

CR 2017/75 - Income tax: Special Dividend, rebalancing of stapled security structure: 360 Capital Group Limited

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Class Ruling

Income tax: Special Dividend, rebalancing of stapled security structure: 360 Capital Group Limited

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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.

Summary – what this ruling is about

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

Relevant provision(s)

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subparagraph 44(1)(a)(i) of the ITAA 1936
- subparagraph 44(1)(b)(i) of the ITAA 1936
- subparagraph 44(1)(c)(i) of the ITAA 1936
- section 128B of the ITAA 1936
- subparagraph 128B(3)(ga)(i) of the ITAA 1936
- subsection 128B(3E) of the ITAA 1936
- section 128D of the ITAA 1936

- former section 160APHM of the ITAA 1936
- former section 160APHN of the ITAA 1936
- Section 177EA of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 67-25 of the ITAA 1997
- subsection 110-25(5) of the ITAA 1997
- subsection 110-55(2) of the ITAA 1997
- section 204-30 of the ITAA 1997
- Division 207 of the ITAA 1997
- section 207-20 of the ITAA 1997
- subsection 207-35(1) of the ITAA 1997
- subsection 207-75(2) of the ITAA 1997
- section 207-145 of the ITAA 1997
- paragraph 207-145(1)(a) of the ITAA 1997.

All subsequent legislative references in this Ruling are to provisions of the ITAA 1997 unless specified otherwise.

Class of entities

3. The class of entities to which this Ruling applies are the holders of 360 Capital Group stapled securities ('Securityholders') who:

- participated in the Scheme that is the subject of this Ruling
- received the Special Dividend
- held their stapled securities on capital account, that is, the shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)), and
- are not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their stapled securities.

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

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 22 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 2017 to 30 June 2018. The Ruling continues to apply after 30 June 2018 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

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 21 July 2017 on behalf of 360 Capital Group Limited and 360 Capital FM Limited as responsible entity of 360 Capital Investment Trust
- Constitution of 360 Capital Group Limited (as amended)
- Supplemental Deed made on 31 October 2017 by 360 Capital FM Limited as responsible entity of 360 Capital Investment Trust to amend the Constitution of 360 Capital Investment Trust
- 360 Capital Group Annual Report for the years ended 30 June 2016 and 30 June 2017, and
- Financials for the half-year ended 31 December 2016.

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

9. 360 Capital Group is a real estate investment and funds management group that concentrates on the strategic investment and investment management of real estate and real estate-related assets.

10. 360 Capital Group Limited ('360CGL') and its subsidiaries carry out the investment management and property management activities for the 360 Capital Group. 360 Capital FM Limited as responsible entity of the 360 Capital Investment Trust ('360CIT') and its sub-trusts hold investments in property funds including co-investment stakes in property funds managed by 360CGL and its subsidiaries.

11. 360CGL is an Australian-resident public company. 360CIT is an Australian resident trust. The shares in 360CGL are stapled to the units in 360CIT. The Securityholders hold these stapled securities ('360 Capital Securities') which are listed on the Australian Securities Exchange (ASX). The Securityholders are a mix of individuals, companies, superannuation funds and other institutional investors, some of which are non-residents.

12. 360CGL's share capital structure consists of ordinary class shares. As at 30 October 2017, 360CGL had 227,102,516 fully paid ordinary class shares on issue.

13. On 9 January 2017, the 360 Capital Group settled a divestment transaction to sell the majority of its funds management platform and co-investment stakes in its listed and unlisted funds for approximately \$290.7 million. As a consequence, 360CGL:

- received proceeds of approximately \$103.8 million on settlement, and
- realised a profit of approximately \$77.6 million. This profit was included in the 31 December 2016 accounts of 360CGL.

14. The above proceeds caused a significant increase in 360CGL's net tangible assets (NTA) and the relative NTA split between 360CGL and 360CIT.

15. Consistent with its current strategy, most of the activity which will be undertaken by the 360CGL Group in the future will be passive co-investments held by 360CIT, including equity investments in ASX-listed real estate investment trusts (REITS) and mezzanine debt investments in Australian real estate assets.

16. In order to meet this strategy going forward, 360 Capital Group's capital structure requires a re-balancing in order for 360CIT to be provided with the necessary capital base to carry out its business of making debt and equity investments in property funds.

17. To effect this capital re-balancing, 360CGL resolved to pay a Special Dividend to Securityholders who were then mandatorily required to contribute those dividend proceeds as capital to 360CIT.

Special Dividend

18. On 27 October 2017 the Board of Directors of 360CGL declared a fully franked Special Dividend of \$0.2101 cash per 360CGL share held by Securityholders on 24 November 2017 (Special Dividend Record Date).

19. The Special Dividend was sourced entirely from 360CGL's profits reserve and 360CGL did not debit the Special Dividend against its share capital account.

20. The Special Dividend Record Date was 24 November 2017 and the Special Dividend Payment Date was 1 December 2017.

Implementation of the Transaction

21. On 27 October 2017 Securityholders approved the following:

- The Special Dividend of \$0.2101 per 360CGL share, aggregating to approximately \$47.7 million ('Special Dividend Amount') would be debited to the retained earnings of 360CGL.
- The proposed capital contribution into 360CIT ('360CIT Contribution') is \$0.2101 per unit. The aggregate capital contribution would be approximately \$47.7m.
- 360CGL and 360CIT agree to set-off the Special Dividend Amount against the 360CIT Contribution Amount such that no cash is received, or payable, by a Securityholder. This will result in 360CGL assuming an obligation to pay the 360CIT Contribution Amount to 360CIT.
- The 360CIT Contribution Amount is to be contributed in respect of the existing units in 360CIT. No new units will be issued by 360CIT.
- There will be no physical transfer of cash to or from Securityholders at any step.

Assumptions

22. The applicant has asked the Commissioner to make the following assumptions:

- based on 360CGL's Securityholder register as at 30 October 2017, 360CGL is not an exempting entity, and
- 360CGL is not a former exempting entity as defined by section 208-50.

Ruling

Special Dividend

23. The Special Dividend of \$0.2101 cash per 360CGL share paid to Securityholders constitutes a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability and withholding tax

Residents

24. A resident Securityholder who received the fully franked Special Dividend is required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Non-residents not carrying on business at or through a permanent establishment

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

Non-residents carrying on business at or through a permanent establishment

26. A non-resident Securityholder carrying on business in Australia at or through a permanent establishment in Australia and where the fully franked Special Dividend is attributable to that permanent establishment, is required to include the Special Dividend as assessable income (subparagraphs 44(1)(b)(i) and 44(1)(c)(i) of the ITAA 1936) and is not subject to Australian withholding tax in respect of the Special Dividend (subsection 128B(3E) of the ITAA 1936).

Gross-up and tax offset

27. A resident Securityholder, and a non-resident Securityholder that is carrying on business in Australia at or through a permanent establishment in Australia, who received the fully franked Special Dividend:

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

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

under section 207-20 and subsection 207-75(2), subject to being a qualified person in relation to the Special Dividend.

28. A Securityholder (not being an entity taxed as a corporate tax entity) that is the trustee of a trust (not being a complying superannuation entity) or a partnership, is required to include the amount of the franking credit attached to the Special Dividend in its assessable income under subsection 207-35(1), subject to the trustee or the partnership being a qualified person in relation to the Special Dividend.

Qualified persons

29. A Securityholder will be regarded as making a related payment in respect of the Special Dividend for the purposes of paragraph 207-145(1)(a) and former section 160APHN of the ITAA 1936.

30. Therefore, a Securityholder will be a qualified person in relation to the Special Dividend if, from 11 October 2017 until 9 January 2018 inclusive, they continued to hold their 360CGL shares and did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of their 360CGL shares for a continuous period of at least 45 days.

Refundable tax offset

31. The franking credit tax offset a Securityholder is entitled to under Division 207 in relation to the Special Dividend is subject to the refundable tax offset rules in Division 67. Certain trustees and corporate tax entities are excluded from the refundable tax offset rules pursuant to section 67-25.

32. A non-resident Securityholder that carries on business in Australia at or through a permanent establishment in Australia, where the Special Dividend is attributable to the permanent establishment, is excluded from the refundable tax offset rules (subsection 67-25(1DA)).

Capital Gains Tax (CGT) consequences

33. A Securityholder's cost base and reduced cost base of each 360CIT unit they hold will increase by the amount of the Special Dividend which is constructively received by the Securityholders and applied as a contribution of equity in respect of the existing units in 360CIT with the expected effect of increasing the unit's value (subsection 110-25(5) and subsection 110-55(2)).

The anti-avoidance provisions

Section 177EA

34. Section 177EA of the ITAA 1936 will not apply in respect of the Special Dividend.

Section 204-30

35. Section 204-30 will not apply in respect of the Special Dividend.

Section 207-145

36. Section 207-145 will not apply to the whole, or any part, of the Special Dividend.

Commissioner of Taxation

8 November 2017

Appendix 1 – Explanation

❶ *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.*

Special Dividend

37. 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.

38. The payment of the Special Dividend was a distribution of money by 360CGL to its shareholders/Securityholders.

39. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes any:

... moneys paid or credited by a company to a shareholder ... where the amount of the moneys paid or credited, ... is debited against an amount standing to the credit of the share capital account of the company...

40. The Special Dividend was sourced entirely from 360CGL's profits reserve and not debited against 360CGL's share capital account. Therefore, the exclusion in paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 does not apply and the Special Dividend paid to Securityholders constitutes a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability and withholding tax

Residents

41. 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.

42. As the Special Dividend was paid to Securityholders out of profits derived by 360CGL, the Securityholders 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.

Non-residents not carrying on business at or through a permanent establishment

43. 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.

44. However, subsection 44(1) of the ITAA 1936 does not apply to a dividend to the extent to which it is included in, or excluded from, assessable income by another provision that expressly deals with dividends in ITAA 1936 or the ITAA 1997.

45. Subsection 128B(1) of the ITAA 1936 expressly deals with dividends by imposing Australian withholding tax on dividends paid by a resident company and is derived by the non-resident on or after 1 January 1968.

46. 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 Securityholder.

47. In addition, section 128D of the ITAA 1936 states that income that would be subject to withholding tax but for subparagraph 128B(3)(ga)(i) of the ITAA 1936 is not assessable income and is not exempt income.

48. As the payment of the Special Dividend is income that would be subject to withholding tax but for subparagraph 128B(3)(ga)(i) of the ITAA 1936, it will not be assessable income, and will not be exempt income of the non-resident Securityholder.

49. Accordingly, non-resident Securityholders who received the fully franked Special Dividend (other than those carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the Special Dividend as assessable income under subsection 44(1) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be subject to Australian withholding tax in relation to the Special Dividend (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

Non-residents carrying on business at or through a permanent establishment

50. The application of subsection 128B(1) of the ITAA 1936 is subject to subsection 128B(3E) of the ITAA 1936.

Subsection 128B(3E) states that section 128B does not apply to dividend income that is paid to a non-resident carrying on business in Australia at or through its Australian permanent establishment and which is attributable to that permanent establishment.

51. 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 received to the extent they are paid out of profits from non-Australian sources and is attributable to the permanent establishment.

52. In addition, 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.

53. Accordingly, non-resident Securityholders carrying on business in Australia at or through a permanent establishment who received the fully franked Special Dividend are required to include the dividend as assessable income, to the extent to which the Special Dividend is attributable to the permanent establishment, pursuant to subparagraphs 44(1)(b)(i) and 44(1)(c)(i) of the ITAA 1936, and are not liable to Australian withholding tax in relation to the Special Dividend.

Gross-up and tax offset

54. 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.

55. Therefore, subject to satisfying the qualified person rule, where the fully franked Special Dividend is received directly by a Securityholder and the Securityholder satisfies the residency requirements in section 207-75, the Securityholder:

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

56. If the fully franked Special Dividend was received by a Securityholder (not being an entity taxed as a corporate 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.

57. 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 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.

58. Where a Securityholder that is a partnership or a trustee of a trust is a qualified person, the Securityholder is required to include the amount of the franking credit attached to the Special Dividend in the assessable income of the trust or partnership under subsection 207-35(1).

Qualified person

59. Paragraph 207-145(1)(a) provides that where a franked distribution is made to an entity, only a 'qualified' person in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 is:

- required to include the amount of the franking credit in their assessable income, and
- entitled to a tax offset in respect of the franking credit attached to the franked distribution.

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

61. The main test of what constitutes a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, which is known as the holding period rule, is set out in former subsection 160APHO(1) of the ITAA 1936 which states:

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

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

to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification period in relation to the dividend.

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

63. 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 is required 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 is required to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

64. In order to work out the relevant qualification period, it is necessary to determine whether a Securityholder has made, or is under an obligation to make, or is likely to make, a related payment in respect of any of the Special Dividend received.

65. Former section 160APHN of the ITAA 1936 sets out for the purposes of Division 1A of former Part IIIA of the ITAA 1936 non-definitive examples of what constitutes the making of a related payment.

66. Former subsection 160APHN(2) of the ITAA 1936 provides that a:

...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.

67. Former subsection 160APHN(3) of the ITAA 1936 contains examples of transactions that may have the effect of passing the benefit of the dividend or distribution to one or more other persons (for example, where an amount paid or credited is equal to the amount of the dividend or distribution or causing a payment or the transfer of property in accordance with the direction of another person or persons).

68. Former subsection 160APHN(4) of the ITAA 1936 outlines the circumstances of transactions referred to in former subsection 160APHN(3) of the ITAA 1936 that may have the effect of passing the benefit of the dividend or distribution to one or more other persons (for example, where an amount paid or credited is equal to the amount of the dividend or distribution).

69. In the present circumstances, Securityholders will be automatically required to apply the Special Dividend of \$0.2101 per 360CGL share towards a capital contribution to the 360CIT. The Commissioner considers this to be an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936.

70. Therefore, it is considered that a Securityholder is taken to have made a related payment in respect of the Special Dividend.

Holding period requirement

71. The holding period rule requires shareholders to hold their ordinary shares at-risk for a continuous period of not less than 45 days during the relevant qualification period.

72. As a Securityholder is considered to have made or be likely to make a related payment in respect of the Special Dividend, the Securityholder is required to satisfy the holding period requirement within the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

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

...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*...

74. 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.

75. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 24 November 2017, being the last day on which acquisition by a person of a 360CGL share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date of a 360CGL share for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 25 November 2017.

76. The secondary qualification period thus runs from 45 days before and ends on 45 days after the ex-dividend date of 25 November 2017. In practical terms, this means that the secondary qualification period runs from 11 October 2017 to 9 January 2018. 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 360CGL share is to be excluded. This would mean that the secondary qualification period would be from 11 October 2017 until the date that Securityholders are no longer at risk for the purposes of former Division 1A of Part III of the ITAA 1936.

77. Further, pursuant to former paragraph 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

78. Securityholders who are entitled to a tax offset under subsection 207-20(2) in respect of the franking credit received (or entities entitled to a tax offset under section 207-45 equal to their share of the franking credit) will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

79. Pursuant to section 67-25, certain taxpayers are specifically excluded from the operation of the refundable tax offset rules. The identified entities include:

- 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 (paragraph 67-25(1B)(b))
- 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)).

80. Securityholders (or entities entitled to a tax offset under section 207-45) were entitled to the refundable tax offset unless specifically excluded pursuant to section 67-25.

CGT consequences

Cost base impact

81. The Special Dividend Amount will be applied as the 360CIT Contribution (that is, as a contribution of equity in respect of the existing units in 360CIT) without any new units in 360CIT issuing to the Securityholder as a result. This is expected to increase the value of the units in 360CIT.

82. Therefore, a Securityholder's cost base and reduced cost base of each 360CIT unit they hold will increase by the amount of the Special Dividend which is applied as a contribution of equity in respect of the existing units in 360CIT.

The anti-avoidance provisions

Section 177EA

83. 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.

84. 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 imputation benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

85. 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 directly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the **relevant taxpayer**) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and

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

Special Dividend

86. In the present case, it is considered that the conditions of subsection 177EA(3) of the ITAA 1936 are not satisfied. Having regard to the circumstances surrounding the payment of the Special Dividend, it could not be concluded that the Special Dividend was paid as part of an arrangement with the more than incidental purpose of conferring an imputation benefit on Securityholders.

87. Payment of the Special Dividend by 360CGL was to re-balance the 360 Capital Group's capital structure following the sale of one of its major assets. The payment of the Special Dividend out of the profits of 360CGL to the Securityholders who then had to mandatorily contribute those dividend proceeds as capital to 360CIT to meet the strategic needs of the 360 Capital Group was reflective of the changed commercial circumstances and direction of the 360 Capital Group.

88. 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 to be received in relation to the Special Dividend.

Section 204-30

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

- (a) an *imputation benefit is, or apart from this section would be, received by a *member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a)), and
- (b) the member would *derive a *greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)), and
- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

90. Relevantly, if section 204-30 applies, the Commissioner has the discretionary powers under subsection 204-30(3) to make a written determination.

91. Subsection 204-30(3) provides:

The Commissioner may make one or more of these determinations:

- (a) that a specified *franking debit arises in the *franking account of the entity, for a specific *distribution or other benefit to a disadvantaged member;
- (b) that a specified *exempting debit arises in the *exempting account of the entity, for a specified *distribution or other benefit to a disadvantaged member;
- (c) that no imputation benefit is to arise in respect of any streamed distribution made to a favoured member and specified in the determination.

A determination must be in writing.

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

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

94. Under the current arrangement, all Securityholders received an imputation benefit when the Special Dividend was paid. The imputation benefit for resident shareholders is in the form of a tax offset (paragraph 204-30(6)(a)), and for non-resident shareholders is in the form of not being liable to pay dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders may derive a greater benefit from franking credits than the non-resident shareholders.

95. However, the Special Dividend was paid equally to all Securityholders and was fully franked regardless of their tax profiles. Accordingly, it cannot be said that 360CGL selectively directed the flow of franked distributions to those members who could most benefit from the franking credits.

96. As the conditions in subsection 204-30(1) have not been met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole of, or any part of, the imputation benefit received in relation to the Special Dividend.

Section 207-145

97. 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:

- (a) the entity is not a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the *Income Tax Assessment Act 1936*;
- (b) the Commissioner has made a determination under paragraph 177EA(5)(b) of that Act that no imputation benefit (within the meaning of that section) is to arise in respect of the distribution for the entity;
- (c) the Commissioner has made a determination under paragraph 204-30(3)(c) of this Act that no imputation benefit is to arise in respect of the distribution for the entity;
- (d) the distribution is made as part of a dividend stripping operation;
- (da) the distribution is one to which section 207-157 (which is about distribution washing) applies;

then, ...

98. Explanation of whether a Securityholder is a qualified person in relation to the Special Dividend for the purpose of the former Division 1A of the ITAA 1936 is contained in paragraphs 59 to 63.

99. The Commissioner will not make a determination 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.

100. 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.

101. Having regard to the circumstances of the scheme under which Securityholders received the Special Dividend, the Commissioner considers that the payment of the Special Dividend was not made as part of a dividend stripping operation. Therefore, paragraph 207-145(1)(d) will not apply to the Special Dividend.

102. Consequently, section 207-145 will not apply to the Special Dividend received by the Securityholders.

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 Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 177EA
 Income tax ~~ Capital management ~~ Anti avoidance

rules -- Other

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