CR 2012/122 - Income tax: takeover of Alesco Corporation Limited and payment of Final Dividend, Special Dividend and Additional Discretionary Dividend

Class Ruling

Income tax: takeover of Alesco Corporation Limited and payment of Final Dividend, Special Dividend and Additional Discretionary Dividend

Contents Para

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 44(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Division 1A of former Part IIIAA of the ITAA 1936;
- section 177EA of the ITAA 1936;
- Division 67 of the ITAA 1997;
- section 104-10 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 202-5 of the ITAA 1997;

- section 202-40 of the ITAA 1997;
- section 204-30 of the ITAA 1997; and
- Division 207 of the ITAA 1997.

All 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 consists of the holders of ordinary shares in Alesco Corporation Limited (Alesco) who:

(a) (i) disposed of their ordinary shares in Alesco under the off-market offer by DuluxGroup (Nominees) Pty Ltd which was announced on 1 May 2012, and has subsequently been amended; or

(ii) had their ordinary shares in Alesco compulsorily acquired pursuant to Part 6A.1 of the *Corporations Act 2001*;

(b) received the Alesco Final Dividend and the Alesco Special Dividend and/or are entitled to receive the Alesco Additional Discretionary Dividend;

(c) are residents of Australia as that term is defined in subsection 6(1) of the ITAA 1936;

(d) held their shares in Alesco neither as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1) – that is, broadly on capital account; and

(e) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their Alesco shares.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

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 27 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.

Date of effect

8. This Ruling applies from 1 July 2012 to 30 June 2013. The Ruling continues to apply after this date 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 (PricewaterhouseCoopers). The following documents, or relevant parts of them, form part of and are to be read with the description:

- Request for Class Ruling dated 5 October 2012;
- Replacement Bidder's Statement dated 21 May 2012 issued by DuluxGroup (Nominees) Pty Ltd;
- Takeover Implementation Agreement dated 28 September 2012 (as amended);
- Third Supplementary Target's Statement by Alesco dated 8 October 2012;
- announcements by Alesco and DuluxGroup Ltd to the Australian Securities Exchange.

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

Alesco

10. Alesco is a company listed on the Australian Securities Exchange (ASX). As at 4 September 2012, Alesco had 94,193,403 ordinary shares on issue, with each share carrying equal rights.

11. Alesco has paid fully franked dividends since at least the 1999 calendar year.

Dulux

12. DuluxGroup Ltd (Dulux) is a company listed on the ASX.

13. Before 1 May 2012, Dulux's wholly-owned subsidiary, DuluxGroup (Nominees) Pty Ltd, had acquired 19.96% of the shares in Alesco.

Takeover bid

14. On 1 May 2012, Dulux announced an off-market takeover bid for all of the shares in Alesco. Dulux subsequently revised its original offer.

15. Certain institutional investors indicated their support for the Dulux takeover bid by tendering their Alesco shares into the Institutional Acceptance Facility set up by Dulux.

16. On 28 September 2012, Alesco and Dulux signed a Takeover Implementation Agreement setting out the key terms of the revised Dulux offer. The directors of Alesco agreed to recommend acceptance of the revised Dulux offer by Alesco shareholders, subject to there being no superior proposal and the Additional Discretionary Dividend being paid.

17. Under the amended offer, DuluxGroup (Nominees) Pty Ltd will acquire all of the shares in Alesco that it does not already own for an offer consideration of $2.05 per share (the Dulux Offer).

18. The Offer Period commenced on 25 May 2012 and is currently scheduled to end on 19 December 2012.

19. The Dulux Offer is subject to a number of conditions. One of these conditions is that during the Offer Period, there must be a minimum acceptance of the Dulux Offer that gives DuluxGroup (Nominees) Pty Ltd a relevant interest in at least 90% of all shares in Alesco. Dulux declared the Dulux Offer unconditional on 12 December 2012.

20. Under section 661A of the *Corporations Act 2001*, DuluxGroup (Nominees) Pty Ltd is entitled to compulsorily acquire any Alesco shares for which it had not received acceptances on the same terms as the Dulux Offer if during, or at the end of, the Offer Period, DuluxGroup (Nominees) Pty Ltd and its associates had relevant interests (as defined in the *Corporations Act 2001*) in at least 90% of Alesco shares.

The Final Dividend and the Special Dividend

21. Alesco determined on 24 July 2012 that a fully franked Final Dividend of $0.05 per share and a fully franked Special Dividend of $0.10 per share would be paid. The Record Date for both dividends was 17 August 2012. The payment date for both dividends was 7 September 2012.

22. Pursuant to subparagraph 1(b)(3) of the Takeover Implementation Agreement, the offer consideration of $2.05 per share will be reduced by the Final Dividend of $0.05 per share and the Special Dividend of $0.10 per share. There will be no adjustment to the offer consideration for the value of the franking credits attached to the Final Dividend and the Special Dividend.

23. The Final Dividend and the Special Dividend were paid from Alesco's existing cash reserves and existing debt facilities.

The Additional Discretionary Dividend

24. Under subclause 1(b) of the Takeover Implementation Agreement, Alesco was permitted (but not obliged) to determine to pay a further fully franked dividend of up to $0.27 per share (the Additional Discretionary Dividend), conditional on Dulux declaring the Dulux Offer free of all defeating conditions.

25. Alesco determined on 28 November 2012 that the Additional Discretionary Dividend would be $0.27 per share. The Record Date for the Additional Discretionary Dividend was 7 December 2012. The payment date for the Additional Discretionary Dividend is 19 December 2012.

26. Pursuant to subparagraph 1(b)(3) of the Takeover Implementation Agreement, the offer consideration of $2.05 per share will be reduced by the Additional Discretionary Dividend of up to $0.27 per share. There will be no adjustment to the offer consideration for the value of the franking credits attached to the Additional Discretionary Dividend.

27. Under subclause 1(d) of the Takeover Implementation Agreement, the Additional Discretionary Dividend must be funded by Alesco drawing down funds from the debt facilities of Alesco or its subsidiaries.

Ruling

Dividends included in residents' assessable income

28. The Final Dividend of $0.05 per share, the Special Dividend of $0.10 per share and the Additional Discretionary Dividend of $0.27 per share are each a 'dividend' as defined in subsection 6(1) of the ITAA 1936. They must each be included in the assessable income of a resident Alesco shareholder (paragraph 44(1)(a) of the ITAA 1936).

Gross-up and tax offset

29. The Final Dividend of $0.05 per share, the Special Dividend of $0.10 per share and the Additional Discretionary Dividend of $0.27 per share are each a frankable distribution under section 202-40.

30. An Alesco shareholder who receives any of these dividends directly, satisfies the residency requirement in section 207-75, and is a 'qualified person' in relation to the franked distribution:

- must include in their assessable income the amount of the franking credit attached to the dividend (subsection 207-20(1)); and
- will be entitled to a tax offset equal to the franking credit received on the dividend (subsection 207-20(2)).

31. An Alesco shareholder who:

- receives any of these dividends as a partnership or the trustee of a trust;
- is not a corporate tax entity or a complying superannuation entity; and
- is a 'qualified person' in relation to the franked distribution,

must include in the assessable income of the partnership or trust the amount of the franking credit attached to the dividend (subsection 207-35(1)).

32. If a partner in the partnership or a beneficiary of the trust is a 'qualified person' in relation to the franked distribution, the partner or the beneficiary is entitled to a tax offset. Division 207 contains detailed rules for calculating the share of the franking credit on a dividend received by a partnership or the trustee of a trust that the partners in the partnership, or the beneficiaries of the trust, will be entitled to as a tax offset.

Qualified person

The Final Dividend and the Special Dividend

33. The payment of the Final Dividend of $0.05 per share and the Special Dividend of $0.10 per share will constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

34. Accordingly, to be a 'qualified person' in relation to the Final Dividend and the Special Dividend, an entity will need to hold their Alesco shares, or interest in Alesco shares, 'at risk' for a continuous period of at least 45 days in the secondary qualification period from 4 July 2012 to 2 October 2012 (inclusive) (former section 160APHO of the ITAA 1936).

35. In determining whether they hold the shares, or interest in shares, for at least 45 days in the secondary qualification period, an entity does not count the day of acquisition of the shares or interest, or the day (if any) on which the shares or interest were disposed of. An entity must exclude any days on which the entity has materially diminished risks of loss or opportunities for gain in respect of the shares or interest (within the meaning of former sections 160APHM and 160APHJ of the ITAA 1936).

The Additional Discretionary Dividend

36. The payment of the Additional Discretionary Dividend of $0.27 per share will constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

37. Alesco shareholders who accepted the Dulux Offer will no longer be considered to hold their Alesco shares 'at risk' for the purposes of former Division 1A of Part IIIA of the ITAA 1936 as of 12 December 2012, which is the date on which the Dulux Offer was declared unconditional.

38. Alesco shareholders who did not accept the Dulux Offer but have their shares compulsorily acquired pursuant to the *Corporations Act 2001* will no longer be considered to hold their Alesco shares 'at risk' when the shares are acquired by DuluxGroup (Nominees) Pty Ltd.

39. Accordingly, to be a 'qualified person' in relation to the Additional Discretionary Dividend, an entity will need to hold their Alesco shares, or interest in Alesco shares, 'at risk' for a continuous period of at least 45 days in the secondary qualification period from 24 October 2012 to the earlier of 22 January 2013 or the date on which an Alesco shareholder ceases to hold their Alesco shares 'at risk' (in either case, the dates are inclusive) (former section 160APHO of the ITAA 1936).

40. In determining whether they hold the shares, or interest in shares, for at least 45 days in the secondary qualification period, an entity does not count the day of acquisition of the shares or interest, or the day (if any) on which the shares or interest were disposed of. An entity must exclude any days on which the entity has materially diminished risks of loss or opportunities for gain in respect of the shares or interest (within the meaning of former sections 160APHM and 160APHJ of the ITAA 1936).

Refundable tax offset

41. The franking credit tax offset that Alesco shareholders, or the partners in a partnership or the beneficiaries of a trust that have an interest in Alesco shares, are entitled to under Division 207 is subject to the refundable tax offset rules in Division 67. Certain trustees and corporate tax entities are excluded from the refundable tax offset rules because of section 67-25.

CGT consequences

42. CGT event A1 happens when an Alesco shareholder disposes of each of their Alesco shares to DuluxGroup (Nominees) Pty Ltd (section 104-10).

43. Under subsection 104-10(3), the time of CGT event A1 is the date that an Alesco shareholder accepts the Dulux Offer, entering into a contract for the disposal of their Alesco shares to DuluxGroup (Nominees) Pty Ltd.

44. Where an Alesco shareholder does not accept the Dulux Offer and subsequently has their shares compulsorily acquired by DuluxGroup (Nominees) Pty Ltd, the time of CGT event A1 is when DuluxGroup (Nominees) Pty Ltd becomes the owner of the relevant shares (subsection 104-10(6)).

45. An Alesco shareholder will make a capital gain when CGT event A1 happens if the capital proceeds from the disposal exceed the cost base of that share. An Alesco shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the share (subsection 104-10(4)).

Capital proceeds

46. The capital proceeds from CGT event A1 happening to an Alesco shareholder is the total of the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

47. The capital proceeds from CGT event A1 happening in respect of each Alesco share will not include the Final Dividend, the Special Dividend or the Additional Discretionary Dividend.

48. The capital proceeds received by an Alesco shareholder who disposes of Alesco shares pursuant to the Dulux Offer (whether they accept the offer or have their shares compulsorily acquired) will be $1.63 per share.

The anti-avoidance provisions

49. 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 by Alesco shareholders in relation to the Final Dividend, the Special Dividend or the Additional Discretionary Dividend.

50. 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 by Alesco shareholders in respect of the Final Dividend, the Special Dividend or the Additional Discretionary Dividend.

Commissioner of Taxation
19 December 2012

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.

Dividends included in residents' assessable income

51. 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.

52. The payment of the Final Dividend of $0.05 per share and the Special Dividend of $0.10 per share was, and the payment of the Additional Discretionary Dividend of $0.27 per share will be, a distribution of money by Alesco to its shareholders.

53. 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...

54. The Final Dividend and the Special Dividend were each, and the Additional Discretionary Dividend will be, sourced entirely from Alesco's retained earnings. Alesco did not debit the Final Dividend or the Special Dividend, and will not debit the Additional Discretionary Dividend, against its share capital account. Therefore, the exclusion in paragraph (d) will not apply and the Final Dividend, the Special Dividend and the Additional Discretionary Dividend will each constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

55. Paragraph 44(1)(a) 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.

56. As the Final Dividend and the Special Dividend were each paid, and the Additional Discretionary Dividend will be paid, to Alesco shareholders out of profits derived by Alesco, Alesco shareholders who are residents of Australia are required to include the Final Dividend, the Special Dividend and the Additional Discretionary Dividend in their assessable income.

Gross-up and tax offset

Direct distributions

57. In the case of Australian resident shareholders (other than a partnership or the trustee of a trust) who directly receive the Final Dividend, the Special Dividend or the Additional Discretionary Dividend:

- the amount of each dividend is included in the assessable income of each shareholder under subsection 44(1) of the ITAA 1936; and
- subject to being a 'qualified person' under Division 1A of former Part IIIAA of the ITAA 1936, the amount of the franking credit on each dividend is included in the assessable income of each shareholder under subsection 207-20(1) of the ITAA 1997 (gross-up).

58. Subject to being a 'qualified person' under Division 1A of former Part IIIAA of the ITAA 1936 as required by section 207-145 of the ITAA 1997, these shareholders are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the franking credit on the dividend.

Indirect distributions

59. A franked distribution (being each of the Final Dividend, the Special Dividend or the Additional Discretionary Dividend) may flow indirectly to an Australian resident who is a partner in a partnership or a beneficiary of certain trusts.

60. In the case of a partnership:

- pursuant to subsection 44(1) of the ITAA 1936, the amount of each dividend received by the partnership is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90 of the ITAA 1936; and
- subject to the partnership being a 'qualified person' under Division 1A of former Part IIIAA of the ITAA 1936, the amount of the franking credit on each dividend received by the partnership is included in the assessable income of the partnership for the purposes of computing the net income of the partnership under section 90 of the ITAA 1936 (gross-up), pursuant to subsection 207-35(1) of the ITAA 1997.

61. In the case of a trust:

- pursuant to subsection 44(1) of the ITAA 1936, the amount of each dividend received by the trustee of the trust is included in the assessable income of the trust for the purposes of computing the net income of the trust under subsection 95(1) of the ITAA 1936; and

- subject to the trustee of the trust being a 'qualified person' under Division 1A of former Part IIIAA of the ITAA 1936, the amount of the franking credit on each dividend received by the trustee of the trust is included in the assessable income of the trust for the purposes of computing the net income of the trust under subsection 95(1) of the ITAA 1936 (gross-up), pursuant to subsection 207-35(1) of the ITAA 1997.

62. Subject to a partner in the partnership being a 'qualified person' under Division 1A of former Part IIIAA of the ITAA 1936 as required by section 207-150 of the ITAA 1997, the partner is entitled to a tax offset equal to the partner's share of the franking credit on each dividend received by the partnership, under section 207-45 of the ITAA 1997.

63. Subject to a beneficiary of the trust being a 'qualified person' under Division 1A of former Part IIIAA of the ITAA 1936 as required by section 207-150 of the ITAA 1997, the beneficiary is entitled to a tax offset equal to the beneficiary's share of the franking credit on each dividend received by the trustee of the trust, under section 207-45 of the ITAA 1997.

Qualified person

64. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked distribution made to an entity, only a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 is required to include the amount of the franking credit in their assessable income and is entitled to a tax offset in respect of the franking credit attached to the franked distribution.

65. Paragraph 207-150(1)(a) of the ITAA 1997 provides that in relation to a franked distribution which flows indirectly to an entity (being a partner in a partnership, or a trustee or beneficiary of a trust), only a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 is required to include their share of the franking credit in their assessable income and is entitled to a tax offset in respect of their share of the franking credit attached to the franked distribution.

66. If the assets of a partnership include shares, or the trustee of a trust holds shares, former section 160APHG of the ITAA 1936 deems a partner in the partnership or a beneficiary of the trust to hold an interest in the shares.

67. Former section 160APHU of the ITAA 1936 provides that a partner in a partnership or the beneficiary of a trust cannot be a qualified person in relation to a dividend unless the partnership or the trustee of the trust is also a qualified person in relation to the dividend.

68. Division 1A of former Part IIIAA of the ITAA 1936 contains the tests that must be satisfied for an entity to be a 'qualified person' in relation to a franked distribution.

69. The main test of what constitutes a 'qualified person', known as the holding period rule, is in former subsection 160APHO(1) of the ITAA 1936, which states:

> 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, or 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 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 secondary qualification period in relation to the dividend.

70. Former subsection 160APHO(2) of the ITAA 1936, referred to in the preceding paragraph, requires the taxpayer to hold the shares or interest in shares for at least 45 days if the shares are not preference shares, or at least 90 days if the shares are preference shares.

71. Former sections 160APHP, 160APHQ, 160APHR and 160APHT of the ITAA 1936 provide other means by which an entity can be a 'qualified person' in relation to a franked distribution.

Related payment rule

72. In order to determine what the relevant qualification period is, it is necessary to determine whether, under the present arrangement, an Alesco shareholder has made, or is under an obligation to make, or is likely to make, a related payment in respect of any of the dividends they receive.

73. Former section 160APHN of the ITAA 1936 gives examples of, but does not limit, what constitutes, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, the making of a related payment by a taxpayer by a taxpayer or an associate of a taxpayer in respect of a dividend paid in respect of shares, or in respect of a distribution made in respect of interests in shares, held by the taxpayer.

74. Former subsection 160APHN(2) of the ITAA 1936 states:

> 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.

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

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other persons:

(a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or

(b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or 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.

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

The circumstances referred to in subsection (3), are where:

(a) the amount or the sum of the amounts paid, credited or applied; or

(b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or

(c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

(d) is, or may reasonably be expected to be, equal to; or

(e) approximates or may reasonably be expected to approximate; or

(f) is calculated by reference to;

the amount of the dividend or distribution.

77. 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 relation to the primary qualification period in relation to the dividend in order to be a 'qualified person'.

78. 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 relation to the secondary qualification period in relation to the dividend in order to be a 'qualified person'.

79. In the circumstances of this takeover bid, it is considered that the payment of the Final Dividend of $0.05, the Special Dividend of $0.10 and the Additional Discretionary Dividend of $0.27 is an integral part of the arrangement. Under the terms of the Takeover Implementation Agreement, the offer consideration is reduced by the amount of the Final Dividend, the Special Dividend and the Additional Discretionary Dividend paid by Alesco to its shareholders (including partnerships and the trustees of trusts). Therefore, the former paragraphs 160APHN(3)(f) and 160APHN(4)(c) of the ITAA 1936 are satisfied. The reduction of the offer consideration has the effect of passing the benefit of the dividends from an Alesco shareholder to Dulux or DuluxGroup (Nominees) Pty Ltd. An Alesco shareholder, and a partner in a partnership or a beneficiary of a trust that has an interest in Alesco shares, is taken to have made, or to be under an obligation to make, a related payment in respect of the Final Dividend, the Special Dividend and the Additional Discretionary Dividend.

Holding period requirement

80. As the Alesco ordinary shares are not preference shares, an Alesco shareholder, or a partner in a partnership or a beneficiary of a trust that has an interest in Alesco shares, is required to hold the shares, or the interest in the shares, on which a dividend has been paid for a continuous period of at least 45 days during the relevant qualification period.

81. In determining whether they hold the shares, or interest in shares, for at least 45 days in the secondary qualification period, an entity does not count the day on which the shareholder acquired the shares or interest in shares. If the shareholder has disposed of the shares or interest in shares, an entity does not count the day on which the disposal occurred. Furthermore, any days on which the shareholder has materially diminished risks of loss or opportunities for gain in respect of the shares or interest in shares (within the meaning of former sections 160APHM and 160APHJ of the ITAA 1936) are to be excluded. The exclusion of those days is not taken to break the continuity of the period for which the shareholder held the shares or interest in shares.

82. Under former subsection 160APHM(2) of the ITAA 1936, a taxpayer is taken to have materially diminished risks of loss or opportunities for gain in respect of shares or an interest in shares if the taxpayer's 'net position' (defined in former subsection 160APHJ(5) of the ITAA 1936) on a particular day in relation to the shares or interest has less than 30% of those risks and opportunities.

83. The requirement to exclude any days on which the shareholder has materially diminished risks of loss or opportunities for gain in respect of shares or an interest in shares is often referred to in positive terms as requiring the shareholder to only count the days during the relevant qualification period on which they hold the shares or interest in shares 'at risk'.

84. As the Alesco shareholders, and the partners in partnerships and the beneficiaries of trusts that have an interest in Alesco shares, are taken, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to have made, or be under an obligation to make, a related payment in respect of the Final Dividend, the Special Dividend and the Additional Discretionary Dividend, the relevant qualification period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

85. The former section 160APHD of the ITAA 1936 defines the 'secondary qualification period' in relation to a taxpayer in relation to shares or an interest in shares as:

> (a) if the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest become *ex dividend*...

86. The former section 160APHE of the ITAA 1936 defines '*ex dividend*' as:

> (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, become *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.
>
> (2) An interest as a beneficiary of a widely held trust in a share in respect of which a dividend is to be paid becomes *ex dividend* on the day after the last day on which the acquisition by a person of the interest will entitle the person to receive a distribution from the trust.

The Final Dividend and the Special Dividend

87. Alesco determined eligibility for the Final Dividend and the Special Dividend on the Record Date of 17 August 2012. Accordingly, in respect of the Final Dividend and the Special Dividend, the day on which the shares or interests in shares become *ex dividend* for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 18 August 2012.

88. The secondary qualification period began 45 days before the *ex dividend* date of 18 August 2012 and ended 45 days after that day. This means that the secondary qualification period ran from 4 July 2012 to 2 October 2012. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which an entity had materially diminished risks of loss or opportunities for gain in respect of their Alesco shares, or interest in Alesco shares, are excluded from counting towards the 45 day holding period requirement.

89. Accordingly during the secondary qualification period from 4 July 2012 to 2 October 2012, an Alesco shareholder, or a partner in a partnership or a beneficiary of a trust that has an interest in Alesco shares, who received the Final Dividend and the Special Dividend must hold their shares ‘at risk’ for at least 45 days (not counting the day on which the share or interest was acquired or the day, if any, of disposal of the share or interest) in order to be a qualified person in relation to the Final Dividend and the Special Dividend.

The Additional Discretionary Dividend

90. Alesco determined eligibility for the Additional Discretionary Dividend on the Record Date of 7 December 2012. Accordingly, in respect of the Additional Discretionary Dividend, the day on which the shares or interests in shares become *ex dividend* for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 8 December 2012.

91. The secondary qualification period began 45 days before the *ex dividend* date of 8 December 2012 and ended 45 days after that day. This means that the secondary qualification period ran from 24 October 2012 to 22 January 2013. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which an entity had materially diminished risks of loss or opportunities for gain in respect of their Alesco shares, or interest in Alesco shares, are excluded from counting towards the 45 day holding period requirement.

92. For the purposes of Division 1A of former Part IIIAA of the ITAA 1936:

- where an Alesco shareholder (including a partnership and the trustee of a trust) accepted the Dulux Offer prior to it becoming unconditional (including shareholders who tendered their Alesco shares into the Institutional Acceptance Facility), those shareholders, and the partners in those partnerships and the beneficiaries of those trusts who have an interest in Alesco shares, will no longer be considered to hold their Alesco shares 'at risk' as of 12 December 2012, which is the date on which the Dulux Offer was declared unconditional – the secondary qualification period for these entities will run from 24 October 2012 to 11 December 2012 (inclusive);
- where an Alesco shareholder (including a partnership and the trustee of a trust) accepted the Dulux Offer after it becomes unconditional, those shareholders, and the partners in those partnerships and the beneficiaries of those trusts who have an interest in Alesco shares, will no longer be considered to hold their Alesco shares 'at risk' from the date the shareholder accepts the Dulux Offer – the secondary qualification period for these entities will run from 24 October 2012 to the date they accept the Dulux Offer;
- where an Alesco shareholder (including a partnership and the trustee of a trust) does not accept the Dulux Offer but has their shares compulsorily acquired pursuant to the *Corporations Act 2001*, those shareholders, and the partners in those partnerships and the beneficiaries of those trusts who have an interest in Alesco shares, will no longer be considered to hold their Alesco shares 'at risk' as of the date on which their shares are acquired by DuluxGroup (Nominees) Pty Ltd.

93. For Alesco shares that are compulsorily acquired, the secondary qualification period for those shareholders, and the partners in those partnerships and the beneficiaries of those trusts who have an interest in Alesco shares, would run from 24 October 2012 until the earlier of:

(a) 45 days after the *ex dividend* date (22 January 2013); and

(b) the date DuluxGroup (Nominees) Pty Ltd completes the compulsory acquisition procedures in accordance with the *Corporations Act 2001*.

94. Accordingly, during the secondary qualification period that is applicable to them, an Alesco shareholder, or a partner in a partnership or a beneficiary of a trust that has an interest in Alesco shares, who received the Additional Discretionary Dividend must hold their shares, or interest in shares, 'at risk' for at least 45 days (not counting the day on which the share or interest was acquired or the day, if any, of disposal of the share or interest) in order to be a qualified person in relation to the Additional Discretionary Dividend.

CGT consequences

CGT event A1

95. CGT event A1 in section 104-10 will happen when an entity disposes of a CGT asset. This will occur when there is a change in the ownership of a CGT asset from one entity to another. The time of CGT event A1 is when the disposing entity enters into the contract for the disposal, or if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

96. If an Alesco shareholder accepts the Dulux Offer, the time of CGT event A1 is when the Alesco shareholder entered into the contract to dispose of their Alesco shares to DuluxGroup (Nominees) Pty Ltd.

97. If an Alesco shareholder does not accept the Dulux Offer, but has their shares compulsorily acquired by DuluxGroup (Nominees) Pty Ltd, the time of CGT event A1 is when DuluxGroup (Nominees) Pty Ltd becomes the owner of those Alesco shares (subsection 104-10(6)).

98. An Alesco shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an Alesco share are more than the cost base of the share. An Alesco shareholder will make a capital loss if those capital proceeds are less than the reduced cost base of the Alesco share (subsection 104-10(4)).

Capital proceeds

99. The capital proceeds from CGT event A1 received by an Alesco shareholder is the total of the money they have received, or are entitled to receive, in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

100. The offer consideration for an Alesco shareholder that accepts the Dulux Offer is $2.05 for each share in Alesco. The offer consideration is the same for an Alesco shareholder that does not accept the Dulux Offer and has their shares compulsorily acquired by DuluxGroup (Nominees) Pty Ltd.

101. A Final Dividend of $0.05 per share and a Special Dividend of $0.10 per share has been paid by Alesco. An Additional Discretionary Dividend of $0.27 per share will be paid by Alesco. The offer consideration of $2.05 per share will be reduced by the amount of each of these dividends. Therefore, an Alesco shareholder will receive $1.63 per share.

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

103. In this case, the payment of the Final Dividend and the Special Dividend has occurred independently of the Dulux Offer. Neither dividend was paid in respect of the disposal of Alesco shares under the Dulux Offer. The capital proceeds from CGT event A1 happening in respect of each Alesco share will not include the Final Dividend or the Special Dividend.

104. The determination to pay the Additional Discretionary Dividend was at the discretion of Alesco. Dulux had no control over Alesco's decision to pay it, or its quantum (subject to the $0.27 ceiling in the Takeover Implementation Agreement). The payment of the Additional Discretionary Dividend will be funded entirely by Alesco drawing down its debt facilities, with no actual or contingent funding support by Dulux.

105. In these circumstances, it is considered that the capital proceeds from CGT event A1 happening in respect of each Alesco share will not include the Additional Discretionary Dividend.

The anti-avoidance provisions

Section 177EA of the ITAA 1936

106. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares.

107. Where section 177EA applies, the Commissioner has a discretion pursuant to subsection 177EA(5) of the ITAA 1936 to make a determination to either:

- debit the company's franking account pursuant to paragraph 177EA(5)(a) of the ITAA 1936; or
- deny the imputation benefit on the distribution that flowed directly or indirectly to each shareholder pursuant to paragraph 177EA(5)(b) of the ITAA 1936.

108. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA of the ITAA 1936 applies if:

(a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and

(b) either:

(i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or

(ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and

(c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and

(d) except for this section, the person (the '**relevant taxpayer**') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and

(e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

109. Under this arrangement, the 'relevant taxpayer' is an Alesco shareholder and the scheme comprises the circumstances surrounding the Dulux Offer.

110. In the present case the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied.

(a) The disposal of the ordinary shares in Alesco (a corporate tax entity) pursuant to the Dulux Offer is a scheme for the disposition of membership interests.

(b) The Final Dividend and the Special Dividend are frankable distributions that have been paid to Alesco shareholders in respect of their Alesco shares. The Additional Discretionary Dividend is a frankable distribution that is expected to be payable to Alesco shareholders in respect of their Alesco shares.

(c) The Final Dividend and the Special Dividend are each a franked distribution. The Additional Discretionary Dividend is expected to be a franked distribution.

(d) Alesco shareholders could reasonably be expected to receive imputation benefits as a result of the Final Dividend, the Special Dividend and the Additional Discretionary Dividend.

111. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of Alesco, its shareholders or any other relevant party who entered into or carried out the scheme or any part of the scheme, there is a purpose (other than an incidental purpose) of enabling Alesco shareholders to obtain an imputation benefit.

112. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of 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.

113. The Commissioner has concluded that section 177EA of the ITAA 1936 does not apply to the scheme. Having regard to the relevant circumstances of the scheme, and considering the manner, form and substance of the scheme, the Commissioner has concluded that the scheme was not entered into for the requisite purpose of enabling Alesco shareholders to obtain an imputation benefit.

- The Final Dividend and the Special Dividend were, and the Additional Discretionary Dividend will be, fully franked, which is a continuation of Alesco's policy of paying fully franked dividends.
- Alesco only has ordinary shares on issue. The Final Dividend and the Special Dividend were paid, and the Additional Discretionary Dividend will be paid, to all Alesco shareholders on an equal basis in proportion to the number of shares that each Alesco shareholder held on the relevant Record Date.

114. Therefore, 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 Final Dividend, the Special Dividend and the Additional Discretionary Dividend.

Section 204-30

115. 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));

(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)).

116. Relevantly, if section 204-30 applies, the Commissioner has a discretion under subsection 204-30(3) to make a written determination 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 any streamed distribution made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

117. 'Streaming' is not defined for the purposes of section 204-30. However, the Commissioner has understood it to refer to a company 'selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits' (paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002).

118. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than another member of the entity. The words 'derive a greater benefit from franking credits' are defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

119. Under the current arrangement, all Alesco shareholders have received an imputation benefit as a result of the payment of the Final Dividend and the Special Dividend, and will receive an imputation benefit when the Additional Discretionary Dividend is paid. The imputation benefit for resident shareholders is in the form of a tax offset (paragraph 204-30(6)(a)), and for non-resident shareholders is in the form of not being liable to pay dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders derived a greater benefit from franking credits than the non-resident shareholders.

120. However, the Final Dividend and the Special Dividend were paid, and the Additional Discretionary Dividend will be paid, equally to all Alesco shareholders and were, or will be, fully franked. Accordingly, it cannot be said that Alesco selectively directed the flow of franked distributions to those members who could most benefit from the imputation benefits.

121. As the conditions in subsection 204-30(1) are not 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 the Special Dividend, or to be received in relation to the Additional Discretionary Dividend.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2002/4
TR 2006/10
TR 2010/4

Subject references:

- arrangement
- CGT asset
- CGT capital proceeds
- CGT cost base
- CGT event A1
- CGT events
- distributions
- dividend income
- dividend streaming arrangements
- frankable dividends
- franking credits
- holding period rule
- imputation system
- ordinary shares
- qualified persons
- related payment rule
- takeovers
- takeovers & mergers

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 44(1)(a)
- ITAA 1936 Div 1A of Pt IIIAA
- ITAA 1936 160APHD
- ITAA 1936 160APHE
- ITAA 1936 160APHE(1)
- ITAA 1936 160APHG
- ITAA 1936 160APHM
- ITAA 1936 160APHN
- ITAA 1936 160APHN(2)
- ITAA 1936 160APHN(3)
- ITAA 1936 160APHN(4)
- ITAA 1936 160APHO
- ITAA 1936 160APHO(1)
- ITAA 1936 160APHO(1)(b)
- ITAA 1936 160APHO(2)
- ITAA 1936 160APHO(3)
- ITAA 1936 160APHU
- ITAA 1936 177EA
- ITAA 1936 177EA(3)
- ITAA 1936 177EA(3)(a)
- ITAA 1936 177EA(3)(b)
- ITAA 1936 177EA(3)(c)
- ITAA 1936 177EA(3)(d)
- ITAA 1936 177EA(3)(e)
- ITAA 1936 177EA(5)
- ITAA 1936 177EA(5)(a)
- ITAA 1936 177EA(5)(b)
- ITAA 1936 177EA(17)
- ITAA 1997
- ITAA 1997 Div 67
- ITAA 1997 67-25
- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(2)
- ITAA 1997 104-10(3)
- ITAA 1997 104-10(4)
- ITAA 1997 104-10(6)
- ITAA 1997 116-20(1)
- ITAA 1997 118-20
- ITAA 1997 204-30
- ITAA 1997 204-30(1)
- ITAA 1997 204-30(1)(a)
- ITAA 1997 204-30(1)(b)
- ITAA 1997 204-30(1)(c)
- ITAA 1997 204-30(3)
- ITAA 1997 204-30(3)(a)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 204-30(6)(a)
- ITAA 1997 204-30(6)(e)
- ITAA 1997 204-30(8)
- ITAA 1997 207-20(1)
- ITAA 1997 207-20(2)
- ITAA 1997 207-35(1)
- ITAA 1997 207-45
- ITAA 1997 207-145(1)(a)
- ITAA 1997 207-150(1)(a)
- TAA 1953
- Copyright Act 1963
- Corporations Act 2001

Other references:

- Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002

ATO references	
NO:	1-4ACB99P
ISSN:	1445-2014
ATOlaw topic:	Income Tax ~~ Assessable income ~~ dividend, interest and royalty income Income Tax ~~ Capital Gains Tax ~~ capital proceeds Income Tax ~~ Capital Gains Tax ~~ CGT event A1 – disposal of a CGT asset Income Tax ~~ Entity specific matters ~~ franking of dividends – company matters Income Tax ~~ Tax integrity measures ~~ dividend streaming and demerger benefits Income Tax ~~ Tax integrity measures ~~ qualified persons – franking credits Income Tax ~~ Tax offsets, credits and benefits ~~ franking tax offset