


# ***CR 2014/4 - Income tax: Clough Limited Scheme of Arrangement and Special Dividend***

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## Class Ruling

# Income tax: Clough Limited Scheme of Arrangement and Special Dividend

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### **📌 This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provisions

2. The relevant provisions dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - subsection 44(1) of the ITAA 1936;
  - section 128B of the ITAA 1936;
  - section 128D of the ITAA 1936;
  - former section 160APHM of the ITAA 1936;
  - former section 160APHN of the ITAA 1936;
  - Division 1A of former Part IIIAA of the ITAA 1936;
  - section 177EA of the ITAA 1936;
  - section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - Division 115 of the ITAA 1997;

- section 116-20 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 207-35 of the ITAA 1997;
- section 207-75 of the ITAA 1997;
- section 207-145 of the ITAA 1997; and
- section 855-10 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 is the ordinary shareholders of Clough Limited (Clough) who:

- held their Clough ordinary shares on capital account;
- participated in the Clough Scheme of Arrangement (the Scheme) under which Murray & Roberts Pty Ltd (Bidco) acquired all of the shares in Clough not already owned by Murray & Roberts Limited (M&R);
- received the Special Dividend and the Scheme Consideration; and
- are not subject to the taxation of financial arrangements rule in Division 230 in relation to gains and losses on their Clough shares.

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

In this Ruling, an entity belonging to this class of entities is referred to as a 'Clough shareholder'.

This Class Ruling does not consider the taxation treatment of the holders of options granted pursuant to the Clough Employee Option Plan (Clough Options) and Performance Rights granted pursuant to the Clough Executive Incentive Scheme (Clough Performance Rights).

## **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 was carried out in accordance with the scheme described in paragraphs 8 to 29 of this Ruling.

6. If the scheme actually carried out was 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

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7. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

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8. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Class Ruling application dated 11 October 2013;
- The Scheme Implementation Agreement (SIA) dated 28 August 2013, together with its schedules and annexure;
- Agreement dated 8 October 2013 which clarifies clauses 5.1 to 5.3 of the SIA and replaces Annexure C to the SIA with a new Loan Agreement;
- The Clough Scheme Booklet dated 11 October 2013; and
- Other correspondence provided by the applicant between 30 August 2013 and 13 October 2013 inclusive.

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

## **Relevant Entities**

### ***Clough***

9. Clough is an Australian resident company that was listed on the Australian Securities Exchange. Clough is the head company of the Clough income tax consolidated group.
10. Clough is an engineering and project services contractor servicing the Energy & Chemical and Mining & Mineral sectors in Australia and Papua New Guinea.
11. As at 4 October 2013 Clough had 777,203,039 ordinary shares on issue. Clough did not have any other class of shares on issue.
12. The shareholders of Clough were a mix of individuals, companies, superannuation funds and other institutional investors.
13. Except for M&R, no non-resident shareholders, either alone or together with associates, beneficially owned 10% or more of the shares in Clough.
14. Clough had also granted Clough Options and Clough Performance Rights. These Clough Options and Clough Performance Rights were either exercised or cancelled in accordance with the terms and conditions of the SIA prior to the Scheme Record Date.
15. Based on the publicly available shareholder data, Clough is not and has never been an exempting entity as defined in section 208-5.
16. The sum of the market values of Clough's assets that are taxable Australian real property does not exceed the sum of the market values of its assets that are not taxable Australian real property.

### ***Bidco, M&R and Murray & Roberts Holdings Limited***

17. Bidco is an Australian resident company and a wholly owned subsidiary of M&R.
18. M&R is a South African resident and a wholly owned subsidiary of Murray & Roberts Holdings Limited (M&R Holdings). M&R beneficially held 61.6% of the issued shares in Clough.
19. M&R Holdings, through its subsidiaries, is an engineering, contracting and construction services company based in Johannesburg, South Africa and is listed on the JSE Limited.

## **The Scheme of Arrangement**

20. On 29 August 2013, Clough announced that it had executed a binding SIA with M&R Holdings and Bidco. Under the SIA, subject to the satisfaction of conditions precedent, it was proposed that Bidco would acquire all of the ordinary shares in Clough not already owned by M&R, by way of a scheme of arrangement under Part 5.1 of the *Corporations Act 2001*.

21. The Scheme was approved by a majority of eligible Clough shareholders at the Scheme Meeting held on 15 November 2013.
22. Under the Scheme, Clough shareholders received a total cash payment of \$1.46 (comprising Scheme Consideration of \$1.32 and a fully franked Special Dividend of \$0.14) for each Clough share transferred to Bidco.
23. The Scheme Record Date was 4 December 2013 and the Implementation Date for the Scheme was 11 December 2013.
24. The payment of the Scheme Consideration by Bidco to Clough Shareholders was financed through a combination of proceeds from the Special Dividend received by the M&R Group (i.e. M&R Holdings and its subsidiaries), new bank debt provided to the M&R Group from existing lenders and funds borrowed from Clough pursuant to the Clough Loan Agreement. No part of the Clough Loan was used to fund the Special Dividend.

### **The Special Dividend**

25. On 15 November 2013 and subsequent to the Scheme Meeting, the Clough Board of Directors (excluding the Excluded Directors (i.e. Clough directors employed by the M&R Group)) determined to pay a fully franked Special Dividend of \$0.14 per Clough share, subject to the Scheme becoming effective.
26. The determination of the Special Dividend was at the absolute discretion of the Independent Directors of Clough (i.e. directors on the Clough Board that are not a director of or employed by an entity within the M&R Group). The M&R Group did not have any influence or control over the declaration or payment of the Special Dividend. In particular, the Excluded Directors were not entitled to vote on the Clough Board's resolution to approve the Special Dividend. Neither Bidco, M&R nor M&R Holdings have an obligation to ensure the Special Dividend was paid to the Clough shareholders under the Scheme.
27. Implementation of the Scheme was not conditional upon the declaration or payment of the Special Dividend.
28. Clough shareholders, including M&R, who were registered as holding Clough shares on the Special Dividend Record Date of 28 November 2013, received the fully franked Special Dividend of \$0.14 per share on the Special Dividend Payment Date of 3 December 2013.
29. The Special Dividend was funded from existing cash reserves of Clough and was debited against Clough's 2013 profit reserve account (a separate retained earning account created for the payment of future dividends) and current year profits account.

## Ruling

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### The Special Dividend

30. The Special Dividend of \$0.14 cash per Clough share paid to a Clough shareholder constitutes a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

### Assessability of the Special Dividend

31. A Clough shareholder who received the fully franked Special Dividend and is a resident of Australia, as defined in subsection 6(1) of the ITAA 1936, is required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

32. A Clough shareholder who received the fully franked Special Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) is not required to include the Special Dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and is not liable for Australian withholding tax in respect of the Special Dividend (paragraph 128B(3)(ga) of the ITAA 1936).

33. A Clough shareholder who received the fully franked Special Dividend and is a non-resident carrying on business in Australia at or through a permanent establishment in Australia, where the Special Dividend is attributable to the permanent establishment, is required to include the Special Dividend as assessable income under subparagraph 44(1)(c)(i) of the ITAA 1936 and is not liable for Australian withholding tax in respect of the Special Dividend (subsection 128B(3E) of the ITAA 1936).

### Gross up and tax offset

34. A Clough shareholder who received the fully franked Special Dividend directly and who satisfies the residency requirements in section 207-75:

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

under section 207-20, subject to being a qualified person in relation to the Special Dividend.

35. A Clough shareholder (not being a corporate tax entity), who received the fully franked Special Dividend as a trustee of a trust (not being a complying superannuation entity or a FHSA trust) or as a partnership, is required to include an amount equal to the franking credit attached to the Special Dividend as assessable income under subsection 207-35(1), subject to the trustee or the partnership being a qualified person.

**Qualified person**

36. The payment of the Special Dividend as part of the Scheme constitutes a related payment for the purposes of former section 160APHN of the ITAA 1936.

37. Accordingly, each Clough shareholder will need to hold their Clough shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person in respect of the Special Dividend.

38. A Clough shareholder will no longer be considered to hold their Clough shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 as from the Scheme Record Date of 4 December 2013.

39. Therefore, a Clough shareholder will be a qualified person in relation to the Special Dividend if, in the period from 15 October 2013 until 3 December 2013 inclusive, they continued to hold their Clough shares and did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of their Clough shares for a continuous period of at least 45 days (not counting the day on which the share was acquired or the day of disposal of the share).

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

40. CGT event A1 happened when a Clough shareholder disposed of their Clough share to Bidco pursuant to the Scheme (subsections 104-10(1) and 104-10(2)).

41. The time of the CGT event was when the change of ownership occurred (paragraph 104-10(3)(b)). This was when the Clough shares were transferred to Bidco on the Scheme Implementation Date of 11 December 2013.

***Capital gain or capital loss***

42. A Clough shareholder made a capital gain if the capital proceeds in respect of the disposal of their Clough share exceeded its cost base (subsection 104-10(4)). The capital gain is the amount of the excess.

43. A Clough shareholder made a capital loss if the capital proceeds in respect of the disposal of their Clough share was less than its reduced cost base (subsection 104-10(4)). The capital loss is the amount of the difference.



## ***Capital proceeds***

44. The capital proceeds received by a Clough shareholder from the CGT event is the money received or entitled to be received in respect of the event happening (subsection 116-20(1)).

45. The capital proceeds received by a Clough shareholder for each Clough share they disposed of under the Scheme is \$1.32. The Special Dividend of \$0.14 does not form part of the capital proceeds as it is considered, having regard to the circumstances of the Scheme, that the Special Dividend was not paid in respect of the CGT event A1 happening.

## ***Discount capital gain***

46. A capital gain made by a Clough shareholder when they disposed of a Clough share under the Scheme is a discount capital gain if they acquired the share at least 12 months before the date of disposal (i.e. 11 December 2013) and the other conditions in Division 115 are satisfied.

## ***Foreign resident shareholders***

47. A foreign resident Clough shareholder who participated in the Scheme disregards any capital gain made when CGT event A1 happened if their shares were not 'taxable Australian property' (section 855-10).

## ***Anti-avoidance provisions***

48. 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 respect of the Special Dividend paid in relation to a Clough share.

49. 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 respect of the Special Dividend paid in relation to a Clough share.

50. Section 207-145 will not apply to the whole, or any part, of the Special Dividend received by a Clough shareholder, provided the shareholder is a qualified person.

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## Appendix 1 – Explanation

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

### **The Special Dividend**

51. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders, whether in money or other property.

52. The payment of the Special Dividend is a distribution in money made by Clough to its shareholders.

53. Paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 however 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 Special Dividend was paid out of Clough's existing cash reserves and was debited against Clough's 2013 profits reserve account and current year profits account, not the share capital account. Therefore, the exclusion in paragraph (d) does not apply and the Special Dividend constituted a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

### **Assessability of the Special Dividend – residents**

55. 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.

56. As the Special Dividend was paid to Clough shareholders out of profits derived by Clough, Clough shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Special Dividend in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

## **Assessability of the Special Dividend – non-residents (not carrying on business at or through a permanent establishment)**

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

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

58. However, subsection 44(1) of the ITAA 1936 does not apply to a dividend to the extent to which another provision of the ITAA 1936 that expressly deals with dividends excludes some or all of the dividend from assessable income.

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

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

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

61. In addition, section 128D of the ITAA 1936 states that:

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

62. As the payment of the Special Dividend is income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936, it will not be assessable income, and will not be exempt income of a non-resident Clough shareholder pursuant to section 128D of the ITAA 1936.

63. Accordingly, a Clough shareholder who received the fully franked Special Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) is not required to include the Special Dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and is not liable for Australian withholding tax in relation to the Special Dividend (paragraph 128B(3)(ga) of the ITAA 1936).

**Assessability of the Special Dividend – non-residents (carrying on business at or through a permanent establishment)**

64. Application of subsection 128B(1) of the ITAA 1936 is subject to subsection 128B(3E) of the ITAA 1936. Subsection 128B(3E) of the ITAA 1936 states that section 128B of the ITAA 1936 does not apply to dividend income that:

- (a) is paid to a person who is a non-resident carrying on business in Australia at or through a permanent establishment of the person in Australia; and
- (b) is attributable to the permanent establishment; and
- (c) is not paid to the person in the person's capacity as a trustee.

65. Subparagraph 44(1)(c)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder of a resident company who is carrying on business in Australia at or through a permanent establishment of the shareholder in Australia:

Dividends (other than non-share dividends) that are paid to the shareholder by the company and are attributable to the permanent establishment, to the extent to which they are paid out of profits derived by the company from sources outside Australia.

66. Accordingly, a non-resident Clough shareholder carrying on business in Australia at or through a permanent establishment who received the fully franked Special Dividend (to the extent to which the dividend is attributable to the permanent establishment) is required to include the Special Dividend in their assessable income under subparagraph 44(1)(c)(i) of the ITAA 1936 and is not liable for Australian withholding tax in relation to the Special Dividend.

**Gross up and tax offset**

67. 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 another amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a \*tax offset for the income year in which the distribution is made. The tax offset is equal to the \*franking credit on the distribution.

68. Therefore, subject to being a qualified person in relation to the Special Dividend, if the fully franked Special Dividend was received directly by a Clough shareholder and the Clough shareholder satisfies the residency requirement in section 207-75, the Clough shareholder:

- is required to include the amount of the franking credit on the Special Dividend in their assessable income; and

- is entitled to a tax offset equal to the amount of the franking credit.

69. If the fully franked Special Dividend was received by a Clough shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

If:

- (a) a \*franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a \*corporate tax entity when the distribution is made; and
- (c) if the entity is a 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.

70. Therefore, subject to being a qualified person rule, a Clough shareholder that is a trustee of a trust or a partnership is required to include the amount of the franking credit on the Special Dividend in the assessable income of that trust or partnership under subsection 207-35(1).

## Qualified person

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

72. In broad terms, Division 1A of former Part IIIAA of the ITAA 1936 (former Division 1A) provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' in relation to a franked distribution they have received and thus be entitled to a tax offset for the franking credit on the distribution. The former Division 1A has effect via the express terms of section 207-145.

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

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a qualified person in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or

- (b) where the taxpayer or an associate of a taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification period in relation to the dividend.

74. Former subsection 160APHO(2) of the ITAA 1936 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***

75. In order to determine the relevant qualification period, it is necessary to determine whether, under the present arrangement, the Clough shareholders are considered to have made, be under an obligation to make, or be likely to make, a related payment.

76. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A. Former subsection 160APHN(2) of the ITAA 1936 provides:

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

77. 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.

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

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

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to;  
the amount of dividend or distribution.

79. The payment of the Special Dividend of \$0.14 per share is an integral part of the Scheme. The payment of the Special Dividend was conditional upon the Scheme becoming effective. In addition, the payment of the Special Dividend reduced the payment that a Clough shareholder would have received from Bidco for the disposal of their Clough shares to Bidco under the Scheme.

80. In these circumstances, it is considered the payment of the Special Dividend constitutes an act that has the effect of passing the benefit of the Special Dividend to another for the purposes of former Division 1A. Therefore a Clough shareholder is taken to have made or be likely to make a related payment in respect of the Special Dividend.

### ***Holding period***

81. As the Clough shareholders are taken, for the purposes of former Division 1A, to have made or be likely to make a related payment in respect of the Special Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

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

In relation to a taxpayer in relation to shares or an interest in shares, means:

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

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

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

84. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 28 November 2013. This was the last day on which acquisition by a person of a Clough share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) of the ITAA 1936 was 29 November 2013.

85. The secondary qualification period thus runs from 45 days before the ex-dividend date of 29 November 2013 and ends 45 days after that date. This means that the secondary qualification period runs from 15 October 2013 to 13 January 2014.

86. 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 Clough shares are to be excluded. This means that the secondary qualification period runs from 15 October 2013 until the date that Clough shareholders no longer held their shares at risk for the purposes of former Division 1A.

87. Entitlement to participate in the Scheme was determined on the Scheme Record Date of 4 December 2013. It is considered that once a Clough shareholder was identified as a Clough shareholder on the Scheme Record Date, that Clough shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A as at that time the Clough shareholder was committed to disposing of their Clough share and receiving the Scheme Consideration.

88. Accordingly, for a Clough shareholder who disposed of their Clough shares under the Scheme, the secondary qualification period would run from 15 October 2013 to 3 December 2013 (inclusive). A Clough shareholder who received the Special Dividend would need to have held their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A. Further, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, the dates of acquisition and disposal are not included in the relevant 45 day period.



89. As such, a Clough shareholder who acquired a Clough share on or before 19 October 2013 will be a 'qualified person' for the purposes of former Division 1A if they continuously held their share at risk until the Scheme Record Date of 4 December 2013.

## **Capital gains tax**

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

90. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10). The 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)).

91. A takeover or merger effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract (paragraph 9 of Taxation Determination TD 2002/4<sup>1</sup>).

92. CGT event A1 happened when a Clough shareholder disposed of a Clough share to Bidco pursuant to the Scheme (subsections 104-10(1) and 104-10(2)). The disposal occurred on the Implementation Date of 11 December 2013 when the share was disposed of by a Clough shareholder (paragraph 104-10(3)(b)).

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

94. A Clough shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of their Clough share exceeded its cost base. A Clough shareholder made a capital loss if those capital proceeds were less than their Clough share's reduced cost base (subsection 104-10(4)).

### ***Capital proceeds***

95. The capital proceeds received by a Clough shareholder from the CGT event A1 is the money received or entitled to be received in respect of the event happening (subsection 116-20(1)).

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

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<sup>1</sup> Taxation Determination TD 2002/4: *Income tax: capital gains: what is the first element of the cost base and reduced cost base of a share in a company you acquire in exchange for a share in another company in a takeover or a merger?*

97. Taxation Ruling TR 2010/4 explains when a dividend declared or paid will constitute capita proceeds under section 116-20. TR 2010/4 states in paragraph 9 that:

A dividend declared or paid by the target company to the vendor shareholder will be money or property that the vendor shareholder has received, or is entitled to receive, under the contract or the scheme of arrangement, in respect of the transfer of the shares, if the vendor shareholder has bargained for the receipt of the dividend (whether or not in addition to other consideration) in return for giving up the shares. That is to say, if the dividend forms the whole or part of that sum of money or property in return for which the vendor shareholder is willing, and under the contract has promised or under the scheme of arrangement is bound, to transfer the shares in the target company, it will be capital proceeds in respect of the CGT event A1 happening.

98. Further, paragraph 11 of TR 2010/4 states:

Similarly, a dividend will be capital proceeds of CGT event A1 happening in respect of a disposal of shares under a scheme of arrangement if the vendor shareholders' acceptance of the scheme of arrangement (by the requisite majority vote) is conditional upon one or more of the following circumstances being present:

- the dividend being declared by the target company; or
- the purchaser or a third party financing or facilitating payment of the dividend; or
- the purchaser or a third party being obliged to bring about the result that the dividend will be received by the vendor shareholders.

99. In this case, at the time when the Clough shareholders voted on the Scheme, there was no certainty that the Special Dividend would be declared and paid.

100. Although payment of the Special Dividend was conditional upon the Scheme becoming effective, the declaration and payment of the Special Dividend was at the discretion of the Independent Directors. M&R Group did not have any influence or control over the decision to pay the Special Dividend nor did they provide any funds to Clough to finance the payment of the Special Dividend.

101. Therefore, it is considered that the Special Dividend was not received in respect of the disposal of Clough shares under the Scheme. Accordingly, the Special Dividend does not form part of the capital proceeds a Clough shareholder received in respect of CGT event A1 happening.

102. The capital proceeds received by a Clough shareholder for each Clough share disposed of under the Scheme is \$1.32.

### ***Discount capital gain***

103. Division 115 provides a CGT discount that reduces the amount of CGT otherwise payable by a taxpayer by the relevant discount percentage in accordance with Subdivision 115-B. Only discount capital gains are eligible for the CGT discount.

104. To be eligible to treat a capital gain as a discount capital gain, the capital gain must:

- be made by an individual, a complying superannuation entity, a trust or (in certain circumstances) a life insurance company (section 115-10)
- result from a CGT event happening after 11.45am legal time in the Australian Capital Territory on 21 September 1999 (section 115-15)
- have been worked out using a cost base that was not subject to indexation (subsection 115-20(1)), and
- result from a CGT event happening to a CGT asset that was acquired by the entity at least 12 months before the CGT event (subsection 115-25(1)).

105. Therefore, if a Clough shareholder made a capital gain when they disposed of a Clough share, the capital gain can be treated as a discount capital gain if the shareholder acquired the Clough share at least 12 months before the date of disposal under the Scheme, being the Scheme Implementation Date of 11 December 2013, subject to the other requirements listed in paragraph 104 of this Ruling being satisfied.

### ***Foreign resident shareholders***

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

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

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

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

- their share in Clough was an indirect Australian real property interest (item 2 of the table in section 855-15); or
- their share in Clough had been used at any time by the foreign resident, or the trustee of a foreign trust for CGT purposes, in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15); or
- their share in Clough was covered by subsection 104-165(3) (item 5 of the table in section 855-15).

109. An indirect Australian real property interest under section 855-25 is a membership interest held by an entity in another entity if the interest passes:

- the non-portfolio interest test under section 960-195; and
- the principal asset test in section 855-30.

110. The non-portfolio interest test under section 960-195 is as follows:

An interest held by an entity (the holding entity) in another entity (the test entity) passes the non-portfolio interest test at a time if the sum of the direct participation interests held by the holding entity and its associates in the test entity at that time is 10% or more.

111. In respect of the principal asset test, subsection 855-30(2) states:

A \*membership interest held by an entity (the **holding entity**) in another entity (**the test entity**) passes the principal asset test if the sum of the \*market values of the test entity's assets that are \*taxable Australian real property exceeds the sum of the \*market values of its assets that are not taxable Australian real property.

112. On the information provided with the Scheme description, none of the Clough shares disposed of as a part of the Scheme pass the non-portfolio interest test or the principal asset test. Consequently, the Clough shares held by non-resident shareholders do not constitute indirect Australian real property interest.

113. Where an individual or a company stops being an Australian resident, CGT event I1 happens (subsection 104-160(1)).

Subsection 104-165(3) provides that if an individual chooses to disregard making a capital gain or a capital loss from a CGT asset covered by CGT event I1 under subsection 104-165(2), that CGT asset is taken to be taxable Australian property until the earlier of:

- (a) a CGT event happening in relation to the asset, if the CGT event involves the individual ceasing to own the asset, and
- (b) the individual again becoming an Australian resident.

114. Consequently, an individual Clough shareholder, who stopped being an Australian resident after they acquired the Clough shares disposed of under the Scheme and has chosen to disregard the capital gain or capital loss from CGT event I1, can not disregard under subsection 855-10(1) a capital gain or capital loss from the disposal of their Clough shares under the Scheme.

## **Anti-avoidance provisions**

### **Section 177EA**

115. 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. 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.

116. 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 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.

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

118. Clough is a corporate tax entity. The disposal of the ordinary shares in Clough pursuant to the Scheme is a scheme for the disposition of membership interests. The fully franked Special Dividend is a frankable distribution that was paid to the Clough shareholders (the relevant taxpayers) as a part of this Scheme and who could, therefore, reasonably be expected to receive imputation benefits.

119. In the present case, the conditions in paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(17) of the ITAA 1936), it would be concluded that, on the part of Clough, its shareholders or any other relevant party, there is a purpose, not including an incidental purpose, of enabling a relevant taxpayer to obtain an imputation benefit under the Scheme.

120. 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.

121. The relevant circumstances of the Scheme include the fact that the disposition of the ordinary shares in Clough was made pursuant to the Scheme of Arrangement under the *Corporations Act 2001* voted upon by Clough's eligible shareholders.

122. The Special Dividend was fully franked and was paid to the existing shareholders of Clough in proportion to their shareholding, and irrespective of their ability to utilise the relevant franking credits. The Special Dividend allowed Clough shareholders to share in the accumulated profits of Clough.

123. In considering the manner, form and substance of the Scheme, it is considered that the Scheme was not entered into or carried out by Clough or the Clough shareholders for a purpose, more than an incidental purpose, of enabling Clough shareholders to obtain imputation benefits. The goal of providing imputation benefits to Clough shareholders remained incidental, in the sense of being subservient to, the purpose of transferring their shares to Bidco.

124. Having regard to the relevant circumstances of the Scheme, the Commissioner has come to the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

### **Section 204-30**

125. 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)).

126. If section 204-30 applies, the Commissioner may make a determination in writing:

- (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 distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

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

128. Pursuant to the Scheme in relation to the payment of the Special Dividend, all Clough shareholders received an imputation benefit as a result of the Special Dividend. Subject to being a 'qualified person', Australian resident Clough shareholders received an imputation benefit in the form of a tax offset (paragraph 204-30(6)(a)). Non-resident Clough shareholders received an imputation benefit in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). Resident Clough shareholders derived a greater benefit from franking credits than the non-resident shareholders.

129. However, the Special Dividend was paid to all Clough shareholders identified at the Special Dividend Record Date and was fully franked. Accordingly, it cannot be concluded that Clough intended to direct the flow of distributions in such a manner as to stream the imputation benefits to members that derive a greater benefit from the franking credits attached to the Special Dividend, while other members received lesser or no imputation benefits.

130. As the conditions in subsection 204-30(1) are not met in relation to the Special Dividend, 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 respect of the Special Dividend.

### **Section 207-145**

131. Pursuant to subsection 207-145(1), gross-up and tax offset treatment under sections 207-20, 207-35 and 207-45 does not apply if an entity makes a franked distribution to another entity in one or more of the following circumstances:

- the entity is not a qualified person in relation to the distribution for the purposes of former Division 1A (paragraph 207-145(1)(a));
- the Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(b));
- the Commissioner has made a determination under paragraph 204-30(3)(c) that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(c)); or
- the distribution is made as part of a dividend stripping operation (paragraph 207-145(1)(d)).

132. Explanation of whether a Clough shareholder is a qualified person for the purpose of the former Division 1A is provided in paragraph 71 to paragraph 89 of this Ruling.

133. The Commissioner has confirmed that no determination will be made under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit in relation to the Special Dividend.



134. Paragraph 207-145(1)(d) applies if a franked distribution is made as part of a dividend stripping operation. A distribution will be taken to be made as part of a dividend stripping operation, pursuant to section 207-155, if the making of the distribution arose out of, or was made in the course of, a scheme that:

- (a) was by way of, or in the nature of, dividend stripping; or
- (b) had substantially the effect of a scheme by way of, or in the nature of, dividend stripping.

135. Having regard to the circumstances of the Scheme under which the Clough shareholders disposed of their Clough shares to Bidco, it is not considered that the payment of the Special Dividend to the Clough shareholders was made as part of a dividend stripping operation. Therefore, paragraph 207-145(1)(d) will not apply.

136. Consequently, section 207-145 will not apply to the Special Dividend received by the Clough shareholders.

**Appendix 2 – Detailed contents list**

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