

CR 2011/61 - Income tax: scrip for scrip: exchange of shares in Goldman Sachs & Partners Australia Group Holdings Pty Ltd

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Class Ruling

Income tax: scrip for scrip: exchange of shares in Goldman Sachs & Partners Australia Group Holdings Pty Ltd

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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 considered in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 44(1) of the ITAA 1936;
- Division 1A of former Part IIIA of the ITAA 1936;
- section 177E of the ITAA 1936;
- section 177EA of the ITAA 1936;
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997;
- section 109-10 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;
- section 115-30 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 116-50 of the ITAA 1997;
- section 124-780 of the ITAA 1997;
- section 124-785 of the ITAA 1997;
- section 124-790 of the ITAA 1997;
- section 124-795 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997; and
- section 207-145 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Goldman Sachs & Partners Australia Group Holdings Pty Ltd (GSPA) who hold P Class Shares in GSPA and:

- (a) are residents of Australia within the meaning of the term 'resident of Australia' in subsection 6(1) of the ITAA 1936;
- (b) are not temporary residents of Australia within the meaning of the term 'temporary resident' of Australia in subsection 995-1(1);
- (c) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their P Class Shares;

and who engage in one or more of the following transactions:

- (d) receive the GSPA Dividend described in paragraphs 29 to 31 of this Ruling;
- (e) purchase P Class Shares from the Company Share Trust (CST) established by a trust deed dated 12 September 2003 as set out in paragraphs 24 to 28 of this Ruling;

- (f) sell their P Class Shares pursuant to the Offer described in paragraphs 15 to 23 of this Ruling and:
- (i) are taken to have acquired their P Class Shares in GSPA on or after 20 September 1985;
 - (ii) hold their P Class Shares on capital account;
 - (iii) dispose of their P Class Shares to the Purchaser i.e., the Goldman Sachs Group, Inc. (the GS Group), or a permitted nominee of the GS Group (the Permitted Nominee) in exchange for GS Group Common Stock and cash;
 - (iv) are not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions in Subdivision 124-M; and
 - (v) will hold their GS Group Common Stock on capital account.

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 31 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 2012. The Ruling continues to apply after 30 June 2012 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:

- application for a Class Ruling, dated 8 April 2011;
- Merger Implementation Agreement, dated 7 April 2011
- GSPA Constitution, marked-up version, provided on 8 April 2011;
- draft Offer Document dated 7 April 2011;
- Shareholders Agreement dated 12 September 2003 and incorporating amendments effective 3 March 2006 and 24 October 2009;
- Explanatory Memorandum and Notices of Meetings Booklet, dated 18 April 2011;
- draft Paying Agent Agreement between GSPA and the GS Group, dated 7 April 2011;
- 2009 and 2010 GSPA Annual Reports;
- draft Company Share Trust Share Offer document, dated 14 April 2011; and
- correspondence dated 28 April 2011 and other emails in relation to the application.

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

GSPA

10. GSPA is an Australian resident company that conducts an investment banking business, primarily in Australia and New Zealand and is limited by shares. GSPA is registered as a company under the *Corporations Act 2001* and it is the head company of a tax consolidated group.

11. GSPA has only ordinary shares on issue, and it does not have on issue any options over any of its ordinary shares.

12. GSPA's share capital structure consists of M Class Shares and P Class Shares, both of which are classified as ordinary shares under the Constitution. The M Class Shares which consist of 45% of the ordinary share capital of GSPA are owned by the GS Group. The remaining 55% are P Class Shares and are owned by current and former GSPA employees and their associated entities and the CST.

13. In some cases, the ownership of P Class Shares is held by associated entities of those current and former employees and by a company as nominee for the underlying P Class Beneficial Owners (the Nominee Company).

The GS Group

14. The GS Group is incorporated in Delaware, USA and is listed on the New York Stock Exchange. Like GSPA, the GS Group also conducts an investment banking business but on a global scale.

The Offer

15. On 7 April 2011, GSPA and the GS Group signed a Merger Implementation Agreement under which it was proposed that the GS Group (or the Permitted Nominee) would acquire the remaining 55% of GSPA. The proposed acquisition would be implemented in accordance with an offer made by the GS Group under the GSPA Constitution (the Offer).

16. The GSPA Constitution requires that the Offer be on identical terms (as defined in the Constitution) for all P Class Shareholders. It permits the making of the Offer by the GS Group where the P Class Shareholders pass an ordinary resolution permitting the Offer to be made. If the Offer is accepted by P Class Shareholders with 75% or more of the voting power attached to P Class Shares, the remaining P Class Shareholders will have their shares compulsorily acquired by the GS Group in accordance with the Offer, pursuant to the GSPA Constitution.

17. The Offer Document was issued by the GS Group. The Offer opened for acceptance on 13 May 2011 and subsequently closed on 27 May 2011. The completion date of the Offer is 1 July 2011 (Scheme Completion Date).

18. Under the Offer, the participating P Class Shareholders who dispose of their P Class Shares to the Purchaser will receive:

- cash (Cash Consideration) or shares of GS Group Common Stock in lieu of a cash amount (Elected Common Stock);
- GS Group Common Stock (Consideration Common Stock);
- a proportionate share of GSPA's 2011 earnings calculated in accordance with the Offer Document (Stub Earnings Consideration); and
- a proportionate share of any earn-out payment received by GSPA in connection with the sale of one of GSPA's businesses (Cairns Earn-out Payment).

19. The number of shares of Elected or Consideration Common Stock that can be allocated to a P Class Shareholder is calculated in accordance with the formula provided in the Offer Document. A P Class Shareholder is entitled to receive cash in respect of any fractional entitlements resulting from this calculation.

20. The cash amount payable to a P Class Shareholder is the Total Cash Amount which comprises of:

- the Cash Consideration (subject to elections to receive Elected Common Stock in lieu of some or all of the Cash Consideration);
- Stub Earnings Consideration (if any);
- Cairns Earn-out Payment (if any); and
- cash in respect of any fractional entitlements to GS Group Common Stock (if any).

21. The Total Cash Amount payable under the Offer may be adjusted after the Scheme Completion Date.

22. GS Group Common Stock received under the Offer will be held in a custody account in the name of the relevant P Class Shareholder (or if the relevant P Class Shareholder so directs, their P Class Beneficial Owner) to be released at future points in time.

23. The Offer was subject to regulatory approvals from the Foreign Investment Review Board (FIRB) and various other regulatory bodies.

The Company Share Trust (CST) Share Offer

24. The CST is a discretionary trust established by a trust deed to hold P Class Shares.

25. The CST held approximately 1% of the total shares in GSPA as at the date of the Offer Document. The CST offered to sell all of its P Class Shares to the remaining P Class Shareholders in proportion to their shareholding as at the record date for the CST Share Offer (CST Share Offer).

26. The CST Share Offer document sets out the details of the offer including the purchase price (CST Sale Price), the number of shares that could be acquired and the timing and manner of payment if the CST Share Offer was accepted.

27. The CST Share Offer was due for completion 3 days before the Scheme Completion Date and was independent of the Offer.

28. A P Class Shareholder who accepted the CST Share Offer would be able to participate in the Offer in respect of those P Class Shares acquired from the CST.

The payment of Dividend by GSPA

29. GSPA declared a dividend on 24 March 2011 and paid the dividend on 31 March 2011 (the Dividend). The record date for the Dividend was 24 March 2011.

30. The Dividend was part of GSPA's normal dividend payment processes, that is, a fully franked dividend paid to all shareholders of GSPA.

31. The Dividend was debited against GSPA's retained earnings and funded from GSPA's existing cash reserves. Neither the GS Group, nor its associates, has funded the Dividend.

Ruling

Capital gains tax (CGT) consequences of disposing of P Class Shares under the Offer

CGT event A1

32. CGT event A1 happens when a P Class Shareholder disposes of their P Class Shares to the Purchaser (subsections 104-10(1) and (2)).

33. For P Class Shareholders who accepted the Offer, CGT event A1 happens on the later of the day that the P Class Shareholder accepted the Offer and when the condition relating to FIRB approval was satisfied (paragraph 104-10(3)(a)). CGT event A1 will not happen unless the condition relating to FIRB approval is satisfied.

34. A P Class Shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a P Class Share exceed its cost base. The capital gain is equal to the amount of the excess. A P Class Shareholder will make a capital loss if those capital proceeds are less than the P Class Share's reduced cost base (subsection 104-10(4)). The capital loss is equal to the amount of the difference.

35. Where a P Class Share is held by the Nominee Company on behalf of a P Class Beneficial Owner, the CGT consequences set out in this Ruling will apply to the P Class Beneficial Owner rather than the Nominee Company.

Capital proceeds

36. The capital proceeds from CGT event A1, as at the time of the CGT event, will consist of the Total Cash Amount and the market value of any property received in the form of GS Group Common Stock (subsection 116-20(1)).

Custody arrangement

37. There are no CGT consequences when GS Common Stock is deposited in and withdrawn from a custody account under the terms of the Offer (paragraph 104-10(7)(a)).

Repayment of capital proceeds

38. The capital proceeds from CGT event A1 happening will be reduced if any Consideration Common Stock is returned or forfeited by a P Class Shareholder under the terms of the Offer. The capital proceeds will be reduced by the market value of the Consideration Common Stock returned or forfeited calculated at the time of the CGT event A1 (section 116-50).

Scrip for scrip roll-over

39. A P Class Shareholder who makes a capital gain from the disposal of their P Class Shares in return for GS Group Common Stock may, subject to paragraph 41 of this Ruling, choose roll-over under Subdivision 124-M (section 124-780).

40. If a P Class Shareholder makes a capital loss from the disposal of their P Class Shares, they cannot choose scrip for scrip roll-over under Subdivision 124-M (subsection 124-780(3)).

41. If the capital gain would be disregarded otherwise than by reason of a roll-over, the scrip for scrip roll-over cannot be chosen (subsection 124-795(2)).

42. If roll-over under Subdivision 124-M is chosen, that part of the capital gain that is referable to the receipt of the GS Group Common Stock when CGT event A1 happens is disregarded (subsections 124-785(1)).

Capital gain referable to cash

43. The capital gain will not be disregarded to the extent that the P Class Shareholder will receive cash for the disposal of their P Class Share as the Total Cash Amount is considered ineligible proceeds under subsection 124-790(1).

44. The part of the capital gain on a P Class Share that is referable to the Total Cash Amount is the ineligible proceeds less the part of the cost base of the P Class Share reasonably attributable to the Total Cash Amount. In working out the part of the cost base of a P Class Share that is reasonably attributable to the Total Cash Amount, the Commissioner accepts the following formula:

$$\begin{array}{rcl} \text{Cost base of P Class} & & \text{Cost base of} \\ \text{Share reasonably} & & \text{the P Class} \\ \text{attributable to Total} & = & \text{Share at the} \\ \text{Cash Amount} & & \text{time of the} \\ & & \text{CGT event} \end{array} \times \frac{\text{Total Cash Amount}}{\text{(Total Cash Amount + Market value of GS Group Common Stock)}}$$

Discount capital gain

45. If a P Class Shareholder makes a capital gain and roll-over under Subdivision 124-M is not chosen, or cannot be chosen, they may be eligible to treat the gain as a discount capital gain provided that the P Class Shareholder satisfies the requirements of Subdivision 115-A.

Cost base of GS Group Common Stock

46. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each GS Group Common Stock is equal to the part of the cost base of the P Class Shares exchanged for the relevant GS Group Common Stock (that is, the part of the cost base of the P Class Shares that does not relate to the cash consideration received) (subsections 124-785(2) and 124-785(4)).

47. Where roll-over under Subdivision 124-M is not chosen, the first element of the cost base and reduced cost base of each GS Group Common Stock is equal to the market value of the P Class Shares referable to the acquisition of the GS Group Common Stock as at the time of that acquisition (subsections 110-25(2), 110-55(2) and 112-30(1)).

Acquisition date of GS Group Common Stock

48. The acquisition date of the GS Group Common Stock is the later of the date when the P Class Shareholder accepted the Offer and when the condition relating to FIRB approval was satisfied (Item 2 of the table in section 109-10).

49. For the purpose of determining whether a capital gain made from any later disposal of GS Group Common Stock is eligible to be treated as a discount capital gain, a P Class Shareholder who chooses scrip for scrip roll-over is taken to have acquired their GS Group Common Stock when they acquired the corresponding P Class Shares (Item 2 of the table in subsection 115-30(1)).

The Company Share Trust (CST) Share Offer

CGT – First element of the cost base

50. A P Class Shareholder who acquired a CST Share under the CST Share Offer will have the CST Sale Price as the first element of the cost base under subsection 110-25(2).

The Dividend

Assessability of the Dividend

51. The Dividend constitutes a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

52. A GSPA shareholder who received the Dividend is required to include the Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross up and tax offset

53. A P Class Shareholder who received the Dividend directly will, under section 207-20:

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

subject to being a qualified person.

Refundable tax offset

54. A P Class Shareholder who is entitled to a tax offset under subsection 207-20(2), in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

Qualified persons

55. The payment of the Dividend will not constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

56. Accordingly, each GSPA shareholder who has not previously had to satisfy the holding period rule will need to hold their GSPA shares 'at risk' for a continuous period of at least 45 days in the primary qualification period in order to be a qualified person.

57. A P Class Shareholder who accepted the Offer will no longer be considered to hold their P Class Shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 once the Offer becomes unconditional. A P Class Shareholder who did not accept the Offer, but is required to transfer their shares after 75% acceptance is achieved pursuant to the GSPA Constitution, will no longer hold their shares 'at risk' from the date the P Class Directors, acting under power of attorney, signed the acceptance form on their behalf and the Offer becomes unconditional.

58. P Class Shareholders who have held their P Class Shares 'at risk' for a continuous period of 45 days during the period from when they acquired their P Class Shares to 9 May 2011 will be qualified persons with respect to the Dividend. As the Offer did not open until 13 May 2011, the Offer will not affect whether a P Class Shareholder holds their P Class Shares 'at risk' as there is more than 45 days between when the Dividend was paid and the opening of the Offer.

The anti-avoidance provisions

59. 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 Dividend.

60. 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 Dividend.

61. Sections 177E of the ITAA 1936 and 207-145 of the ITAA 1997 will not apply in respect of the Offer.

Commissioner of Taxation22 June 2011

Appendix 1 – Explanation

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

Capital Gains Tax

Scrip for scrip roll-over

62. The tax consequences that arise concerning the Offer are outlined in the Ruling part of this document.

63. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. Scrip for scrip roll-over 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 the exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

64. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main conditions and exceptions that are relevant to the Offer are:

- (a) shares in a company 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.

65. Under the Offer, the conditions for roll-over under Subdivision 124-M are satisfied.

CGT event A1 happening

66. CGT event A1 in section 104-10 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)).

67. The Offer is subject to FIRB approval being granted. Under clause 8.1(b) of the Offer Document, this is a condition precedent to the formation of the contract.

68. Where a P Class Shareholder accepts the Offer, CGT event A1 happens at the later of:

- (a) the time when the condition relating to FIRB is satisfied under the Offer; or
- (b) the time when the P Class Shareholder entered into the contract to dispose of their P Class Shares to the Purchaser (either by choice or by the P Class Directors, acting under power of attorney, signing the acceptance form on behalf of the P Class Shareholder once the 75% threshold has been reached).

No CGT event happening

69. Under the terms of the Offer, a P Class Shareholder is required to deposit their GS Group Common Stock into custody accounts. These accounts are in the name of the P Class Shareholder or, if the relevant P Class Shareholder so directs, their P Class Beneficial Owner. The P Class Shareholder or P Class Beneficial Owner (as applicable) receives dividends and is entitled to vote in relation to the GS Group Common Stock held in those accounts. There are no CGT consequences when the GS Group Common Stock is placed in the custody accounts, or when it is withdrawn from those accounts.

Capital proceeds

70. The capital proceeds received by a P Class Shareholder are the money and the value of any property received or entitled to be received in respect of the event happening (subsection 116-20(1)).

71. A P Class Shareholder that accepts the Offer is entitled to receive the consideration outlined in paragraph 18 of this Ruling. This includes both cash and GS Group Common Stock. A P Class Shareholder can elect to receive additional GS Group Common Stock rather than cash.

72. As the capital proceeds include property, being GS Group Common Stock, the market value of this property is included in the capital proceeds received by a P Class Shareholder. As GS Group Common Stock is listed on the New York Stock Exchange, the market value of GS Group Common Stock should be determined by reference to the last closing price of the stock on or before the date that CGT event A1 occurs in Australia, translated into Australian dollars at the daily foreign exchange rate for US dollars on that date.

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

74. In this case, the payment of the Dividend has occurred independently of the Offer. The Directors of GSPA made a determination, before the Offer was made, that a Dividend would be payable. The Dividend was to be paid regardless of whether or not the Offer was made.

75. The Dividend was funded entirely from existing cash reserves of GSPA and the Purchaser did not provide any financial support to fund the Dividend.

76. In these circumstances, the Dividend will not form part of the capital proceeds which a P Class Shareholder will receive in respect of CGT event A1 happening.

Repayment of capital proceeds & other adjustments after Completion

77. Where a P Class Shareholder is required to return and forfeit GS Group Common Stock under the terms of the Offer, section 116-50 will operate to reduce the capital proceeds received in respect of the disposal of the P Class Shares. The capital proceeds will then be equal to the Total Cash Amount and the market value of any GS Group Common Stock that is not forfeited. The cost base of GS Group Common Stock and the capital gain on the ineligible proceeds will also need to be recalculated.

78. Any purchase price adjustments that occur under the terms of the Offer may result in the P Class Shareholder being required to recalculate the capital gain in respect of the disposal of the P Class Shares.

79. Any recalculation of the capital gain in respect of the P Class Shares may require the P Class Shareholder to amend their tax return for the year in which CGT event A1 happens.

The Company Share Trust (CST) Share Offer

CGT – First element of the cost base

80. Section 110-25 provides that the first element of the cost base of a CGT asset is the total of the money paid to acquire a CGT asset and the market value of any property given to acquire the CGT asset. *Prima facie*, the cost base of CST Shares acquired by a buyer P Class Shareholder will be the CST Sale Price.

81. As the price for the P Class Shares was determined by reference to a third party offer for the shares, the parties were dealing at arm's length in relation to the transaction. Therefore, the first element of the cost base will not be modified under section 112-20.

The Dividend

Assessability of the Dividend

82. 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, but does not include distributions debited against a share capital account or certain redeemable preference share redemptions. The payment of the Dividend on 31 March 2011 was a distribution of profits by GSPA to its shareholders sourced from retained earnings and was a 'dividend' as defined.

83. 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.

84. As the Dividend was paid to GSPA shareholders out of profits derived by GSPA, a GSPA shareholder who is a resident of Australia (as defined in subsection 6(1) of the ITAA 1936) is required to include the Dividend in their assessable income.

Gross up and tax offset

85. 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.

86. Therefore, subject to satisfying the qualified person rule, where the Dividend is received by a GSPA shareholder, the GSPA shareholder will:

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

87. If the GSPA shareholder is a corporate tax entity (not acting in a trustee capacity), a franking credit will also arise in the entity's franking account.

88. Where the Dividend is received by a GSPA shareholder (not being 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.

89. Therefore, subject to satisfying the qualified person rule, a GSPA shareholder that is a trust or partnership will be required to include the amount of the franking credit attached to the Dividend in its assessable income under subsection 207-35(1).

Refundable tax offset

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

91. Pursuant to section 67-25, 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));
- a trustee of a trust who is liable to be assessed under section 98 or 99A of the ITAA 1936 (subsection 67-25(1B));
- 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)); and
- foreign resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

92. Accordingly, a P Class Shareholder will be subject to the refundable tax offset rules unless they are one of the specifically excluded entities under section 67-25. For example a corporate tax entity (including a company, a corporate limited partnership, a corporate unit trust and a public trading trust) will, subject to the exceptions outlined under section 67-25, be excluded from the operation of the refundable tax offset rules.

Qualified persons

93. Former Division 1A of the ITAA 1936 contains the measures referred to as the holding period rule and the related payment rule. 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.

94. The test as to what constitutes a 'qualified person' is set out in former subsection 160APHO(1) of the ITAA 1936 as follows:

When taxpayer is qualified person

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

95. 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

96. 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 ITAA 1936. Former subsection 160APHN(2) of the ITAA 1936 provides:

Effect of passing benefit of dividend or distribution

- (2) 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.

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

Actions which may have effect of passing benefit

- (3) 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.

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

Circumstances required for effect of passing of benefit

- (4) 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.

99. In the current circumstances, the payment of the Dividend was not a term of the Offer. The Dividend was declared as part of GSPA's normal dividend process and was paid to all shareholders of GSPA out of the existing cash reserves of GSPA. Payment of the Dividend was not conditional upon P Class Shareholders voting in favour of receiving an offer, nor on the Offer itself. Accordingly, the P Class Shareholders are not taken to have made a related payment in respect of the Dividend for the purposes of former Division 1A of the ITAA 1936.

Primary qualification period

100. As the P Class Shareholders are not taken to have made a related payment in respect of the Dividend, the relevant holding period is the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

101. The primary qualification period is defined in former section 160APHD of the ITAA 1936 as follows:

'primary qualification period', in relation to a taxpayer in relation to shares or an interest in shares, means the period beginning on the day after the day on which the taxpayer acquired the shares or interest and ending:

- (a) if the shares are not preference shares – on the 45th day after the day on which the shares or interest became ex dividend; or
- (b) if the shares are preference shares – on the 90th day after the day on which the shares or interest became ex dividend.

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

Shares or interests in shares

- (1) 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.

103. GSPA determined eligibility for the Dividend on the Dividend Record Date of 24 March 2011. This was the last day on which acquisition by a person of a GSPA share entitled the person to receive the Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) was 25 March 2011.

104. Pursuant to section 160APHD of the ITAA 1936 the primary qualification period runs from when the GSPA shareholder acquired the shares to the 45th day after the day on which the shares became ex-dividend. The qualification period therefore ends on 9 May 2011. 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 GSPA shares are to be excluded from this calculation.

105. A GSPA shareholder who accepted the Offer will no longer be considered to hold their GSPA shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 once the Offer becomes unconditional. GSPA shareholders who did not accept the Offer, but are required to transfer their shares pursuant to the GSPA Constitution after 75% acceptance of the Offer is achieved, will no longer hold their shares 'at risk' from the date the P Class Directors, acting under power of attorney, signed the acceptance form on their behalf and the Offer becomes unconditional. Therefore, as the Offer did not open until 13 May 2011, the Offer will not affect whether a P Class Shareholder holds their shares 'at risk'.

The anti-avoidance provisions

Section 204-30

106. Section 204-30 applies where an entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, 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));
- (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)).

107. Relevantly, if section 204-30 applies the Commissioner is vested with a discretion under subsection 204-30(3) to make a determination in writing that:

- (a) 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) no imputation benefit is to arise in respect of any distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

108. For section 204-30 to apply, members to whom a distribution is 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 the streaming not occurred.

109. Pursuant to the payment of the Dividend, all GSPA shareholders received an imputation benefit as a result of the Dividend: that is both 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)).

110. However, the Dividend was paid to all GSPA shareholders, including the GS Group, and was fully franked with Australian franking credits. Therefore, GSPA did not direct 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 Dividend, while the other members received lesser or no imputation benefits.

111. As the conditions in subsection 204-30(1) 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 benefits received in relation to the Dividend.

Section 177EA

112. 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) of the ITAA 1936 provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or

- (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, 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.

113. If section 177EA 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 dividend paid to the relevant taxpayer or, in the alternative, that only some or no franking credit benefits arise in respect of a dividend paid to the relevant taxpayer.

114. GSPA is a corporate tax entity. The disposal of the P Class Shares pursuant to the Offer is a scheme for the disposition of membership interests. The Dividend was a frankable distribution that was paid to GSPA shareholders prior to the Offer.

115. 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 GSPA or its shareholders, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the scheme.

116. In arriving at a conclusion, the Commissioner has had regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may not be present at any one time in any one scheme.

117. The relevant circumstances of the scheme indicate that there is no requisite purpose. The Dividend was fully franked, which is a continuation of GSPA's normal dividend policy to pay fully franked dividends. GSPA only has ordinary shares on issue and the Dividend was paid to all GSPA shareholders (including the GS Group) in proportion to the number of shares that the GSPA shareholder held on the Dividend Record Date. The amount of the dividend was largely consistent with dividends previously paid out by GSPA and allowed GSPA shareholders to share in the retained profits of GSPA.

118. In considering the manner, form and substance of the payment of the Dividend and the Offer, the scheme was not entered into for the purpose of enabling participating members to obtain an imputation benefit. 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 benefits received in relation to the Dividend.

Section 177E

119. Section 177E of the ITAA 1936 is an anti-avoidance provision that is designed to prevent tax benefits being obtained as part of a dividend stripping scheme or a scheme with substantially the same effect as a dividend stripping scheme.

120. The term 'dividend stripping' has no precise legal meaning. In its traditional form, a dividend stripping operation occurs when shares in a company with retained profits are acquired, usually by a share trader who pays the existing shareholders a capital sum reflecting the value of the retained profits. The new shareholders then liberate those profits through the payment of a dividend post acquisition. Generally, the new shareholders who derive dividend income from the company would not be liable to tax upon those dividends.

121. Therefore, a scheme by way of, or in the nature of, dividend stripping, or one that has substantially the effect of a scheme by way of, or in the nature of, dividend stripping, would be one that has the effect of delivering a shareholder's entitlement to a dividend in a tax advantaged manner.

122. Prior to the Offer, GSPA paid an assessable Dividend, which indicates that the scheme is not being entered into for the purposes of distributing dividends in a tax advantaged manner. Further, the scheme is being entered into for genuine commercial purposes which indicates that the requisite dominant purpose of tax avoidance is not present. Therefore, the Commissioner has come to the view that the scheme is not a dividend stripping scheme.

Section 207-145

123. Consistent with the discussion on section 177E of the ITAA 1936 that there was no dividend stripping scheme or a scheme in the nature of a dividend stripping scheme, paragraph 207-145(1)(d) will not be relevant to the scheme.

124. 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 Dividend.

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

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Subject references:

- arrangement
- CGT capital proceeds
- CGT cost base
- dividend streaming arrangement
- dividend stripping
- frankable dividends
- franking credits
- holding period rule
- imputation system
- ordinary shares
- qualified person
- related payment rule

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NO: 1-2VY3R3P

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Assessable income ~~ dividend, interest and royalty income
Income Tax ~~ Capital Gains Tax ~~ CGT event A1 – disposal of a CGT asset
Income Tax ~~ Capital Gains Tax ~~ roll-overs – scrip for scrip