


CR 2011/34 - Income tax: off market takeover of Ammtec Limited

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Class Ruling

Income tax: off market takeover of Ammtec Limited

Contents	Para
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LEGALLY BINDING SECTION:	
-------------------------------------	--

What this Ruling is about	1
----------------------------------	----------

Date of effect	8
-----------------------	----------

Scheme	9
---------------	----------

Ruling	36
---------------	-----------

NOT LEGALLY BINDING SECTION:	
---	--

Appendix 1:	
--------------------	--

Explanation	63
--------------------	-----------

Appendix 2:	
--------------------	--

Detailed contents list	126
-------------------------------	------------

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 160APHM of the ITAA 1936;
- former section 160APHN of the ITAA 1936;
- former section 160APHO of the ITAA 1936;
- Division 1A of the former Part IIIA of the ITAA 1936;
- section 177EA of the ITAA 1936;

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-30 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- Subdivision 115-C of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 855-10 of the ITAA 1997; and
- section 855-15 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are shareholders of Ammtec Limited (Ammtec) who held Ammtec ordinary shares on capital account and:

- received the Final Dividend and Special Dividend; and
- accepted the Revised Cash Offer or the Revised Share Offer made by Australian Laboratory Services Pty Limited (ALS) to acquire their Ammtec shares or had their shares compulsorily acquired pursuant to Part 6A.1 of the *Corporations Act 2001* (Corporations Act);

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 35 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

8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 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

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 Ernst & Young dated 13 October 2010;
- Ammtec Annual Report for the year ended 30 June 2010;
- Bidder's Statement lodged with the Australian Securities and Investments Commission (ASIC) on 5 July 2010;
- Target's Statement lodged with ASIC on 23 July 2010;
- Conditional Revised Offer dated 13 September 2010;

- Fourth Supplementary Target's Statement lodged with ASIC on 17 September 2010;
- Sixth Supplementary Bidder's Statement lodged with ASIC on 14 October 2010;
- Bidder's notice declaring the Revised Offer unconditional dated 5 November 2010;
- Bidder's extension of Revised Offer to 12 November 2010 dated 29 October 2010; and
- further information provided by the applicant dated 16 November 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.

Ammtec

10. Ammtec is an Australian resident company listed for quotation on the Australian Securities Exchange (ASX).

11. Ammtec is a holding company that invests in two unit trusts, the Ammtec Unit Trust and the Marc Unit Trust, which are the operating entities.

12. Ammtec's principal business activities are the provision of metallurgical and minerals testing and related services to the mining industry.

13. As at 16 September 2010, Ammtec had 36,531,360 shares and 3,673,284 options on issue.

CPB

14. Campbell Brothers Limited (CPB) is an Australian resident public company listed for quotation on the ASX.

15. CPB offers analytical laboratory and testing services internationally as well as commercial chemical and cleaning solutions throughout Australia and the Pacific and the distribution of hospitality wares throughout Australia and New Zealand.

ALS

16. ALS is a wholly owned Australian resident subsidiary company of CPB.

17. ALS is a global diversified testing services organisation providing analytical laboratory and technical services to international minerals, coal, environmental, tribology and industrial markets. Other markets include food, pharmaceutical, microbiology, electronics, ecotoxicology, occupational health and air quality.

The ALS Offer

18. On 18 May 2010, CPB announced (on behalf of its wholly owned subsidiary, ALS), its intention to make an offer to acquire all of the shares in Ammtec through its wholly owned subsidiary ALS by way of an off market takeover bid.

19. Following a number of announcements to revise the original offer, on 13 September 2010, Ammtec and ALS jointly announced a Revised Offer which would provide the following consideration (the Revised Offer consideration) to Ammtec shareholders for each of their Ammtec shares:

- a cash payment of \$3.85 (Revised Cash Offer) per Ammtec share; or
- four CPB shares in exchange for every 33 Ammtec shares (Revised Share Offer).

20. Ammtec declared a Final Dividend on 21 July 2010 of \$0.11 per share.

21. Ammtec announced a fully franked Special Dividend on 13 September 2010 of \$0.10 per share. At the time of the announcement, the Special Dividend was contingent on ALS declaring the Revised Offer unconditional.

22. On 16 September 2010, ALS waived the condition above and the parties announced the Special Dividend would no longer be conditional upon ALS declaring its offer unconditional, but would be paid regardless of the status of the Revised Offer. Ammtec advises that, for shareholders that accepted the offer, there were a series of rolling acquisitions.

23. Under section 661A of the Corporations Act, ALS was entitled to compulsorily acquire any Ammtec shares for which it had not received acceptances on the same terms as the Revised Offer if during, or at the end of, the Revised Offer period ALS had a relevant interest in at least 90% by number of the Ammtec shares.

24. On 29 October 2010, ALS declared the Revised Offer unconditional and announced the extension of the Revised Offer period until 12 November 2010.

25. On 15 November 2010, ALS announced acceptances in relation to the Revised Offer totalling 97.34% of the outstanding shares of Ammtec. On 10 November 2010, ALS commenced the compulsory acquisition process in accordance with the Corporations Act to acquire the remaining Ammtec securities. Ammtec advises that the compulsory acquisition process was completed on 21 December 2010.

The Final Dividend and the Special Dividend

26. The Final Dividend of \$0.11 per Ammtec share is fully franked. The Special Dividend of \$0.10 per Ammtec share is fully franked.

27. The Record date for both the Final Dividend and the Special Dividend was 24 September 2010. Any Ammtec shareholder who held their Ammtec shares on the Record Date was eligible to receive the Final Dividend and the Special Dividend.

28. The Final Dividend and the Special Dividend were paid on 29 October 2010.

29. The Final Dividend and Special Dividend reflected a distribution of profits that had accrued prior to the takeover bid being implemented. The Final Dividend and Special Dividend were debited against Ammtec's retained profits.

30. In addition, Ammtec has acknowledged that the balance in its existing Retained Earnings Account would be sufficient for the distribution of the Final Dividend and Special Dividend.

31. As at 30 June 2010, Ammtec had a franking account balance of \$8,052,413.

Foreign shareholders

32. Certain foreign shareholders (ineligible foreign shareholders) are not entitled to receive CPB shares for their Ammtec shares pursuant to the Revised Offer. The CPB shares that would otherwise have been issued to those shareholders will be issued to, and held by, a nominee approved by ASIC. The nominee will then sell the CPB shares on the ASX and pay the net cash proceeds to the ineligible foreign shareholders.

Other matters

33. There were no 'significant stakeholders' or 'common stakeholders' in relation to the takeover within the meaning of those expressions in section 124-783.

34. For the purposes of subsections 124-780(4) and 124-780(5), just before the relevant takeover started, no original interest holder in Ammtec was a member of a linked group which included Ammtec and CPB.

35. All of the ordinary shares in Ammtec were acquired on or after 20 September 1985.

Ruling

The Final Dividend and the Special Dividend

36. The Final Dividend of \$0.11 per share and the Special Dividend of \$0.10 per share paid to an Ammtec shareholder (the Dividends) will constitute a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Final Dividend and the Special Dividend

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

Gross up and tax offset

38. Ammtec shareholders who received the fully franked Final Dividend and Special Dividend directly will:

- include the amount of the franking credit attached to the Final Dividend and 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, subject to being a qualified person.

Qualified persons

39. The payment of the Final Dividend and Special Dividend as part of the takeover offer will not constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

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

41. Each Ammtec shareholder who accepted the Revised offer and who has not previously satisfied the primary qualification period, for the purposes of Division 1A of the former Part IIIA of the ITAA 1936, will be considered to have satisfied the holding period rule under former section 160APHO of the ITAA 1936 and therefore be a qualified person in relation to the Dividends if:

- (a) the Ammtec shareholder acquired the Ammtec share or interest in the share on or before 13 September 2010; and
- (b) during the period when the Ammtec share or interest in the share was held, the Ammtec shareholder did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) for a continuous period of at least 45 days.

42. Ammtec shareholders who accepted the Revised Offer will no longer be considered to hold their Ammtec shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 as of 29 October 2010, which is the day the takeover offer was declared unconditional. Ammtec shareholders who did not accept the bid but had their shares compulsorily acquired pursuant to the Corporations Act will no longer be considered to hold their Ammtec shares 'at risk' when the shares were acquired by ALS.

Non-resident shareholders

43. Ammtec shareholders who received the fully franked Dividends 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 Dividends 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

44. CGT event A1 happens when an Ammtec shareholder disposes of each of their Ammtec shares to ALS (subsections 104-10(1) and (2)).

45. Under subsection 104-10(3), where an Ammtec shareholder accepted the ALS Revised Offer, CGT event A1 happens on the day the Ammtec shareholder entered into the contract to dispose of their Ammtec shares to ALS.

46. Where an Ammtec shareholder did not accept the ALS Revised Offer and subsequently had their shares compulsorily acquired by ALS, CGT event A1 happens when ALS becomes the owner of the relevant shares (subsection 104-10(6)).

Capital gain or capital loss

47. An Ammtec shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an Ammtec share exceeds its cost base. An Ammtec shareholder will make a capital loss if those capital proceeds are less than the Ammtec share's reduced cost base (subsection 104-10(4)).

Capital proceeds

48. The capital proceeds for each Ammtec share received by an Ammtec shareholder who elects to receive the Revised Cash Offer is \$3.85 per Ammtec share (subsection 116-20(1)).

49. The capital proceeds for each Ammtec share received by an Ammtec shareholder who elects to receive the Revised Share Offer is the sum of that part of the total market value of CPB shares received (worked out as at the time that CGT event A1 happened to the Ammtec shareholder) as is reasonably attributable to the disposal of the Ammtec share (subsections 116-20(1)).

50. The Ammtec Final and Special Dividends do not form part of the capital proceeds for CGT event A1 happening to the Ammtec shares.

Foreign resident participating Ammtec shareholders

51. An Ammtec shareholder who 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) any capital gain or capital loss made from CGT event A1 happening to the Ammtec shares if the shares are not taxable Australian property as defined in section 855-15.

52. If their Ammtec share is taxable Australian property, a foreign resident shareholder is not eligible to choose roll-over if the replacement CPB share is not taxable Australian property (subsection 124-795(1)).

Availability of scrip for scrip roll-over if a capital gain is made

53. Subject to the qualification in paragraph 54 of this Ruling, an Ammtec shareholder who made a capital gain from the disposal of their Ammtec shares to ALS under the Revised Share Offer is eligible to choose scrip for scrip roll-over (section 124-780 and subsection 124-785(1)).

54. Scrip for scrip roll-over cannot be chosen if any capital gain an Ammtec shareholder made from the replacement CPB share would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

55. Where an Ammtec shareholder elected to receive the Revised Share Offer the only capital proceeds they received for their Ammtec shares were the CPB shares. Therefore, if an Ammtec shareholder chose scrip for scrip roll-over, the capital gain they will make upon the disposal of an Ammtec share to ALS is disregarded completely (subsection 124-785(1)).

Discount capital gain

56. Ammtec shareholders who received CPB shares and made capital gains that are not disregarded (that is, capital gains for which scrip for scrip roll-over is not chosen or cannot be chosen) are eligible to treat any resulting capital gain as a 'discount capital gain' provided that:

- the Ammtec shareholder is an individual, complying superannuation entity or, subject to the rules in Subdivision 115-C, a trust (section 115-10);
- the capital gain has been calculated using a cost base that has been calculated without reference to indexation at any time; and
- the Ammtec shares had been held for at least 12 months before the CGT event.

Cost base of CPB shares***Scrip for scrip roll-over is not chosen***

57. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each CPB share is equal to the market value of the Ammtec shares (and parts thereof) given in exchange for the CPB share (subsections 110-25(2) and 110-55(2)). The market value is worked out as at the time of the acquisition of the CPB shares (subsection 110-25(2)).

Scrip for scrip roll-over is chosen

58. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each new CPB share is equal to the sum of the cost bases of the Ammtec shares (and parts thereof) exchanged for the relevant CPB shares (subsections 124-785(2) and 124-785(4)).

Acquisition date of CPB shares

59. Ammtec shareholders acquired their CPB shares if they accepted the Revised Offer and elected to receive the Revised Share Offer to dispose of their Ammtec shares, on the date when they entered into the contract.

60. However, for the purposes of applying the CGT discount to any later disposal of their CPB shares, Ammtec shareholders who choose scrip for scrip roll-over under the Revised Offer are taken to have acquired their CPB shares when they acquired the corresponding Ammtec shares (item 2 in the table in subsection 115-30(1)).

The anti-avoidance provisions – imputation benefits

61. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Dividends.

62. 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.

Commissioner of Taxation30 March 2011

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.

The Final and Special Dividends

63. 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.

64. The payment of the Final Dividend and Special Dividend is a distribution of money by Ammtec to its shareholders.

65. 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...

66. The Final Dividend and Special Dividend were sourced entirely from Ammtec's retained earnings and Ammtec did not debit these dividends to its share capital account. In addition, Ammtec acknowledged that the balance in its existing Retained Earnings Account was sufficient to cover both distributions. Therefore, the exclusions in paragraph (d) will not apply and the Final Dividend and Special Dividend will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Dividends

67. 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.

68. As the Final Dividend and Special Dividend were paid to Ammtec shareholders out of profits derived by Ammtec, Ammtec shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Final Dividend and Special Dividend as assessable income.

Non-resident shareholders

69. 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.

70. 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.

71. 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 Final Dividend and Special Dividend are fully franked, they will not be subject to Australian withholding tax when derived by non-resident Ammtec shareholders.

72. 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.

73. As the Final Dividend and Special Dividend are 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 Ammtec shareholders pursuant to section 128D of the ITAA 1936.

74. Accordingly, Ammtec shareholders who received the fully franked Final Dividend and 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).

Gross up and tax offset

75. Section 207-20 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.

76. Therefore, subject to satisfying the qualified person rule, where the fully franked Final Dividend and Special Dividend are received directly by an Ammtec shareholder, the Ammtec shareholder will:

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

77. Where the fully franked Final Dividend and Special Dividend are received by an Ammtec 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) 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.

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

Qualified persons

79. Pursuant to paragraph 207-145(1)(a), an entity must be a 'qualified person' in relation to a dividend in order to be entitled to a tax offset in respect of the franking credit allocated to the dividend.

80. Former Division 1A of the former Part IIIAA of the ITAA 1936 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.

81. 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.

82. Former subsection 160APHO(2) of the ITAA 1936, referred to in paragraph 81 of this Ruling, 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

83. In order to determine which qualification period is relevant, it is necessary to determine whether, under the present proposal, the Ammtec shareholders are considered to have made a related payment in respect of the Final Dividend and Special Dividend.

84. 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 of the former Part IIIAA of the ITAA 1936. Former subsection 160APHN(2) of the ITAA 1936 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.

85. 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.

86. 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.

87. Where a shareholder is not taken to pass the benefit of the dividend to another person in the circumstances set out above, the shareholder will need to satisfy the holding period requirement in respect of the primary qualification period in order to be entitled to the franking credit on the dividend. However, where a shareholder is taken to pass the benefit of the dividend to another person in the circumstances set out above, the shareholder will need to satisfy the holding period requirement in respect of the secondary qualification period in order to be entitled to a tax offset in respect of the franking credit allocated to the dividend.

88. Having regard to the relevant circumstances of the takeover, it cannot be said that the takeover documents indicate that an Ammtec shareholder does anything that has the effect of passing the benefit of the dividend to another person in respect of the Final Dividend and Special Dividend. The Final Dividend and Special Dividend were paid regardless of whether or not the takeover proceeded, nor did the payment of the Final Dividend and Special Dividend alter the consideration available under the Revised Offer. As the Ammtec shareholders are not taken, for the purposes of the former Division 1A of the ITAA 1936, to have made a related payment in respect of the Final Dividend and Special Dividend as a result of the takeover, and provided no individual circumstances exist which would result in the related payment rule applying, the relevant holding period for the Final Dividend and Special Dividend is the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

Holding period requirement

89. The holding period requirement requires a shareholder to hold the shares, on which a dividend is paid, at risk for a continuous period of at least 45 days during the relevant qualification period.

90. The primary qualification period as provided in the former section 160APHD of the ITAA 1936 begins from the day after the date of acquisition of the share and ends on the 45th day after the day on which the share becomes ex-dividend. In determining whether a shareholder has satisfied the holding period rule, the following days are not counted:

- the day on which the Ammtec shares were acquired;
and
- any days during which there is a materially diminished risk in relation to the share.

91. 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.

92. Ammtec determined eligibility for the Final Dividend and Special Dividend on the Record Date of 24 September 2010. This was the last day on which acquisition by a person of an Ammtec share entitled the person to receive the Final Dividend and Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 25 September 2010.

93. The primary qualification period thus runs from the day after acquisition of an Ammtec share and ends 45 days after the ex-dividend date of 25 September 2010. In practical terms, this means the primary qualification period runs from the day after the date of acquisition until 9 November 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 Ammtec shares are to be excluded. This would mean that the primary qualification period would run from the day after the date of acquisition until the date that Ammtec shareholders are no longer at risk for the purposes of former Division 1A of the ITAA 1936.

94. Ammtec shareholders who accepted the Revised Offer will no longer be considered to hold their Ammtec shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 as of 29 October 2010, which is the day the Revised Offer was declared unconditional. Ammtec shareholders who did not accept the Revised Offer but had their shares compulsorily acquired pursuant to the Corporations Act will no longer be considered to hold their Ammtec shares 'at risk' when the shares are acquired by ALS. However, as compulsory acquisition occurred more than 45 days after the ex-dividend date, the primary qualification period would not be altered.

95. In these circumstances, there are 45 clear days between 13 September 2010 and 29 October 2010. As such, any Ammtec shareholder who accepted the Revised Offer and who had acquired their Ammtec shares on or before 13 September 2010, and who has not previously satisfied the holding period requirement, will be capable of being a qualified person in respect of the Final Dividend and Special Dividend provided they held their Ammtec shares at risk for at least 45 days during the relevant period. For those Ammtec shareholders who have their shares compulsorily acquired, there are 45 clear days between 25 September 2010 and 9 November 2010. If such shareholders had not previously satisfied the holding period requirement, they would need to have acquired their Ammtec shares on or before 25 September 2010 and hold them at risk for 45 days from the day after the date of acquisition until 9 November 2010 for the purposes of former Division 1A of the ITAA 1936.

Capital gains tax***CGT event A1***

96. CGT event A1 (section 104-10) happens 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)).

97. Where an Ammtec shareholder accepted the ALS Revised Offer and elected to receive CPB shares under the Revised Share Offer, CGT event A1 happened when the Ammtec shareholder entered into the contract to dispose of their Ammtec shares to ALS.

98. Where an Ammtec shareholder did not accept the ALS Revised Offer, but had their shares compulsorily acquired by ALS, CGT event A1 happens when ALS becomes the owner of those Ammtec shares (subsection 104-10(6)).

99. The time when CGT event A1 happens determines the income year in which any capital gain or loss is made and whether the CGT discount applies to any capital gain.

100. An Ammtec shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an Ammtec share exceed its cost base. An Ammtec shareholder will make a capital loss if those capital proceeds are less than the Ammtec share's reduced cost base (subsection 104-10(4)).

Capital Proceeds

101. The capital proceeds received by an Ammtec shareholder for CGT event A1 happening to their shares is the money received or entitled to be received or the market value of any other property received or entitled to be received in respect of the disposal of the Ammtec share (subsection 116-20(1)).

102. An Ammtec shareholder who accepted the ALS Revised Offer and elected to receive the Revised Cash Offer is entitled to receive the Revised Cash Offer consideration of \$3.85 cash for each share in Ammtec. An Ammtec shareholder who does not accept the ALS Revised Offer and has their shares compulsorily acquired by ALS will be paid the same Revised Cash Offer consideration at the conclusion of the compulsory acquisition process.

103. An Ammtec shareholder that accepted the ALS Revised Offer and elected to receive the Revised Share Offer is entitled to receive the Revised Share Offer consideration of the market value (worked out as at the time of CGT event A1) of CPB shares received or entitled to be received by the Ammtec shareholder in respect of CGT event A1 happening to their Ammtec shares.

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

105. The Final and Special Dividends were paid to Ammtec shareholders who held Ammtec shares on the Dividends Record date of 24 September 2010 regardless of whether or not the takeover proceeded. They were paid independent of the ALS revised offer and were not funded by ALS but rather from the retained earnings of Ammtec. Therefore the Dividends were not received in respect of the disposal of the Ammtec shares under the takeover and are therefore not capital proceeds for the disposal of Ammtec shares.

Non-resident shareholders

106. Under subsection 855-10(1), 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'.

107. The term 'taxable Australian property' is defined in the table in section 855-15. 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) (choosing to disregard a gain or loss on ceasing to be an Australian resident)

108. Therefore, an Ammtec shareholder who is a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happened, cannot disregard under subsection 855-10(1) a capital gain or capital loss from CGT event A1 if:

- their Ammtec share is an indirect Australian real property interest that is not covered by item 5 of the table in section 855-15 (item 2 of the table in section 855-15); or

- their Ammtec 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 Ammtec share is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident – item 5 of the table in section 855-15).

Scrip for scrip roll-over

109. The tax consequences and relevant legislative provisions that arise concerning the takeover that is the subject of this Ruling are outlined in the Ruling part of this document.

110. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. It enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

111. Section 124-780 contains a number of conditions that must be satisfied before scrip for scrip roll-over is available in respect of an arrangement. The main conditions and exceptions that are relevant to the circumstances of the Ammtec scheme are:

- (a) shares are exchanged for shares in another company;
- (b) the exchange occurs as part of a single arrangement;
- (c) conditions for roll-over are satisfied;
- (d) further conditions are not applicable or are satisfied; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable [subsection 124-780(1)].

112. Under the Revised Offer all of the conditions for roll-over under Subdivision 124-M are satisfied. No further explanation of the application of those tax laws beyond that contained in the Ruling part of this document is necessary.

The anti-avoidance provisions – imputation benefits

Section 204-30

113. Section 204-30 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)).

114. Relevantly, if section 204-30 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)).

115. For section 204-30 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.

116. Under the takeover for the payment of the Ammtec Final Dividend and Special Dividend, all Ammtec shareholders received an imputation benefit as a result of the Final Dividend and Special Dividend; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a)) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders.

117. However, the Final Dividend and Special Dividend were paid to all Ammtec shareholders on the Record Date and were fully franked with Australian franking credits. Accordingly, it cannot be argued that Ammtec directed the flow of distributions in such a manner as to stream the imputation benefits such that one class of members will derive a greater benefit from the franking credits attached to the Final Dividend and Special Dividend, while the other members will receive lesser or no imputation benefits.

118. As the conditions in subsection 204-30(1) for the provision to apply will not be met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Final Dividend and Special Dividend.

Section 177EA

119. 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.

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

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

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

123. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the takeover 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.

124. The relevant circumstances of the takeover indicate that there is no requisite purpose of conferring an imputation benefit under the takeover. The Dividends were fully franked, which is a continuation of Ammtec's dividend policy to pay fully franked dividends. Ammtec has only ordinary shares on issue and the Dividends will be paid to all Ammtec shareholders in proportion to their shareholding and it has been calculated by reference to existing retained profits of Ammtec. The amount of the Dividends allows Ammtec shareholders to share in the accumulated profits of Ammtec.

125. Having regard to the relevant circumstances of the takeover, 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

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	8
Scheme	9
Ammtec	10
CPB	14
ALS	16
The ALS Offer	18
The Final Dividend and the Special Dividend	26
Foreign shareholders	32
Other matters	33
Ruling	36
The Final Dividend and the Special Dividend	36
<i>Assessability of the Final Dividend and the Special Dividend</i>	37
<i>Gross up and tax offset</i>	38
<i>Qualified persons</i>	39
<i>Non-resident shareholders</i>	43
Capital gains tax	44
<i>CGT event A1</i>	44
<i>Capital gain or capital loss</i>	47
<i>Capital proceeds</i>	48
<i>Foreign resident participating Ammtec shareholders</i>	51
Availability of scrip for scrip roll-over if a capital gain is made	53
<i>Discount capital gain</i>	56
Cost base of CPB shares	57
<i>Scrip for scrip roll-over is not chosen</i>	57
<i>Scrip for scrip roll-over is chosen</i>	58
Acquisition date of CPB shares	59
The anti-avoidance provisions – imputation benefits	61

Appendix 1 – Explanation	63
The Final and Special Dividends	63
Assessability of the Dividends	67
Non-resident shareholders	69
Gross up and tax offset	75
Qualified persons	79
Related payment rule	83
Holding period requirement	89
Capital gains tax	96
<i>CGT event A1</i>	96
<i>Capital Proceeds</i>	101
<i>Non-resident shareholders</i>	106
<i>Scrip for scrip roll-over</i>	109
The anti-avoidance provisions – imputation benefits	113
<i>Section 204-30</i>	113
<i>Section 177EA</i>	119
Appendix 2 – Detailed contents list	126

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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
- frankable dividends
- franking credits
- holding period rule
- imputation system
- ordinary shares
- qualified persons
- related payment rule
- scrip for scrip roll-over

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CR 2011/34

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NO: 1-2EYM6HM
ISSN: 1445-2014
ATOlaw topic: Income Tax ~~ Entity specific matters ~~ off market takeovers