



## **Non-resident shareholders**

34. Corporate Express shareholders who received the fully franked Special Dividend and are non-residents (other than those carrying on business in Australia at or through a permanent establishment in Australia) will not be required to include the dividend as assessable income under subparagraph 44(1)(b)(ii) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

## **Capital gains tax**

### ***CGT event A1***

35. CGT event A1 happens when a Corporate Express shareholder disposes of each of their Corporate Express shares to Staples Australia (subsections 104-10(1) and (2) of the ITAA 1997).

36. Under subsection 104-10(3) of the ITAA 1997, where a Corporate Express shareholder accepted the Staples Offer, CGT event A1 happens at the later of:

- the time when the condition relating to FIRB is satisfied under the Staples Offer (that is, 23 April 2010); and
- the time when the Corporate Express shareholder entered into the contract to dispose of their Corporate Express shares to Staples Australia.

37. Where a Corporate Express shareholder does not accept the Staples Offer and subsequently had their shares compulsorily acquired by Staples Australia, CGT event A1 happens when Staples Australia becomes the owner of the relevant shares (subsection 104-10(6) of the ITAA 1997).

38. A Corporate Express shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Corporate Express share exceed its cost base. A Corporate Express shareholder will make a capital loss if those capital proceeds are less than the Corporate Express share's reduced cost base (subsection 104-10(4) of the ITAA 1997).

### ***Capital proceeds***

39. The capital proceeds received by a Corporate Express shareholder is the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

40. The capital proceeds for each Corporate Express share received by a Corporate Express shareholder who is entitled to receive the Special Dividend will be \$5.60.

41. The capital proceeds for each Corporate Express share received by a Corporate Express shareholder who is not entitled to receive the Special Dividend will be \$5.60 reduced by the amount of the Special Dividend.

***Anti-overlap provisions***

42. Any capital gain made by a Corporate Express shareholder when CGT event A1 happens can be reduced by the amount of the Special Dividend that is included in the Corporate Express shareholder's assessable income under subsection 44(1) of the ITAA 1936 (section 118-20 of the ITAA 1997).

***Foreign resident participating Corporate Express shareholders***

43. A Corporate Express shareholder that is a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens disregards under subsection 855-10(1) of the ITAA 1997 any capital gain or capital loss from CGT event A1 happening to the Corporate Express shares if the shares are not taxable Australian property as defined in section 855-15 of the ITAA 1997.

***Anti-avoidance provisions – imputation benefits***

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.

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.

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**Commissioner of Taxation**

28 July 2010

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## 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.*

### The Special Dividend

46. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders.

47. The payment of the Special Dividend is a distribution of money by Corporate Express to its shareholders.

48. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes from the definition of 'dividend' any:

moneys 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 (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...

49. The Special Dividend was sourced entirely from Corporate Express' retained earnings and Corporate Express did not debit the Special Dividend to its share capital account. Therefore, the exclusions in paragraph (d) will not apply and the Special Dividend will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

### Assessability of the Special Dividend

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

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

51. As the Special Dividend was paid to Corporate Express shareholders out of profits derived by Corporate Express, Corporate Express shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Special Dividend as assessable income.

**Gross up and tax offset**

52. 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 any other 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.

53. Therefore, subject to satisfying the qualified person rule, where the fully franked Special Dividend is received directly by a Corporate Express shareholder, the Corporate Express shareholder will:

- include the amount of the franking credit attached to the Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit.

54. Where the fully franked Special Dividend is received by a Corporate Express shareholder (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 or \*FHSA trust 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.

55. Therefore, subject to satisfying the qualified person rule, a Corporate Express shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1) of the ITAA 1997.

**Refundable tax offset**

56. Shareholders who are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997, in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless specifically excluded under section 67-25 of the ITAA 1997.

57. Pursuant to section 67-25 of the ITAA 1997, there are a range of taxpayers who are specifically excluded from the operation of the refundable tax offset rules. This range of excluded entities includes:

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A) of the ITAA 1997);
- a trustee of a trust who is liable to be assessed under section 98 or 99A of the ITAA 1936 (subsection 67-25(1B) of the ITAA 1997);
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the company on behalf of its shareholders (subsections 67-25(1C) and (1D) of the ITAA 1997); and
- foreign resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA) of the ITAA 1997).

58. Accordingly, holders of Corporate Express shares will be subject to the refundable tax offset rules unless they are listed as specifically excluded entities under section 67-25 of the ITAA 1997. Generally, corporate tax entities (including companies, corporate limited partnerships, corporate unit trusts, and public trading trusts) will be excluded from the operation of the refundable tax offset rules.

**Non-resident shareholders**

59. Subparagraph 44(1)(b)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder in a company:

dividends (other than non-share dividends) paid to the shareholder by the company to the extent to which they are paid out of profits derived by it from sources in Australia.

60. Subsection 128B(1) of the ITAA 1936 imposes Australian withholding tax on income that:

- (a) is derived, on or after 1 January 1968, by a non-resident; and
- (b) consists of a dividend paid by a company that is a resident.

61. However, subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes from subsection 128B(1) of the ITAA 1936 income derived by a non-resident that consists of the franked part of a dividend. As the Special Dividend is fully franked, it will not be subject to Australian withholding tax when derived by non-resident Corporate Express shareholders.

62. Section 128D of the ITAA 1936 states that:

Income other than income to which section 128B applies by virtue of subsection (2A), (2C) or (9C) of that section upon which withholding tax is payable, or upon which withholding tax would, but for paragraph 128B(3)(ga) or (jb), section 128F, section 128FA or section 128GB, be payable, is not assessable income and is not exempt income of a person.

63. As the Special Dividend is income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936 it will not be assessable income and will not be exempt income of non-resident Corporate Express shareholders pursuant to section 128D of the ITAA 1936.

64. Accordingly, Corporate Express shareholders who received the fully franked Special Dividend and are non-residents (other than those carrying on business in Australia at or through a permanent establishment in Australia) will not be required to include the dividend as assessable income under subparagraph 44(1)(b)(ii) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

### **Qualified persons**

65. Former Division 1A contains the measures known as the holding period rule and the related payment rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

66. The test of what constitutes a 'qualified person' is provided in former section 160APHO 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 in relation to the dividend.

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

### **Related payment rule**

68. In order to determine which is the relevant qualification period, it is necessary to determine whether, under the present proposal, the Corporate Express shareholders are considered to be under an obligation to make a related payment.

69. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A. 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.

70. 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 person:

- (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 the 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 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; 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.

71. 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 dividend or distribution.

72. In the current circumstances, it is considered that an integral part of the Offer is the payment of the Special Dividend of \$0.74 per share. The payment of the Special Dividend was conditional upon Staples acquiring at least a 90% interest in Corporate Express and the Staples Offer being declared unconditional. As such, the Special Dividend was conditional upon the Offer proceeding, tying the payment of the Special Dividend to the disposal of the Corporate Express shares by participating Corporate Express shareholders to Staples.

73. The payment of the Special Dividend is an integral part of the total amount to be paid to Corporate Express shareholders in relation to the disposal of the Corporate Express shares to Staples pursuant to the Offer. In these circumstances, in determining whether a Corporate Express shareholder is taken to have made or be likely to make a related payment in respect of the Special Dividend, it is considered that the circumstances surrounding the payment of the Special Dividend would constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936. As such, it can be concluded that a Corporate Express shareholder will be taken to have made a related payment in respect of the Special Dividend.

74. As the Corporate Express shareholders are taken, for the purposes of former Division 1A, to have made a related payment in respect of the Special Dividend, the relevant holding period is thus the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.



75. 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 45<sup>th</sup> day before, and ending on the 45<sup>th</sup> day after, the day on which the shares or interest becomes ex dividend...

76. 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.

77. Corporate Express determined eligibility for the Special Dividend on the Special Dividend Record Date of 7 July 2010. This is the last day on which acquisition by a person of a Corporate Express share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 8 July 2010.

78. The secondary qualification period thus runs from 45 days before the ex-dividend date of 8 July 2010 as determined above and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 24 May 2010 to 22 August 2010. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Corporate Express shares are to be excluded. This would mean that the secondary qualification period would run from 24 May 2010 until the date that Corporate Express shareholders are no longer at risk for the purposes of former Division 1A.

79. Corporate Express shareholders who accepted the takeover offer will no longer be considered to hold their Corporate Express shares 'at risk' for the purposes of former Division 1A as of 9 July 2010, which is the date the takeover offer was declared unconditional. Corporate Express shareholders who do not accept the bid but have their shares compulsorily acquired pursuant to the Corporations Act will no longer be considered to hold their Corporate Express shares 'at risk' when the shares are acquired by Staples Australia.

80. Accordingly, for those Corporate Express shareholders who accepted the offer the secondary qualification period would run from 24 May 2010 until 8 July 2010 (inclusive). For those Corporate Express shareholders who have their shares compulsorily acquired, the secondary qualification period would run from 24 May until the earlier of 45 days after the ex-dividend date (22 August 2010) and the date Staples Australia completes the compulsory acquisition procedures in accordance with the Corporations Act. Corporate Express shareholders who received the Special Dividend would need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A. Further, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, the date of acquisition or disposal are not included in the relevant 45 day period. This would have the effect in the present circumstances, for example, that the 45 day qualification period could not include 24 May 2010 if this was the date of acquisition of Corporate Express shares.

### **Capital gains tax**

#### **CGT event A1**

81. CGT event A1 in section 104-10 of the ITAA 1997 will happen if there is a change in the ownership of an asset from one entity to another. This event happens when a contract to dispose of the asset is entered into, or if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

82. The Staples Offer was subject to FIRB approval being granted. Under clause 12.9(a) of the Bidder's Statement this is a condition precedent to the formation of the contract.

83. Where a Corporate Express shareholder accepted the Staples Offer, CGT event A1 happens at the later of:

- the time when the condition relating to FIRB is satisfied under the Staples Offer (that is, 23 April 2010); and
- the time when the Corporate Express shareholder entered into the contract to dispose of their Corporate Express shares to Staples Australia.

84. Where a Corporate Express shareholder did not accept the Staples Offer, but has their shares compulsorily acquired by Staples Australia, CGT event A1 happens when Staples Australia becomes the owner of those Corporate Express shares (subsection 104-10(6) of the ITAA 1997).

85. A Corporate Express shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Corporate Express share exceed its cost base. A Corporate Express shareholder will make a capital loss if those capital proceeds are less than the Corporate Express share's reduced cost base (subsection 104-10(4) of the ITAA 1997).

## ***Capital proceeds***

86. The capital proceeds received by a Corporate Express shareholder is the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

87. A Corporate Express shareholder that accepts the Staples Offer is entitled to receive the offer consideration of \$5.60 cash for each share in Corporate Express. A Corporate Express shareholder that does not accept the Staples Offer and had their shares compulsorily acquired by Staples Australia will be paid the same offer consideration at the conclusion of the compulsory acquisition process.

88. A Special Dividend of \$0.74 a share has been determined and became payable upon the Staples Offer being declared unconditional. The offer consideration of \$5.60 will be reduced by the amount of this Special Dividend.

89. The phrase 'in respect of the event happening' in subsection 116-20(1) of the ITAA 1997 requires that the relationship between the event and the receipt of the money, or entitlement to receive the money, must be more than coincidental. An amount is not 'capital proceeds' of an event merely because it is received in association with the event.

90. In this case, the payment of the Special Dividend has not occurred independently of the Staples Offer. The Directors of Corporate Express made a determination, before the Staples Offer became unconditional, that a Special Dividend would be payable. However, the Special Dividend was not payable unless and until Staples Australia received acceptances that gave Staples a relevant interest in at least 90% of all shares in the capital of Corporate Express and the Staples Offer was declared unconditional.

91. The offer consideration of \$5.60 was reduced by the amount of the Special Dividend in accordance with an adjustment clause in the Bidder's Statement. Pursuant to the Implementation Agreement, Staples consented to the payment of the Special Dividend and furthermore, was required to lend to Corporate Express the funds to enable Corporate Express to pay the Special Dividend.

92. In these circumstances, it is considered that the Special Dividend forms part of the capital proceeds which a Corporate Express shareholder will receive in respect of CGT event A1 happening.

## ***Anti-overlap provisions***

93. Any capital gain made by a Corporate Express shareholder from CGT event A1 can be reduced by the amount of the Special Dividend that is included in the Corporate Express shareholder's assessable income under subsection 44(1) of the ITAA 1936 (section 118-20 of the ITAA 1997).

94. The capital gain made by the Corporate Express shareholder will not be reduced by the amount of the franking credit that is included in their assessable income (paragraph 118-20(1B)(b) of the ITAA 1997).

### ***Non-resident shareholders***

95. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

96. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property
Item 2	an indirect Australian real property interest not covered by item 5
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment (within the meaning of section 23AH of the ITAA 1936) in Australia and which is not covered by item 1, 2 or 5
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3
Item 5	a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident)

97. Therefore, a Corporate Express shareholder that is a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens, cannot disregard under subsection 855-10(1) of the ITAA 1997 a capital gain or capital loss from CGT event A1 if:

- their Corporate Express share is an indirect Australian real property interest that is not covered by item 5 of the table in section 855-15 of the ITAA 1997 (item 2 of the table in section 855-15); or
- their Corporate Express share has been used at any time by the foreign resident, or the trustee of a foreign resident trust for CGT purposes, in carrying on a business through a permanent establishment in Australia and is not covered by items 2 or 5 of the table in section 855-15 (item 3 of the table in section 855-15); or
- their Corporate Express share is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident – item 5 of the table in section 855-15).

## The anti-avoidance provisions - imputation benefits

### Section 204-30

98. 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)); and
- (b) the member would \*derive a \*greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); 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)).

99. Relevantly, if section 204-30 of the ITAA 1997 applies, the Commissioner is vested with discretion under subsection 204-30(3) to make a determination in writing either:

- (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)); or
- (b) that no \*imputation benefit is to arise in respect of a distribution that is made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

100. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

101. Pursuant to the payment of the Special Dividend, all Corporate Express shareholders will receive an imputation benefit as a result of the dividend; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a) of the ITAA 1997) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e) of the ITAA 1997). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders (subsection 204-30(8) of the ITAA 1997).

102. However, the Special Dividend was paid to all Corporate Express Shareholders, including Staples (who currently owns its majority interest through a non-resident wholly owned subsidiary) and will be fully franked with Australian franking credits.

103. Accordingly, it cannot be argued that Corporate Express directed the flow of distributions in such a manner as to stream the imputation benefits such that one class of members derived a greater benefit from the franking credits attached to the Special Dividend, while the other members received lesser or no imputation benefits.

104. As the conditions in subsection 204-30(1) of the ITAA 1997 for the provision to apply will not be met, 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.

### **Section 177EA**

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

106. 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 distribution paid to the relevant taxpayer (paragraph 177EA(5)(a)) or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b)).

107. Corporate Express is a corporate tax entity. The disposal of the ordinary shares in Corporate Express pursuant to the proposal is a scheme for the disposition of membership interests. The fully franked Special Dividend is a frankable distribution that was paid to Corporate Express shareholders who could, therefore reasonably be expected to receive imputation benefits.

108. In the present case, the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of Corporate Express or its shareholders, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the proposal.

109. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the arrangement 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.

110. The relevant circumstances of the arrangement indicate that there is no requisite purpose of conferring an imputation benefit under the arrangement. The Special Dividend was fully franked, which is a continuation of Corporate Express' dividend policy to pay fully franked dividends. Corporate Express has only ordinary shares on issue and the Special Dividend will be paid to all Corporate Express shareholders in proportion to their shareholding (including the non-resident majority shareholder) and it has been calculated by reference to existing retained profits of Corporate Express. The amount of the Special Dividend allows Corporate Express shareholders to share in the accumulated profits of Corporate Express.

111. Having regard to the relevant circumstances of the scheme, the Commissioner has come to the view that the requisite purpose is not present and accordingly 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 dividends.

## **Appendix 2 – Detailed contents list**

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

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Subject references:*

- arrangement
- CGT capital proceeds
- CGT event A1 - disposal of a CGT asset
- dividend
- distributions
- franking credits
- frankable dividend
- imputation benefits
- imputation system
- ordinary shares
- qualified person
- takeovers

### *Legislative references:*

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