


CR 2017/78 - Income tax: Seymour Whyte Limited Scheme of Arrangement and Special Dividends

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Class Ruling

Income tax: Seymour Whyte Limited Scheme of Arrangement and Special Dividends

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❶ 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 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:

- Division 1A of former Part IIIAA of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subsection 6(1) of the ITAA 1936
- subsection 44(1) of the ITAA 1936
- paragraph 128B(3)(ga) 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
- Division 115 of the ITAA 1997

- section 116-20 of the ITAA 1997
- section 118-20 of the ITAA 1997
- section 202-40 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 208-195 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies are the ordinary shareholders of Seymour Whyte Limited (Seymour Whyte) who:

- were residents of Australia or non-residents of Australia (other than non-residents who carried on a business at or through a permanent establishment in Australia) as defined in subsection 6(1) of the ITAA 1936
- did not acquire their Seymour Whyte shares pursuant to an employee share plan (including any shares issued under the vesting of the Long Term Investment Plan)
- did not hold their shares in Seymour Whyte as revenue assets (as defined in section 977-50 of the ITAA 1997) nor as trading stock (as defined in subsection 995-1(1) of the ITAA 1997)
- received the Special Dividends on 13 October 2017
- disposed of their ordinary shares in Seymour Whyte to VINCI Construction Australasia Pty Ltd (VCA), a wholly owned subsidiary of VINCI Construction International Network (VCIN) under the scheme of arrangement pursuant to Part 5.1 of the *Corporations Act 2001 (Cth)* (Corporations Act) between Seymour Whyte and its shareholders and received Scheme Consideration for that disposal
- were not subject to the investment manager regime under Subdivision 842-I of the ITAA 1997 in respect of their Seymour Whyte shares, 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 Scheme Shareholders.

Qualifications

4. 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 7 to 29 of this Ruling.

5. 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

6. 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

7. The following description of the scheme is based on information provided by the applicant on behalf of Seymour Whyte.

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

Seymour Whyte

8. Seymour Whyte Limited (Seymour Whyte) is an Australian resident public company listed on the Australian Securities Exchange (ASX) on 27 May 2010.

9. Seymour Whyte provides engineering and construction services for major infrastructure projects across the resources, transport and utilities sectors in Australia.

10. Seymour Whyte is the head company of the Seymour Whyte income tax consolidated group, comprising subsidiary companies Seymour Whyte Constructions Pty Ltd and Rob Carr Pty Ltd.

11. Seymour Whyte had 87,976,230 ordinary shares on issue as at 30 June 2016 and has not issued any further shares since 30 June 2016.

12. As at 30 June 2017, at least 5% of the holders of Seymour Whyte shares were Australian residents and Seymour Whyte was not a 'former exempting entity' within the meaning in section 208-50 of the ITAA 1997.

VINCI Construction and the VINCI Group

13. VINCI Construction Australasia Pty Ltd (VCA), a wholly owned subsidiary of VINCI Construction International Network (VCIN), is a special purpose company incorporated in Australia on 6 July 2017 for the purpose of acquiring the shares in Seymour Whyte under the Scheme.

14. VCIN is a French incorporated wholly owned subsidiary of VINCI SA. VINCI SA (VINCI) is a French incorporated company listed on the Paris Stock Exchange.

15. VINCI is a global group (the VINCI group) that designs, finances, builds and operates infrastructure and facilities. VCIN is a subsidiary of VINCI's construction division and is responsible for developing construction activities by building a network of local companies through acquisitions and provides concession and contracting services globally.

The Scheme

16. On 26 June 2017, Seymour Whyte announced that it had executed a Scheme Implementation Agreement with VCIN on 23 June 2017 under which VCIN or its nominee would acquire all of the issued ordinary shares in Seymour Whyte pursuant to Part 5.1 of the Corporations Act (the Scheme) for total cash consideration of A\$1.285 per ordinary share (Total Consideration).

17. The Total Consideration was reduced by the total amount of Special Dividends paid to the shareholders of Seymour Whyte before the Scheme Implementation Date (Scheme Consideration). The Scheme Consideration was A\$0.84 per ordinary share (being Total Consideration of A\$1.285 less the total amount of Special Dividends of A\$0.445).

18. The Scheme was subject to certain conditions set out in the Scheme Implementation Agreement, including but not limited to:

- the Scheme being approved by Seymour Whyte shareholders, and

- the Scheme being approved by the Federal Court of Australia at the Second Court Hearing.

19. The Scheme was approved by a majority of the shareholders of Seymour Whyte at the Shareholder Meeting held on 28 September 2017 and approved by the Court at the Second Court Hearing held on 3 October 2017. The Scheme became effective on 5 October 2017 (Scheme Effective Date).

20. Pursuant to the Scheme Implementation Agreement, the shareholders of Seymour Whyte who held Seymour Whyte shares on the Scheme Record Date of 16 October 2017 automatically transferred their Seymour Whyte shares to VCA and received the Scheme Consideration on the Scheme Implementation Date of 23 October 2017.

The Special Dividends

21. On 26 September 2017, Seymour Whyte determined to pay two fully franked Special Dividends to its shareholders for every Seymour Whyte share they held on the Dividend Record Date of 9 October 2017.

22. Each Special Dividend was determined by the Board of Directors of Seymour Whyte separately and recorded in the minutes of the Board meeting held on 26 September 2017 as separately determined dividends.

23. The first fully franked Special Dividend of A\$0.075 per Seymour Whyte share (the First Special Dividend) was paid out of Seymour Whyte's existing cash reserves on Dividend Payment Date of 13 October 2017. No financial support was provided by VCA, VCIN or the VINCI Group.

24. The second fully franked Special Dividend of A\$0.37 per Seymour Whyte share (the Second Special Dividend) was paid from a loan from VINCI Finance International SA (VFI), a related entity within the VINCI Group, on 13 October 2017.

25. Both the First Special Dividend and Second Special Dividend (collectively referred to as 'the Special Dividends') were sourced entirely from Seymour Whyte's retained profits brought forward from 30 June 2017 and current year profit for the period 1 July 2017 to 31 August 2017 (as disclosed in Seymour Whyte's special purpose financial statements for the period 1 July 2017 to 31 August 2017).

26. Seymour Whyte did not debit the Special Dividends against its share capital account.

27. The share capital account of Seymour Whyte was untainted for the purposes of Division 197 of the ITAA 1997.

28. Each of the Special Dividends was a dividend that complied with the requirements of the Corporations Act and paid in accordance with Seymour Whyte's Constitution.

29. The payment of the Special Dividends was not a term of the Scheme Implementation Agreement and VCA, VCIN or VINCI had no right to influence the decision made by Seymour Whyte to pay the Special Dividends.

Ruling

The Special Dividends

30. Each of the Special Dividends paid to Scheme Shareholders constituted a dividend as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividends

31. A Scheme Shareholder who is a resident of Australia and received the Special Dividends must include the Special Dividends in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

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

Gross-up and tax offset

33. The Special Dividends are a frankable distribution under section 202-40 of the ITAA 1997.

34. A Scheme Shareholder who received the fully franked Special Dividends directly and satisfies the residency requirement in section 207-75 of the ITAA 1997:

- must include the amount of the franking credits attached to the Special Dividends in their assessable income, and
- will be entitled to a tax offset equal to the amount of the franking credits

under section 207-20 of the ITAA 1997, subject to being a 'qualified person' in relation to the Special Dividends.

35. A Scheme Shareholder (not being a corporate tax entity), who received the Special Dividends as a partnership or trustee of a trust (not being a complying superannuation fund), is required to include an amount equal to the franking credits attached to the Special Dividends in its assessable income under subsection 207-35(1) of the ITAA 1997, subject to the partnership or trustee being a 'qualified person'.

Qualified persons

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

37. A Scheme Shareholder must have held their Seymour Whyte shares, or interest in Seymour Whyte shares, 'at risk' for a continuous period of at least 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 Special Dividends (former section 160APHO of the ITAA 1936). A Scheme Shareholder must exclude any days on which they have materially diminished risks of loss or opportunities for gain in respect of their Seymour Whyte shares.

38. A Scheme Shareholder no longer held their Seymour Whyte shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 as from the Scheme Record Date of 16 October 2017. Therefore, a Scheme Shareholder is a qualified person in relation to the Special Dividends if, in the period from 26 August 2017 to 16 October 2017 (inclusive) they held their Seymour Whyte shares and did not have materially diminished risks of loss or opportunities for gain in respect of their Seymour Whyte 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).

Refundable tax offset rules

39. The franking credits allocated to the Special Dividends will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, provided the Scheme Shareholder is not excluded by the operation of section 67-25 of the ITAA 1997.

Exempting entity

40. Seymour Whyte was not an 'exempting entity' when the Special Dividends were paid, nor was it a 'former exempting entity' at that time as less than 95% of accountable membership interests or accountable partial interests (broadly direct and indirect ownership interests) held in Seymour Whyte were held by non-residents (Division 208 of the ITAA 1997).

41. Section 208-195 of the ITAA 1997 will therefore not apply to deny the gross up of the assessable income of a Scheme Shareholder by the amount of the franking credits attached to the Special Dividends received by Scheme Shareholders, nor to deny the tax offset to which the Scheme Shareholder is otherwise entitled pursuant to Division 207 of the ITAA 1997 at the time when the Special Dividends were paid.

Capital gains tax (CGT)

CGT event A1

42. CGT event A1 happened when a Scheme Shareholder disposed of each of their Seymour Whyte shares to VCA under the Scheme (section 104-10 of the ITAA 1997).

43. The time of CGT event A1 is when the change of ownership occurs (paragraph 104-10(3)(b) of the ITAA 1997). CGT event A1 happened when Seymour Whyte shares were transferred to VCA on the Scheme Implementation Date of 23 October 2017.

44. A Scheme Shareholder makes a capital gain when CGT event A1 happens if the capital proceeds from the disposal of a Seymour Whyte share exceed the cost base of that share. A Scheme Shareholder makes a capital loss if the capital proceeds are less than the reduced cost base of the Seymour Whyte share (subsection 104-10(4) of the ITAA 1997).

Capital proceeds

45. The capital proceeds for each Seymour Whyte share received by a Scheme Shareholder who received the Special Dividends and disposed of their Seymour Whyte shares under the Scheme is A\$1.21 per share (subsection 116-20(1) of the ITAA 1997). The First Special Dividend of A\$0.075 is not included in the capital proceeds.

Anti-overlap provisions

46. Any capital gain made by a Scheme Shareholder when CGT event A1 happens can be reduced (but not below zero) by the amount of the Second Special Dividend that is included in the Scheme Shareholder's assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936 (section 118-20 of the ITAA 1997). The amount of any capital loss made by a Scheme Shareholder cannot be adjusted by the amount of the Second Special Dividend.

Discount capital gain

47. A Scheme Shareholder who made a capital gain on the disposal of their Seymour Whyte shares under the Scheme may be eligible to treat the capital gain as a discount capital gain provided that:

- the Scheme Shareholder is an individual, complying superannuation entity or, subject to the rules in Subdivision 115-C of the ITAA 1997, a trust (section 115-10 of the ITAA 1997)
- the capital gain has not been worked out using a cost base that has been calculated without reference to

- indexation (subsection 115-20(1) of the ITAA 1997),
and
- the Seymour Whyte share was acquired at least 12 months prior to CGT event A1 happening (subsection 115-25(1) of the ITAA 1997).

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 by Scheme Shareholders in relation to the Special Dividends paid in relation to a Seymour Whyte share.

49. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received by Scheme Shareholders in relation to the Special Dividends.

Commissioner of Taxation

15 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.*

The Special Dividends

50. 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, whether in money or other property.

51. The payment of the Special Dividends is a distribution in money by Seymour Whyte to Scheme Shareholders.

52. 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...

53. The Special Dividends were sourced from Seymour Whyte's retained profits and Seymour Whyte did not debit the Special Dividends against its share capital account. Therefore, the exclusion in paragraph (d) does not apply and the Special Dividends constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividends

Resident Scheme Shareholders

54. 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; ...

55. The Special Dividends were paid to Scheme Shareholders out of profits derived by Seymour Whyte. Accordingly, a Scheme Shareholder who is a resident of Australia is required to include the Special Dividends in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Non-resident Scheme Shareholders (not carrying on business at or through a permanent establishment)

56. 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; ...

57. 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.

58. 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:

- (i) the franked part of a dividend; ...

other than a dividend in respect of which a determination is made under paragraph 204-30(3)(c) of the *Income Tax Assessment Act 1997* or a dividend or a part of a dividend in respect of which a determination is made under paragraph 177EA(5)(b) of this Act.

59. Additionally, 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), (jb) or (m), section 128F, section 128FA or section 128GB, be payable, is not assessable income and is not exempt income of a person.

60. As the payment of the Special Dividends 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 Scheme Shareholder pursuant to section 128D of the ITAA 1936.

61. Accordingly, a non-resident Scheme Shareholder who received the Special Dividends (other than those who received the Special Dividends in carrying on business in Australia at or through a permanent establishment in Australia) is not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 and will not be liable for Australian withholding tax.

Gross-up and tax offset

62. Section 207-20 of the ITAA 1997 states:

- (1) If an entity makes a *franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the *franking credit on the distribution. This is in addition to any other amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a *tax offset for the income year in which the distribution is made. The tax offset is equal to the *franking credit on the distribution.

63. Section 207-70 of the ITAA 1997 states:

If an entity makes a *franked distribution to an individual or a *corporate tax entity:

- (a) no amount is included in the receiving entity's assessable income under subsection 207-20(1); and
- (b) the receiving entity is not entitled to a *tax offset under subsection 207-20(2);

unless the receiving entity satisfies the *residency requirement at the time the distribution is made.

64. A Scheme Shareholder who received the Special Dividends satisfies the residency requirement in section 207-75 of the ITAA 1997 at the time the distribution was made if:

- (a) in the case of an individual – the individual is an Australian resident at that time; and
- (b) in the case of a company – the company is an Australian resident at that time; and
- (c) in the case of a *corporate limited partnership – the corporate limited partnership is an Australian resident at that time; and
- (d) ...
- (e) in the case of a *public trading trust – the public trading trust is a resident unit trust for the income year in which that time occurs.

65. Therefore, subject to satisfying the qualified person rule, where the Special Dividends are received directly by a Scheme Shareholder and the Scheme Shareholder satisfies the residency requirement in section 207-75 of the ITAA 1997, the Scheme Shareholder:

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

66. Where the Special Dividends are received by a Scheme 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) of the ITAA 1997 applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) states:

If:

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

- (c) if the entity is the trustee of a trust – the trust is not a *complying superannuation entity 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.

67. Therefore, subject to satisfying the 'qualified person' rule, a Scheme Shareholder that is a trust or a partnership is required to include the amount of the franking credit on the Special Dividends in their assessable income under subsection 207-35(1) of the ITAA 1997.

Qualified person, holding period requirement and related payment rule

Qualified person

68. Pursuant to subsection 207-145(1) of the ITAA 1997, an entity must be a 'qualified person' in relation to a distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 in order to be entitled to a tax offset in respect of the franking credit on a dividend.

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

70. Division 1A of former Part IIIAA of the ITAA 1936 provides the statutory tests that must be satisfied for an entity to be a 'qualified person' in relation to a franked dividend they have received and thus be entitled to a tax offset for the franking credit on the dividend.

71. The test of what constitutes a 'qualified person' is provided 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, 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.

72. Former subsection 160APHO(2) of the ITAA 1936 sets out the holding period requirement and requires the taxpayer to hold the shares or interest in shares for a continuous period of at least 45 days if the shares are not preference shares, or at least 90 days if the shares are preference shares.

73. Broadly, if the Scheme Shareholder is not under an obligation to make a related payment in relation to a dividend or distribution, they will have to satisfy the holding period requirement within the primary qualification period. If the Scheme Shareholder is under an obligation to make a related payment in relation to a dividend or distribution, they will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

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

75. Former section 160APHN of the ITAA 1936 gives examples of, but does not limit, what constitutes the making of a related payment, for the purposes of Division 1A of former Part IIIA of the ITAA 1936.

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

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

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 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, to the taxpayer or associate; 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 the dividend or distribution.

79. In the circumstances of this Scheme, it is considered that the payment of the Special Dividends was an integral part of the Scheme. Under the terms of the Scheme, the Total Consideration was reduced by the amount of the Special Dividends paid to Scheme Shareholders. Therefore, the former paragraphs 160APHN(3)(f) and 160APHN(4)(c) of the ITAA 1936 are satisfied.

80. The reduction of the Total Consideration has the effect of passing the benefit of the dividends from a Scheme Shareholder to VCA. A Scheme Shareholder is taken to have made, or to be under an obligation to make, a related payment in respect of the Special Dividends.

Holding period requirement

81. As a Scheme Shareholder is taken, for the purposes of Division 1A of former Part IIIA of the ITAA 1936, to have made a related payment in respect of the Special Dividends, the relevant holding period is the 'secondary qualification period' pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

82. Former paragraph 160APHO(2)(a) of the ITAA 1936 states:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid satisfies this subsection in relation to a qualification period in relation to the shares or interest if, during the period:

- (a) where the taxpayer held the shares – the taxpayer held the shares for a continuous period (not counting the day on which the taxpayer acquired the shares or, if the taxpayer has disposed of the shares, the day on which the disposal occurred) of not less than:
 - (i) if the shares are not preference shares – 45 days; or
 - (ii) if the shares are preference shares – 90 days.

83. As the Seymour Whyte shares are not preference shares, a Scheme Shareholder is required to hold their Seymour Whyte shares for at least 45 days during the 'secondary qualification period'.

84. Former section 160APHD of the ITAA 1936 defines the 'secondary qualification period':

In relation to a taxpayer in relation to shares or an interest in shares, 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 became ex dividend ...

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

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.

86. Eligibility for the Special Dividends was determined on the Dividend Record Date of 9 October 2017. This is the last day on which acquisition by a person of a Seymour Whyte share entitled the person to receive the Special Dividends as per former section 160APHE of the ITAA 1936. Accordingly, the ex dividend date for the purposes of former subsection 160APHE is 10 October 2017.

87. Pursuant to former section 160APHD of the ITAA 1936, the secondary qualification period runs from 45 days before the ex-dividend date of 10 October 2017 and end 45 days after that day. This means that the secondary qualification period would ordinarily run from 26 August 2017 to 24 November 2017.

88. However, former subsection 160APHO(3) of the ITAA 1936 excludes any days on which a Scheme Shareholder had materially diminished risks of loss or opportunities for gain in respect of their Seymour Whyte shares, or interest in Seymour Whyte shares, from counting towards the 45 day holding period requirement. Former subsection 160APHO(3) states:

In calculating the number of days for which the taxpayer continuously held the shares or interest, any days on which the taxpayer has materially diminished risks of loss or opportunities for gain in respect of the shares or interest are to be excluded, but the exclusion of those days is not taken to break the continuity of the period for which the taxpayer held the shares or interest.

89. This means that for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, the secondary qualification period would run from 26 August 2017 until the day that Scheme Shareholders were no longer considered to hold their Seymour Whyte shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

90. Entitlement to participate in the Scheme was determined on the Scheme Record Date on the basis of being a Scheme Shareholder who was registered in the share register as the holder of the relevant ordinary share on 16 October 2017. Once identified as a Scheme Shareholder on the 16 October 2017, that Scheme Shareholder would no longer be considered to hold their Seymour Whyte shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 as, at that time the Scheme Shareholder was committed to dispose of their Seymour Whyte shares under the Scheme. This means that as and from the Scheme Record Date of 16 October 2017, the Scheme Shareholder no longer held their Seymour Whyte shares 'at risk'.

91. Accordingly, while the secondary qualification period would ordinarily run from 26 August 2017 to 24 November 2017, the period from 16 October 2017 to 24 November 2017 is excluded in determining the period during which the shares were held at risk. As such, the Scheme Shareholder who received the Special Dividends would need to have held their shares at risk for a continuous period of not less than 45 days during the period from 26 August 2017 to 16 October 2017 in order to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Pursuant to paragraph 160APHO(2)(a) of the ITAA 1936, the day of acquisition and disposal of the share is not included in the relevant 45 day period.

92. A Scheme Shareholder could only satisfy the holding period requirement in relation to a Seymour Whyte share if they acquired that Seymour Whyte share on or before 31 August 2017 and continued to hold that share 'at risk' until 16 October 2017.

Refundable tax offset

93. A Scheme Shareholder who is entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 in respect of the franking credit received will also be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless specifically excluded under section 67-25 of the ITAA 1997.

94. Section 67-25 of the ITAA 1997 specifically excludes a certain range of entities 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) of the ITAA 1997)
- a trustee of a trust who is liable to be assessed under sections 98 or 99A of the ITAA 1936 (subsection 67-25(1B) of the ITAA 1997)
- 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) of the ITAA 1997), and
- non-resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA) of the ITAA 1997).

95. Accordingly, a Scheme Shareholder is subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities under section 67-25 of the ITAA 1997.

Generally, corporate tax entities (including companies, corporate limited partnerships, corporate unit trusts, and public trading trusts) will be excluded from the operation of the refundable tax offset rules.

Exempting entity

96. Section 208-195 of the ITAA 1997 provides that Division 207 of the ITAA 1997 does not apply to a distribution by an exempting entity unless it is expressly stated to apply under Subdivision 208-G of the ITAA 1997.

97. Section 208-20 of the ITAA 1997 states:

A *corporate tax entity is an **exempting entity** at a particular time if, at that time, the entity is effectively owned by prescribed persons.

98. Subsection 208-25(1) of the ITAA 1997 broadly provides that an entity is effectively owned by prescribed persons if not less than 95% of accountable membership interests or accountable partial interests (broadly direct and indirect ownership interests) are held by, or on behalf of, prescribed persons.

99. Section 208-40 of the ITAA 1997 provides the definition of a prescribed person in relation to another corporate tax entity. The definition includes companies, trustees, partnerships or individuals that are a foreign resident; or if they were to receive a distribution made by a corporate tax entity, the distribution would be exempt income or non-assessable non-exempt income of the company, trust estate, partnership or individual.

100. Seymour Whyte was not an exempting entity at the time the Special Dividends were paid to Scheme Shareholders, nor was it a former exempting entity at that time, as less than 95% of the accountable membership interests or accountable partial interests held in Seymour Whyte were held by foreign residents (Division 208 of the ITAA 1997).

101. Section 208-195 of the ITAA 1997 therefore does not apply to deny the gross-up of the assessable income of a Scheme Shareholder by the amount of the franking credit attached to the Special Dividends received by that shareholder, nor to deny the tax offset to which the Scheme Shareholder is otherwise entitled pursuant to Division 207 of the ITAA 1997 at the time when the Special Dividends were paid.

Capital Gains Tax (CGT) Consequences

CGT event A1

102. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10 of the ITAA 1997). 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) of the ITAA 1997).

103. CGT event A1 happened when a Scheme Shareholder disposed of a Seymour Whyte share under the Scheme (subsections 104-10(1) and 104-10(2) of the ITAA 1997). The disposal occurred on the Scheme Implementation Date of 23 October 2017 when the Seymour Whyte share was disposed of by a Scheme Shareholder (paragraph 104-10(3)(b) of the ITAA 1997).

104. The Scheme Shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of the Seymour Whyte share are more than the cost base of the share. The Seymour Whyte shareholder makes a capital loss if those capital proceeds are less than the reduced cost base of the Seymour Whyte share (subsection 104-10(4) of the ITAA 1997).

Capital proceeds

105. The capital proceeds received by a Scheme Shareholder is the money and the market value of any property received or entitled to be received in respect of the event happening (worked out at the time of the CGT event A1) (subsection 116-20(1) of the ITAA 1997).

106. The term 'in respect of the event happening' in subsection 116-20(1) of the ITAA 1997 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.

107. In this case, the First Special Dividend was not directly paid in respect of the disposal of the Seymour Whyte shares under the Scheme and was not a term of the Scheme Implementation Agreement. Under the terms of the Scheme, VCA, VCIN or VINCI did not influence the decision to pay the dividend or provide any funds to Seymour Whyte to finance the payment of the First Special Dividend.

108. Accordingly, the First Special Dividend does not form part of the capital proceeds which a Scheme Shareholder received in respect of CGT event A1 happening.

109. However, while VCA, VCIN or VINCI did not influence the decision of Seymour Whyte to pay the Second Special Dividend, VFI provided financial support to fund the payment of the Second Special Dividend, which was contingent on the implementation of the Scheme. As such, the connection between the payment of the Second Special Dividend and the disposal of the Seymour Whyte shares is considered to be more than coincidental.

110. Accordingly, the Second Special Dividend does form part of the capital proceeds which a Scheme Shareholder received in respect of CGT event A1 happening.

111. Therefore, the capital proceeds received by a Scheme Shareholder for the disposal of Seymour Whyte shares to VCA under the Scheme is A\$1.21 per share, being the Scheme Consideration of A\$0.84 per share plus the amount of the Second Special Dividend of A\$0.37 per share.

Anti-overlap provisions

112. Section 118-20 of the ITAA 1997 provides that 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 ITAA 1997. This has the effect of reducing (but not below zero) the capital gain by the amount that is assessable under the other provision.

113. Where a dividend forms part of the capital proceeds from the disposal of shares and is assessable income under section 44 of the ITAA 1936, section 118-20 of the ITAA 1997 will reduce any capital gain by the amount of the dividend. However, paragraph 118-20(1B)(b) of the ITAA 1997 excludes the amount of a franking credit included in assessable income under subsection 207-20(1), 207-35(1) or 207-35(3) of the ITAA 1997.

114. The Special Dividends are included in the assessable income of resident Scheme Shareholders under subparagraph 44(1)(a)(i) of the ITAA 1936. However, only the Second Special dividend forms part of the capital proceeds from the disposal of the shares.

115. Accordingly, section 118-20 of the ITAA 1997 will operate to reduce (but not below zero) any capital gain made by the resident Scheme Shareholder from CGT event A1 happening to their Seymour Whyte shares by the amount of the Second Special Dividend that is included in the assessable income of the Scheme Shareholder under section 44 of the ITAA 1936. Any capital gain made by the resident Scheme Shareholder from CGT event A1 happening will not be reduced by the amount of the franking credits that are included in the shareholder's assessable income.

Discount capital gain

116. Where a Scheme Shareholder made a capital gain from the disposal of their Seymour Whyte shares, the Scheme Shareholder may be eligible to treat the capital gain as a discount capital gain provided that all relevant requirements of Division 115 of the ITAA 1997 are met.

117. One of those requirements is that the capital gain must result from a CGT event happening on a CGT asset that was acquired by the entity making the capital gain at least 12 months before the CGT event (subsection 115-25(1) of the ITAA 1997).

118. This means that a capital gain made by a Scheme Shareholder when they dispose of their Seymour Whyte share is a discount capital gain if the Scheme Shareholder acquired the Seymour Whyte share at least 12 months before the date of disposal under the Scheme, being the Scheme Implementation date of 23 October 2017 and the other requirements in Division 115 of the ITAA 1997 are satisfied.

Anti-avoidance provisions

Section 204-30 of the ITAA 1997

119. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams 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)).

The member that derives the greater benefit from franking credits is the ***favoured member***. The member that receives the lesser imputation benefit is the ***disadvantaged member***.

120. If section 204-30 of the ITAA 1997 applies, the Commissioner has the discretionary powers under subsection 204-30(3) of the ITAA 1997 to make a written determination. Subsection 204-30(3) states:

The Commissioner may make one or more of these determinations:

- (a) that a specified *franked debit arising in the *franking account of the entity, for a specified *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 a distribution that is made to a favoured member and specified in the determination.

A determination must be in writing.

121. 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 another member of the entity. The words 'derive a greater benefit from franking credits' are defined in subsection 204-30(8) of the ITAA 1997 by reference to the ability of the members to fully utilise imputation benefits.

122. All Scheme Shareholders received an imputation benefit when the Special Dividends were paid. The imputation benefit for resident shareholders is in the form of a tax offset (paragraph 204-30(6)(a) of the ITAA 1997) and for non-resident shareholders is in the form of not being liable to pay dividend withholding tax (paragraph 204-30(6)(e) of the ITAA 1997). The resident shareholders may derive a greater benefit from franking credits than the non-resident shareholders.

123. However, the Special Dividends were paid equally to all Scheme Shareholders and were fully franked regardless of their tax profiles. Accordingly, it cannot be concluded that Seymour Whyte selectively directed the flow of franked distributions to those members who could most benefit from the franking credits.

124. As the conditions in subsection 204-30(1) of the ITAA 1997 are not met in respect of the Special Dividends, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received by Scheme Shareholders in relation to the Special Dividends.

Section 177EA of the ITAA 1936

125. 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.

126. 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).

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

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the **relevant taxpayer**) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

128. Seymour Whyte is a corporate tax entity. The disposal of the ordinary shares in Seymour Whyte pursuant to the Scheme Implementation Agreement is a scheme for the disposition of membership interests. The fully franked Special Dividends were a frankable distribution that was paid to Scheme Shareholders (the relevant taxpayers) as a part of this scheme and who could, therefore, reasonably be expected to receive imputation benefits.

129. In the present case, it is considered that the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the circumstances of the scheme (as specified in subsection 177EA(17) of the ITAA 1936), it would be concluded that Seymour Whyte, 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.

130. 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.

131. The relevant circumstances are that the disposition of the ordinary shares in Seymour Whyte was made pursuant to an acquisition by VCA by way of a Scheme of Arrangement under the Corporations Act voted upon by Scheme Shareholders entitled to vote.

132. Scheme Shareholders are a mix of residents and non-residents. The fully franked Special Dividends were paid to all the existing shareholders of Seymour Whyte in proportion to the number of shares that each shareholder held on the relevant Scheme Record Date and irrespective of their ability to utilise the relevant franking credits. The Special Dividends allowed Scheme Shareholders to share in the accumulated profits of Seymour Whyte.

133. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by Seymour Whyte, Scheme Shareholders or other relevant party for more than the incidental purpose of enabling Scheme Shareholders to obtain imputation benefits. The provision of imputation benefits to Scheme Shareholders remained incidental, in the sense of being subservient to the purpose of disposing their Seymour Whyte shares to VCA.

134. Having regard to the relevant circumstances of the scheme, it cannot be concluded that Seymour Whyte, Scheme Shareholders or any other relevant party entered into or carried out the scheme for the purpose of enabling the shareholders to obtain an imputation benefit.

135. As such, the Commissioner has come to view that the requisite purpose is not present and accordingly 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 dividends.

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