

# ***CR 2015/71 - Income tax: iiNet Limited Scheme of Arrangement and Discretionary Special Dividend***



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## Class Ruling

### Income tax: iiNet Limited Scheme of Arrangement and Discretionary Special Dividend

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

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

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

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

## What this Ruling is about

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

#### **Relevant provision(s)**

2. The relevant provisions dealt with in this Ruling are:

- Division 1A of former Part IIIAA of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subparagraph 44(1)(a)(i) of the ITAA 1936
- section 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 45C of the ITAA 1936
- section 177EA of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997

- subsection 115-30(1) of the ITAA 1997
- section 116-20 of the ITAA 1997
- section 118-20 of the ITAA 1997
- section 124-785 of the ITAA 1997
- section 124-790 of the ITAA 1997
- section 204-30 of the ITAA 1997, and
- section 207-20 of the ITAA 1997.

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

## Class of entities

3. The class of entities to which this Ruling applies were the shareholders in iiNet Limited (iiNet) at 5.00pm (WST) on 31 August 2015 (the Scheme Record Date) who:

- were residents of Australia (within the meaning of subsection 6(1) of the ITAA 1936)
  - received the Discretionary Special Dividend, and either:
    - did not dispose of their shares in iiNet as they were wholly owned subsidiaries of TPG Telecom Limited (TPG) being:
      - (i) ACN 139 798 404 Pty Ltd
      - (ii) Blue Call Pty Ltd, or
      - (iii) Value Added Network Pty Ltdand were members of the TPG tax consolidated group of which TPG was the head company,
- or
- disposed of their shares in iiNet to TPG under the Scheme of Arrangement pursuant to Part 5.1 of the *Corporations Act 2001* (Cth) (Corporations Act) between iiNet and its shareholders (Scheme of Arrangement) and received Scheme Consideration for that disposal, and
  - held their iiNet shares on capital account, and
  - will hold any TPG shares received as part of the Scheme Consideration on capital account, such that any capital gain that might arise on a subsequent disposal would not be disregarded (other than because of a roll-over), and

- were not 'significant stakeholders' or 'common stakeholders' as defined in section 124-783 in relation to the Scheme of Arrangement, and
- were not subject to the taxation of financial arrangement rules in Division 230 on financial arrangements under the scheme.

(Note: Division 230 will generally not apply to the financial arrangements of individuals, unless they have made an election for those rules to apply to them.)

The class of entities described in the above paragraph is referred to in this Ruling as iiNet shareholders.

### **Qualifications**

4. This Ruling does not consider how the gross-up and tax offset rules in Division 207 apply to partnership or trustee iiNet shareholders, or to indirect distributions to partners in a partnership, or beneficiaries or trustees of a trust.

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 8 to 30 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**

7. This Ruling applies from 1 July 2015 to 30 June 2016. The Ruling continues to apply after 30 June 2016 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 on behalf of iiNet. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Application for Class Ruling dated 14 July 2015
- Amended and restated Scheme Implementation Agreement dated 5 May 2015 and 10 June 2015 (Amended SIA)
- iiNet Scheme Booklet in relation to a proposal from TPG to acquire all of the ordinary shares in iiNet Limited that the TPG Group does not already own by way of a recommended Scheme of Arrangement
- Constitution of iiNet, and
- further correspondence and information provided by the applicant.

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

### iiNet

9. iiNet is an Australian resident company listed on the Australian Securities Exchange (ASX) and was established in 1993.

10. As at 9 July 2015, there were 162,950,896 iiNet shares on issue. This represented share capital of \$1.54 per share. Each share carried equal rights.

11. As at 25 March 2015, there were 1,614,327 iiNet Performance Rights on issue which vested prior to 27 August 2015 (the Discretionary Special Dividend Record Date). The holders of the 1,614,327 iiNet Performance Rights were entitled to receive the Discretionary Special Dividend and the iiNet shares issued to the holders of those iiNet Performance Rights upon their vesting, were acquired under the Scheme of Arrangement. Other Performance Rights on issue either lapsed or were cancelled before the Scheme Record Date. As such, from the Scheme Record Date, there were no iiNet Performance Rights on issue, and the number of iiNet shares on issue was 164,565,223.

12. In the period 1 January 2010 to 25 March 2015, all dividends paid to iiNet shareholders have been fully franked. In that same period there have been no returns of capital.

**Scheme of Arrangement**

13. TPG is a provider of telecommunication services in Australia and is listed on the ASX. TPG, through its wholly owned subsidiaries, owned 6.32% of the issued shares in iiNet just before the implementation of the Scheme of Arrangement, which occurred on 7 September 2015 (Scheme Implementation Date).

14. On 13 March 2015, iiNet and TPG announced that they had entered into a Scheme Implementation Agreement (SIA) pursuant to which TPG proposed to acquire 100% of the fully diluted share capital in iiNet that it did not already own, by way of a Scheme of Arrangement. Subsequently, the SIA was amended by deeds dated 5 May 2015 and 10 June 2015 (Amended SIA).

15. Under the Scheme of Arrangement, each iiNet shareholder who disposed of their iiNet shares to TPG was entitled to receive the Scheme Consideration. An iiNet shareholder was able to elect to receive the Scheme Consideration in the form of Cash Consideration or Share Consideration.

16. The Cash Consideration is \$8.80 per iiNet share.

17. The Share Consideration is 0.969 fully paid ordinary TPG share issued to iiNet shareholders for each iiNet share held.

18. Since the aggregate number of TPG shares that was required to be issued by TPG as Share Consideration exceeded 27,523,946 TPG shares, there was a proportionate scale back of the TPG shares that were issued to each iiNet shareholder who had elected to receive Share Consideration, from 0.969 to 0.5533 fully paid ordinary TPG share, such that the aggregate number of TPG shares issued equalled 27,523,946 shares. To the extent that iiNet shares held by an iiNet shareholder were not exchanged for TPG shares, the iiNet shareholder received an amount per iiNet share equal to the Cash Consideration of \$3.77.

***Discretionary Special Dividend***

19. On 7 September 2015 iiNet paid a dividend to its shareholders (the Discretionary Special Dividend) of \$0.6914 per iiNet share, as declared by the Board of Directors on 20 August 2015. The Discretionary Special Dividend was fully franked.

20. The payment date for the Discretionary Special Dividend was determined by iiNet at its discretion.

21. The Discretionary Special Dividend was sourced entirely from iiNet's profits (current period profits and retained earnings) and iiNet did not debit the Discretionary Special Dividend totalling \$113,780,395.18 against its share capital account.

22. The share capital account of iiNet is untainted for the purposes of Division 197.

23. The Discretionary Special Dividend was a dividend that complied with the requirements of the Corporations Act, including section 254T of the Corporations Act.

24. The Discretionary Special Dividend was an authorised dividend under the iiNet Constitution.

### ***Top-Up Cash Consideration***

25. The Amended SIA provided that if the amount of the Discretionary Special Dividend declared is less than \$0.75 per iiNet share, Top-Up Cash Consideration is payable equal to the amount by which the Discretionary Special Dividend is less than \$0.75 per iiNet share. The Top-Up Cash Consideration does not take into account the extent to which the Discretionary Special Dividend is franked.

26. As the Discretionary Special Dividend was \$0.6914 per share, the Top-Up Cash Consideration was calculated as \$0.0586 per iiNet share.

### **Other Matters**

27. Under clause 5.9 of the Amended SIA, TPG had agreed that where iiNet declares a Discretionary Special Dividend in accordance with clause 5.8(a) of the Amended SIA, TPG or one of its subsidiaries (TPG Group) will provide an unsecured interest free loan to iiNet in an amount equal to the aggregate amount of the Discretionary Special Dividend. Such loan will be provided to iiNet at least one business day before iiNet is required to pay the Discretionary Special Dividend to iiNet shareholders and is not repayable for at least 12 months from the payment of the Discretionary Special Dividend.

28. The iiNet board of directors (Board) had unanimously recommended the Scheme of Arrangement.

29. The iiNet shareholders approved the Scheme of Arrangement at the shareholders' meeting on 27 July 2015 and the Scheme was subsequently approved by an order of the court on 21 August 2015.

30. TPG will not make a choice under subsection 124-795(4) to prevent iiNet shareholders from being able to obtain partial scrip for scrip roll-over under Subdivision 124-M.

## **Ruling**

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### **Assessability of Discretionary Special Dividend**

31. An iiNet shareholder who received the fully franked Discretionary Special Dividend must include the Discretionary Special Dividend in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

**Qualified persons**

32. The payment of the Discretionary Special Dividend as part of the Scheme constitutes a related payment within the meaning of former section 160APHN of the ITAA 1936.

33. An iiNet shareholder must have held their iiNet shares 'at risk' for a continuous period of 45 days in the secondary qualification period to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 in relation to the Discretionary Special Dividend (former section 160APHO of the ITAA 1936).

**Refundable tax offset**

34. An iiNet shareholder who is a 'qualified person', and who received the fully franked Discretionary Special Dividend directly will:

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

under section 207-20.

35. The franking credit allocated to the Discretionary Special Dividend will be subject to the refundable tax offset rules in Division 67, provided the iiNet shareholder is not excluded by the operation of section 67-25.

**Capital Gains Tax (CGT) consequences*****CGT event A1***

36. CGT event A1 happened when an iiNet shareholder disposed of each of their iiNet shares to TPG under the Scheme of Arrangement (subsections 104-10(1) and 104-10(2)).

37. The time of the CGT event A1 is the Scheme Implementation Date of 7 September 2015 (paragraph 104-10(3)(b)).

38. An iiNet shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an iiNet share exceed its cost base. The capital gain is equal to the amount of the excess. An iiNet shareholder will make a capital loss if those capital proceeds are less than the iiNet share's reduced cost base. The capital loss is equal to the amount of the difference (subsection 104-10(4)).



## ***Capital proceeds***

39. The capital proceeds received by an iiNet shareholder who elected to receive Cash Consideration in respect of the disposal of their iiNet share will be \$8.80 per iiNet share plus the Discretionary Special Dividend and the Top-Up Cash Consideration (subsection 116-20(1)).

40. The capital proceeds received by an iiNet shareholder who elected to receive the Share Consideration in respect of the disposal of their iiNet share will be the market value of 0.5533 fully paid ordinary TPG share at the Scheme Implementation Date plus the Discretionary Special Dividend and the Top-Up Cash Consideration and the Cash Consideration (subsection 116-20(1)).

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

41. Any capital gain made by an iiNet shareholder when CGT event A1 happens can be reduced (but not below zero) by the amount of the Discretionary Special Dividend that is included in the iiNet shareholder's assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936 (section 118-20). The amount of any capital loss made by an iiNet shareholder will not be adjusted by the amount of the Discretionary Special Dividend.

## ***Partial roll-over***

42. An iiNet shareholder who elected to receive the Share Consideration may choose partial scrip for scrip roll-over under subsection 124-790(1) if they made a capital gain on the disposal of their iiNet share.

## ***Consequences of choosing roll-over***

### ***Capital gain disregarded***

43. If an iiNet shareholder chooses scrip for scrip roll-over, the capital gain made from the disposal of an iiNet share is disregarded to the extent that the iiNet shareholder received replacement TPG shares for the disposal of their iiNet shares (subsection 124-785(1) and section 124-790).

### ***Cost base of TPG shares***

44. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each TPG share received is equal to that part of the cost base as is reasonably attributable to the TPG shares received (subsection 124-785(2) and (4)).

*Acquisition date of TPG shares*

45. The iiNet shareholders who choose scrip for scrip roll-over are taken to have acquired the TPG shares on the date they originally acquired their shares in iiNet for the purposes of Division 115 (subsection 115-30(1)).

**Anti-avoidance provisions*****Section 177EA of the ITAA 1936***

46. 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 Discretionary Special Dividend paid in relation to an iiNet share.

***Section 204-30***

47. 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 Discretionary Special Dividend.

***Section 45A of the ITAA 1936***

48. The Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the Discretionary Special Dividend.

***Section 45B of the ITAA 1936***

49. The Commissioner will not make a determination under subsection 45B(3) that section 45C applies in relation to the Discretionary Special Dividend.

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**Commissioner of Taxation****16 September 2015**

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## Appendix 1 – Explanation

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

### Assessability of Discretionary Special Dividend

50. Subparagraph 44(1)(a)(i) of the ITAA 1936 includes in the assessable income of an Australian resident shareholder dividends that are paid to the shareholder by the company out of profits derived by it from any source.

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 Discretionary Special Dividend is a distribution of money by iiNet 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' an amount that has been debited against an amount standing to the credit of the company's share capital account.

54. The Discretionary Special Dividend was sourced entirely from iiNet's profits (current period profits and retained earnings) and iiNet did not debit the Discretionary Special Dividend totalling \$113,780,395.18 against its untainted share capital account. Therefore, the exclusion in paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 will not apply.

55. Accordingly, the Discretionary Special Dividend will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936, and each iiNet shareholder is required to include the Discretionary Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

### Qualified persons

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

57. In broad terms, a person is a 'qualified person' under Division 1A of former Part IIIA of the ITAA 1936 if they satisfy both the holding period rule and the related payment rule contained in former subsection 160APHO(1) of the ITAA 1936:

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 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.

58. The holding period rule, in former subsection 160APHO(2) of the ITAA 1936, requires the taxpayer to continuously hold the shares or interest in shares on which a dividend has been paid for at least 45 days if the shares are not preference shares, or at least 90 days if the shares are preference shares (excluding the day the shares were acquired, and, if relevant, the day on which disposal of the shares occurred). Under former subsection 160APHO(3) of the ITAA 1936, any days on which the taxpayer has materially diminished risks of loss or opportunities for gain in respect of the shares or interests in the shares (within the meaning of former sections 160APHM and 160APHJ) are also excluded and not taken to break the continuity of the period for which the taxpayer held the shares or interest.

59. The related payments rule determines the relevant qualification period for which the holding period rule applies. 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.

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

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

61. Former paragraph 160APHN(3)(d) of the ITAA 1936 states:

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

...

- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or

...

62. 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.

63. Under the present Scheme, in considering whether the iiNet shareholders are under an obligation to make a related payment, it is considered that an integral part of the Scheme is the payment of the Discretionary Special Dividend of \$0.6914 cash per iiNet share. The payment of the Discretionary Special Dividend is conditional upon the Scheme of Arrangement proceeding, tying the payment of the Discretionary Special Dividend to the disposal of the iiNet shares. The payment of the Discretionary Special Dividend is a part of the total consideration paid to iiNet shareholders for the disposal of their iiNet shares to TPG.

64. In these circumstances, in determining whether an iiNet shareholder is taken to have made or be likely to make a related payment in respect of the Discretionary Special Dividend, it is considered that the circumstances surrounding the payment of the Discretionary Special Dividend would constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936 by causing property (i.e., shares in iiNet) to be transferred to TPG. As such, it can be concluded that an iiNet shareholder will be taken to have made a related payment in respect of the Discretionary Special Dividend.

65. As the iiNet shareholders will be taken, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to have made a related payment in respect of the Discretionary Special Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

66. 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...

67. 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

68. Eligibility for the Discretionary Special Dividend is determined on the Discretionary Special Dividend Record Date of 27 August 2015. This is the last day on which acquisition by a person of an iiNet share entitled the person to receive the Discretionary Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 28 August 2015.

69. The secondary qualification period thus runs from 45 days before the ex-dividend date of 28 August 2015 and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 14 July 2015 to 12 October 2015. 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 iiNet shares are to be excluded.

70. Entitlement to participate in the Scheme will be determined on the Scheme Record Date (31 August 2015). iiNet shareholders who dispose of their shares under the Scheme of Arrangement will no longer be considered to hold their iiNet shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

71. Accordingly, for an iiNet shareholder who disposed of their shares under the Scheme of Arrangement, the secondary qualification period will run from 14 July 2015 until 30 August 2015 (inclusive). An iiNet shareholder who received the Discretionary Special Dividend will need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Further, pursuant to former subparagraph 160APHO(2)(a) of the ITAA 1936, neither the date of acquisition nor the date of disposal is included in the relevant 45 day period.

## Refundable tax offset

72. Where the fully franked Discretionary Special Dividend is received by an iiNet shareholder, the iiNet shareholder will:

- include the amount of the franking credit attached to the Discretionary Special Dividend in their assessable income, and
- be entitled to a tax offset equal to the amount of the franking credit (section 207-20).

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

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

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

75. Accordingly, a holder of iiNet shares will be subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities under section 67-25.

## CGT consequences

### **CGT event A1**

76. 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)).

77. CGT event A1 happened when an iiNet shareholder disposed of an iiNet share to TPG pursuant to the Scheme of Arrangement (subsections 104-10(1) and 104-10(2)). The disposal occurred on the Scheme Implementation Date of 7 September 2015 when the share was disposed of by an iiNet shareholder (paragraph 104-10(3)(b)).

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

### ***Capital proceeds***

79. The capital proceeds from CGT event A1 received by an iiNet shareholder is the money or market value of the property they have received, or are entitled to receive, in respect of the event happening (subsection 116-20(1)).

80. 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.

81. Under the Scheme, the payment of the Discretionary Special Dividend will not occur independently of the Scheme of Arrangement. This is primarily reflected in the following Scheme attributes:

- The Scheme Consideration includes Top-Up Cash Consideration of \$0.75 per share, reduced by the amount of the Discretionary Special Dividend that is paid to iiNet shareholders
- The Discretionary Special Dividend will only be declared once the Scheme of Arrangement becomes effective, and
- TPG has consented to the payment of the Discretionary Special Dividend and has agreed to lend to iiNet, by way of an interest-free loan, the funds to enable iiNet to pay the Discretionary Special Dividend.

82. Accordingly, the Discretionary Special Dividend is part of the sum of money in return for which the iiNet shareholders will have, by approving the Scheme of Arrangement, demonstrated their willingness to transfer their iiNet shares. The Discretionary Special Dividend will form part of the capital proceeds which an iiNet shareholder will receive in respect of CGT event A1 happening.

83. An iiNet shareholder who elected to receive Cash Consideration received capital proceeds comprising the sum of the Cash Consideration of \$8.80 for each iiNet share, the Discretionary Special Dividend of \$0.6914 per iiNet share plus and the Top-Up Cash Consideration of \$0.0586.

84. An iiNet shareholder who elected to receive the Share Consideration received capital proceeds comprising the sum of the market value of 0.5533 fully paid ordinary TPG share at the Scheme Implementation Date, the Discretionary Special Dividend of \$0.6914 per iiNet share, the Top-Up Cash Consideration of \$0.0586 and the Cash Consideration of \$3.77.



***Anti-overlap provisions***

85. A capital gain made from a CGT event A1 happening is reduced if the capital gain includes an amount that is included in assessable income under another provision of the ITAA 1936 or the ITAA 1997 (section 118-20). This has the effect of reducing (but not below zero) the capital gain by the amount that is assessable under the other provision.

86. Where a dividend forms part of the capital proceeds from the disposal of shares and is assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936, section 118-20 will reduce any capital gain by the amount of the dividend.

87. The Discretionary Special Dividend is included in the assessable income of iiNet shareholders under subparagraph 44(1)(a)(i) of the ITAA 1936. Therefore, section 118-20 will operate to reduce (but not below zero) any capital gain made by an iiNet shareholder from CGT event A1 happening to their iiNet shares by the amount of the Discretionary Special Dividend that is included in the iiNet shareholder's assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

88. However, under paragraph 118-20(1B)(b), the capital gain made by an iiNet shareholder is not reduced by the amount of the franking credit referable to the Discretionary Special Dividend that is included in their assessable income.

***Partial roll-over***

89. A partial roll-over is available under Subdivision 124-M where a number of conditions are satisfied.

90. The first condition, under subsection 124-780(1), as read with subsection 124-790(1), is that the taxpayer has exchanged a share in a company for capital proceeds that include a share in another company. In the Scheme of Arrangement, iiNet shareholders who elected to receive Share Consideration exchanged their iiNet shares for consideration consisting of TPG shares, as well as other consideration (the Discretionary Special Dividend, the Top-Up Cash Consideration and the Cash Consideration). This condition is satisfied.

91. The second condition is that the exchange of shares occurs in consequence of a single arrangement which satisfies subsection (2) or (2A) of section 124-780. Subsection 124-780(2A) is satisfied if the arrangement:

- results in the acquiring company (including any tax consolidated group companies) becoming the owner of more than 80% of the voting shares in the acquired company, and
- was entered into by the acquired company under Part 5.1 of the Corporations Act, and was approved by order of a court made for the purposes of paragraph 411(4)(b) of that Act.

92. This condition is satisfied, as the Scheme of Arrangement is a single arrangement, entered into by iiNet under the relevant provisions of the Corporations Act, with the required court approval, and resulted in the TPG group owning more than 80% of the voting shares in iiNet.

93. The third condition, under subsection 124-780(3) (a) and (b), is that the taxpayer acquired the original shares on or after 20 September 1985, and apart from a roll-over, would make a capital gain on disposal. This condition is satisfied, as iiNet was established in 1993, and this ruling is based on the assumption that any iiNet shareholder who chooses a partial roll-over under Subdivision 124-M would, in the absence of that choice, make a capital gain on disposal of their iiNet shares.

94. The fourth condition, under paragraph 124-780(3)(c) is that the replacement shares are issued by the acquiring company or its parent. This condition is satisfied, as replacement shares will be issued by TPG.

95. The fifth condition, under paragraph 124-780(3)(d), is that the taxpayer has chosen to obtain roll-over. This is the case.

96. It may be noted that the requirements of paragraphs 124-780(3)(d) and (e), which arise only where section 124-782 operates, will not apply because that latter section will not operate: this ruling is based on the assumption that taxpayers relying on the ruling are not 'significant stakeholders' or 'common stakeholders' as defined.

97. It may also be noted that subsection 124-780(4) and (5) will have no operation because iiNet shareholders and TPG are dealing with each other at arm's length.

98. Under the Scheme, the conditions for partial roll-over under Subdivision 124-M are satisfied. Therefore, an iiNet shareholder who received Share Consideration and made a capital gain on the disposal of their iiNet shares was entitled to choose partial scrip for scrip roll-over for the TPG shares they received in exchange for their iiNet shares.

### ***Consequences of choosing roll-over***

#### ***Capital gain disregarded***

99. Where rollover is available under Subdivision 124-M, any capital gain made is disregarded (subsection 124-785(1)). However, under subsection 124-790(1), only a partial roll-over is available where a shareholder receives capital proceeds for its original interest that includes something other than its replacement interest (ineligible proceeds).

100. An iiNet shareholder who elected to receive Share Consideration received capital proceeds comprising its replacement interest (that is, shares in TPG) and ineligible proceeds (i.e., cash including the Discretionary Special Dividend, the Top-Up Cash Consideration and the Cash Consideration from the scale back of the TPG shares issued).

101. Therefore, only partial scrip for scrip roll-over is available for iiNet shareholders who made a capital gain on the disposal of their iiNet shares, meaning that only part of the capital gain is disregarded under the roll-over (to the extent it does not relate to ineligible proceeds).

#### *Cost base of TPG shares*

102. Where partial scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each TPG share received as a result of the exchange is worked out by reasonably attributing to it the cost base (or part of it) of the iiNet share for which it was exchanged (subsections 124-785(2) and 124-785(4)). However, the cost base of the iiNet share must first be reduced by so much of it that is reasonably attributable to the ineligible proceeds (subsection 124-785(3)).

103. In working out the amount of the cost base of an iiNet share that is reasonably attributable to the ineligible proceeds, the Commissioner accepts the following methodology:

Cost base of an iiNet share exchanged \* [Cash received / (Market value of 0.5533 TPG share received at the Scheme Implementation Date + Cash received)]

Where:

**Cash received** means the amount of the Discretionary Special Dividend plus the Top-Up Cash Consideration and the Cash Consideration (total \$4.52)

104. The remaining portion of the cost base of the iiNet share is used to determine the first element of the cost base or reduced cost base for each replacement TPG share received for the disposal of the iiNet share (subsections 124-785(2) and 124-785(3)). The Commissioner accepts that the cost base of the TPG share can be worked out using the following method:

Cost base of iiNet share exchanged less amount reasonably attributable to ineligible proceeds (as determined under paragraph 103).

#### *Acquisition date of TPG shares*

105. Under item 2 of the table in subsection 115-30(1), where an iiNet shareholder disposed of their iiNet shares in exchange for TPG shares (and other consideration), and the TPG shares are treated as a 'replacement asset' under a 'replacement asset roll-over' (which they are under Subdivision 124-M), the iiNet shareholder is treated as having acquired the TPG shares when they acquired their shares in iiNet for the purposes of Division 115.

**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 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.

107. 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;
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit;
- (d) except for this section, a person (the **relevant taxpayer**) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

108. 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).

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

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

111. 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.

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

113. In considering the manner, form and substance of the Scheme, it is considered that the Scheme was not entered into by iiNet or the iiNet shareholders for more than an incidental purpose of enabling participating shareholders to obtain imputation benefits. The goal of providing imputation benefits to iiNet shareholders remained incidental, in the sense of being subservient to, the purpose of disposing of their shares to TPG.

114. 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 Discretionary Special Dividend.

### **Section 204-30**

115. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a))
- (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. If section 204-30 of the ITAA 1997 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)).

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

118. Pursuant to the payment of the Discretionary Special Dividend, all iiNet shareholders received an imputation benefit as a result of the Discretionary Special Dividend. Subject to being 'qualified persons', Australian resident iiNet shareholders received an imputation benefit in the form of a tax offset (paragraph 204-30(6)(a) of the ITAA 1997). Non-resident iiNet shareholders received an imputation benefit in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e) of the ITAA 1997). Resident iiNet shareholders derived a greater benefit from franking credits than the non-resident shareholders.

119. However, the Discretionary Special Dividend was paid to all iiNet shareholders identified at the Discretionary Special Dividend Record Date and was fully franked. Accordingly, it cannot be concluded that iiNet 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 Discretionary Special Dividend, while other members received lesser or no imputation benefits.

120. As the conditions in subsection 204-30(1) of the ITAA 1997 are not met in respect of the Discretionary 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 Discretionary Special Dividend.

### ***Section 45A of the ITAA 1936***

121. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed to certain shareholders ('the advantaged shareholders') who derive a greater benefit from the receipt of capital and it is reasonable to assume that the other shareholders ('the disadvantaged shareholders') have received or will receive dividends.

122. Since all iiNet shareholders received the Discretionary Special Dividend of \$0.6914 per share, no capital benefit has been provided as per section 45A of the ITAA 1936.

123. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to any part of the Discretionary Special Dividend.

## ***Section 45B of the ITAA 1936***

124. The purpose of section 45B of the ITAA 1936 is to ensure that the relevant amounts distributed to shareholders are treated as dividends for taxation purposes if certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1)).

125. Specifically, subsection 45B(2) of the ITAA 1936 provides that the section applies if:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company (paragraph 45B(2)(a))
- (b) under the scheme a taxpayer, who may or may not be the person provided with the demerger benefit or capital benefit, obtains a tax benefit (paragraph 45B(2)(b)), and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or any part of the scheme for a purpose other than an incidental purpose, of enabling the relevant taxpayer to obtain the tax benefit (paragraph 45B(2)(c)).

126. Under the Scheme the iiNet shareholders did not receive a demerger benefit or capital benefit, but received a Discretionary Special Dividend. Therefore, the requirements in subsection 45B(2) of the ITAA 1936 are not satisfied.

127. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the Discretionary Special Dividend paid to iiNet shareholders.

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

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Subject references:*

- anti-avoidance
- capital gains tax
- capital proceeds
- CGT cost base
- partial roll-over
- qualified person
- refundable tax offset

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scrip

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