


CR 2017/80 - Income tax: Programmed Maintenance Services Limited - Scheme of Arrangement and Special Dividend

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Class Ruling

Income tax: Programmed Maintenance Services Limited – Scheme of Arrangement and Special Dividend

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

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

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

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

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 provisions

2. The relevant provisions dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
 - subsection 44(1) of the ITAA 1936
 - section 128B of the ITAA 1936
 - section 128D of the ITAA 1936
 - Division 1A of former Part IIIA of the ITAA 1936
 - former section 160APHD of the ITAA 1936
 - former section 160APHE of the ITAA 1936
 - former section 160APHN of the ITAA 1936

- former section 160APHO of the ITAA 1936
- section 177E 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
- section 104-10 of the ITAA 1997
- Division 115 of the ITAA 1997
- subsection 116-20(1) of the ITAA 1997
- section 202-40 of the ITAA 1997
- section 202-45 of the ITAA 1997
- section 204-30 of the ITAA 1997
- section 207-20 of the ITAA 1997
- subsection 207-35(1) of the ITAA 1997
- section 207-45 of the ITAA 1997
- section 207-75 of the ITAA 1997
- section 207-145 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 shareholders of Programmed Maintenance Services Limited (Programmed) who:

- are residents or non-residents of Australia (other than non-residents who carry on a business at or through a permanent establishment in Australia) as defined in subsection 6(1) of the ITAA 1936
- held their shares 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))
- disposed of their shares to Autalent Solutions Pty Ltd (Autalent) pursuant to the scheme of arrangement (as described in paragraphs 9 to 27 of this Ruling (the Scheme) and received the Special Dividend and the Scheme Consideration, and

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

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

4. In this Ruling, an entity belonging to this class of entities is referred to as a Scheme Shareholder.

Qualifications

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

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 27 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

Date of effect

8. This Ruling applies from 1 July 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

9. The following description of the scheme is based on information provided by the applicant including the Scheme Booklet dated 31 August 2017 in relation to the proposed acquisition of Programmed Shares. Certain terms used in this Ruling have the same meaning as corresponding terms in the Scheme Booklet.

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

Programmed

10. Programmed is an Australian resident company that has been listed on the Australian Securities Exchange since 1 October 1999.
11. Programmed's principal activities comprise the provision of staffing, maintenance and facility management services.
12. On 30 June 2017, Programmed had 257,525,748 ordinary shares on issue and 4,237,000 Programmed Performance Rights granted.
13. As at 30 June 2017, approximately 29.08% of Programmed Shares were held by institutional investors which were foreign resident entities and approximately 41.85% of Programmed Shares were held by institutional investors which were Australian resident entities. The residency status of the entities that held the remaining 29.06% of Programmed Shares is unknown.

Autalent

14. Autalent was incorporated in Australia on 1 August 2017 and is a wholly owned subsidiary of PERSOL Holdings Co, Ltd. (PERSOL). PERSOL is a company incorporated in Japan and listed on the Tokyo Stock Exchange.
15. Autalent is a proprietary company limited by shares that was incorporated specifically for the purpose of the acquisition of Programmed Shares.
16. PERSOL and its subsidiaries provide a range of services including temporary staffing, permanent placement, recruitment, information technology outsourcing and design development.
17. Prior to the Implementation Date neither Autalent or PERSOL held any Programmed Shares.

The Scheme of Arrangement

18. On 14 July 2017, Programmed announced that it had executed a Scheme Implementation Deed (SID) with PERSOL under which PERSOL, through a wholly-owned subsidiary Autalent, would acquire all Programmed Shares pursuant to Part 5.1 of the *Corporations Act 2001* (Corporations Act).

19. The proposed acquisition of all Programmed Shares was subject to certain conditions precedent set out in the SID including, but not limited to:

- Programmed Shareholder Approval, and
- Court approval by the Federal Court of Australia (Western Australia Registry).

20. The Scheme Resolution was approved at the Scheme Meeting held on 6 October 2017. Final Court orders were obtained on 10 October 2017.

21. The Scheme Booklet was registered by Programmed with the Australian Securities and Investments Commission (ASIC) on 31 August 2017. Entitlement to the Special Dividend (Special Dividend Record Date) was determined on 17 October 2017 and the entitlement to the Scheme Consideration (Scheme Record Date) was determined on 23 October 2017. The implementation date of the Scheme was 27 October 2017 (Implementation Date).

22. Under the scheme, Scheme Shareholders who disposed of a Programmed Share to Autalent received a Total Cash Payment of \$3.02 per share, comprising:

- the Special Dividend of \$0.16, payable by Programmed, and
- the Scheme Consideration of \$2.86, payable by Autalent.

23. The SID was subject to regulatory approvals from the Foreign Investment Review Board and ASIC.

Special Dividend

24. On 11 October 2017, the Board of Directors of Programmed declared a fully franked Special Dividend of \$0.16 to Scheme Shareholders for every Programmed Share they held on the Special Dividend Record Date of 17 October 2017. The Special Dividend Payment Date was 20 October 2017.

25. The declaration of the Special Dividend was conditional upon the approval of the Scheme by the Federal Court of Australia, which was obtained on 10 October 2017. Neither Autalent nor PERSOL influenced the decision of the Programmed Board of Directors to declare the Special Dividend.

26. The Special Dividend was paid out of retained earnings derived by Programmed and was funded by Programmed from existing cash reserves and from Programmed's existing external financiers. Autalent did not provide any funds to Programmed to finance the Special Dividend. The Special Dividend was not debited against Programmed's share capital account.

Scheme Consideration

27. Under the Scheme, Scheme Shareholders received the Scheme Consideration of \$2.86 per share from Autalent.

Ruling

The Special Dividend

28. The Special Dividend paid to Scheme Shareholders is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

29. A Scheme Shareholder who received the Special Dividend and is a resident as defined in subsection 6(1) of the ITAA 1936 is required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

30. A non-resident Scheme Shareholder who received the Special Dividend (other than those 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 (section 128D of the ITAA 1936) and will not be liable for withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

Gross up and tax offset

31. The Special Dividend is a frankable distribution under section 202-40.

32. A Scheme Shareholder who received the Special Dividend directly and satisfies the residency requirements in section 207-75:

- includes 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 franking credit

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

33. A Scheme Shareholder (not being a corporate tax entity), who received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, includes an amount equal to the franking credit attached to the dividend in its assessable income under subsection 207-35(1), subject to the trustee or the partnership being a 'qualified person'.

34. The relevant members of a partnership or trust to whom a distribution flows indirectly through the partnership or trust, are entitled to a tax offset under section 207-45, equal to their share of the franking credit attached to the distribution included in the assessable income of the partnership or trust under subsection 207-35(1).

Qualified persons

35. The payment of the Special Dividend will constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

36. Accordingly, to be a qualified person for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 in relation to the Special Dividend, each Scheme Shareholder will need to have held their Programmed Share 'at risk' for a continuous period of at least 45 days in the secondary qualification period. A Scheme Shareholder must exclude any days on which they have materially diminished risks of loss or opportunities for gain in respect of their Programmed Share.

37. A Scheme Shareholder is considered to not have held their Programmed Share 'at risk' for the purposes of former Division 1A of Part IIIAA of the ITAA 1936 as from the Scheme Record Date of 23 October 2017. Therefore, a Scheme Shareholder will be a qualified person in relation to the Special Dividend if, in the period from 3 September 2017 and 22 October 2017 (inclusive), they continued to hold their Programmed Share and did not have materially diminished risks of loss or opportunities for gain in respect of their Programmed Share 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

38. The tax offset that a Scheme Shareholder is entitled to under Division 207 in respect of the franking credit is subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

Capital Gains Tax (CGT) consequences

CGT event A1

39. CGT event A1 happened when a Scheme Shareholder disposed of each of their Programmed Shares to Autalent pursuant to the Scheme (section 104-10).

40. CGT event A1 happened when Programmed Shares were transferred to Autalent on the Implementation Date of 27 October 2017 (subsection 104-10(3)).

41. A Scheme Shareholder makes a capital gain if the capital proceeds from the disposal of the Programmed Shares are more than the cost base. A Scheme Shareholder makes a capital loss if the capital proceeds are less than the reduced cost base of the Programmed Shares (subsection 104-10(4)).

Capital proceeds

42. The capital proceeds from CGT event A1 will be the Scheme Consideration received or entitled to be received by Scheme Shareholders for each Programmed Share (subsection 116-20(1)). The capital proceeds will not include the Special Dividend.

Discount capital gain

43. If a Scheme Shareholder made a capital gain from the disposal of their Programmed Shares, they will be eligible to treat that 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, a trust (section 115-10)
- the capital gain has been worked out using a cost base that has been calculated without reference to indexation (subsection 115-20(1)), and
- the Programmed Shares were acquired at least 12 months prior to CGT event A1 happening (subsection 115-25(1)).

The anti-avoidance provisions

44. The Scheme is not a scheme, or a scheme having substantially the effect of a scheme, by way of, or in the nature of dividend stripping within the meaning of section 177E of the ITAA 1936.

45. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

46. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

47. The Special Dividend was not made as part of a dividend stripping operation for the purposes of paragraph 207-145(1)(d).

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 Dividend

48. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders, whether in money or other property. However, paragraph (d) of the definition of 'dividend' excludes a distribution that is debited against an amount standing to the credit of the share capital account of the company.

49. The payment of the Special Dividend is a distribution in money made by Programmed to its shareholders. Programmed did not debit the Special Dividend against its share capital account.

50. Therefore, the exclusion in paragraph (d) will not apply and the Special Dividend is a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

Australian residents

51. The assessable income of a resident shareholder in a company includes dividends that are paid to the shareholder by the company out of profits derived by it from any source (paragraph 44(1)(a) of the ITAA 1936).

52. As the Special Dividend is paid to Scheme Shareholders out of profits derived by Programmed, the assessable income of Scheme Shareholders who are residents of Australia includes the Special Dividend (paragraph 44(1)(a) of the ITAA 1936).

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

53. The assessable income of a non-resident shareholder in a company includes 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 (subparagraph 44(1)(b)(i) of the ITAA 1936).

54. Dividends paid by a resident company to a non-resident are generally subject to withholding tax (section 128B of the ITAA 1936). However, no withholding tax will be imposed to the extent the dividend is franked (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

55. As the Special Dividend is fully franked, it will not be subject to withholding tax when derived by non-resident Scheme Shareholders.

56. In addition, income upon which withholding tax would, but for paragraph 128B(3)(ga) of the ITAA 1936 be payable, is not assessable income and is not exempt income of a person (section 128D of the ITAA 1936).

57. As the payment of the Special Dividend is income upon which withholding tax would be payable but for paragraph 128B(3)(ga) of the ITAA 1936, the assessable income of non-resident Scheme Shareholders (other than those carrying on business in Australia at or through a permanent establishment in Australia) will not include the Special Dividend.

Gross up and tax offset

58. A distribution is a frankable distribution to the extent it is not unfrankable (section 202-40). Section 202-45 sets out the circumstances under which an amount or distribution is taken to be unfrankable.

59. None of the circumstances in section 202-45 apply to the Special Dividend. Accordingly, the Special Dividend is a frankable distribution under section 202-40.

60. Where a shareholder receives a franked distribution directly, satisfies the residency requirement in section 207-75 and is a 'qualified person' in relation to the franked distribution, the assessable income of the shareholder includes the amount of the franking credit (subsection 207-20(1)). The shareholder will also be entitled to tax offset equal to the franking credit on the distribution (subsection 207-20(2)).

61. Therefore, subject to satisfying the qualified person rule, the assessable income of a Scheme Shareholder who receives the Special Dividend directly includes the amount of the franking credit attached to the Special Dividend and will be entitled to a tax offset equal to the amount of the franking credit.

62. Subject to satisfying the 'qualified person' rule, the assessable income of the 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, includes the amount of the franking credit attached to the Special Dividend (subsection 207-35(1)).

Qualified persons, related payment and holding period rule

Qualified person

63. If a franked distribution is made to an entity that is not a qualified person in relation to a franked distribution, the franking credit on the distribution is not included in assessable income of the entity. The entity is also not entitled to a franking credit because of the distribution (subsection 207-145(1)).

64. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) of the ITAA 1936. Broadly, if a 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 a 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

65. 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 the Special Dividend they receive.

66. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIA of the ITAA 1936 is provided in former section 160APHN of the ITAA 1936. Broadly, a related payment is where a Scheme Shareholder has done, or is obliged to do, anything having the effect of passing the benefit of the Special Dividend to one or more other persons.

67. Former subsection 160APHN(3) of the ITAA 1936 lists examples of what may have the effect of passing the benefit of the Special Dividend to one or more other persons, for example, 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 (former paragraph 160APHN(3)(f)).

68. Former subsection 160APHN(4) of the ITAA 1936 lists the circumstances of making a related payment referred in former paragraph 160APHN(3)(f) being broadly that the amount of the benefit passed on reflects the amount of the Special Dividend.

69. Under the terms of the SID, the Scheme Consideration is reduced by the amount of the Special Dividend paid by Programmed to Scheme Shareholders.

70. The reduction of the Scheme Consideration has the effect of passing the benefit of the dividends from a Scheme Shareholder to Autalent. Therefore, a Scheme Shareholder, or a partner in a partnership or a beneficiary of a trust that has an interest in Programmed Shares, is taken to have made a related payment in respect of the Special Dividend.

Holding period requirement

71. As Scheme Shareholders are taken, for the purposes of former Division 1A, to have made a related payment in respect of the Special Dividend, the relevant qualification period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

72. The secondary qualification period is satisfied where a Scheme Shareholder held the Programmed Shares for a continuous period (not counting the day on which the Scheme Shareholder acquired the shares or, if they have disposed of the share, the day on which the disposal occurred) of not less than 45 days (former paragraph 160APHO(2)(a) of the ITAA 1936).

73. The secondary qualification period for shares is 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 (former section 160APHD of the ITAA 1936).

74. 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 (former subsection 160APHE(1) of the ITAA 1936).

75. The eligibility for the Special Dividend is determined on 17 October 2017. This is the last day on which acquisition by a person of a Programmed Share entitled the person to receive the Special Dividend. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 18 October 2017.

76. The secondary qualification period will begin 45 days before the ex-dividend date of 18 October 2017 and end 45 days after that day pursuant to former section 160APHD of the ITAA 1936. This means that the secondary qualification period would ordinarily run from 3 September 2017 to 2 December 2017 (45 days before and 45 days after 18 October 2017).

77. In calculating the number of days the shares were continuously held, any days on which an entity had materially diminished risks of loss or opportunities for gain in respect of their Programmed Shares, or interest in Programmed Shares, are excluded from counting towards the 45 day holding period requirement pursuant to former subsection 160APHO(3) of the ITAA 1936.

78. Therefore, the secondary qualification period would run from 3 September 2017 until 27 October 2017, the date that Scheme Shareholders disposed of their shares for the purposes of Division 1A of former Part IIIA of the ITAA 1936.

79. Entitlement to participate in the Scheme was determined on the Scheme Record Date on the basis of being a Scheme Shareholder who is registered in the share register as the holder of the relevant ordinary share at 4:00pm on 23 October 2017. It is considered that once a Scheme Shareholder is identified as a Scheme Shareholder on the Scheme Record Date, that Scheme Shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A of former Part IIIAA of the ITAA 1936 as, at that time the Scheme Shareholder is committed to disposing of their Programmed Shares and receiving the Scheme Consideration. Therefore, the Scheme Shareholders no longer held their Programmed Shares at risk from 23 October 2017.

80. Accordingly, while the secondary qualification period would relevantly run from 3 September 2017 to 2 December 2017, the period 23 October 2017 to 2 December 2017 would be excluded in determining the period during which the shares were held at risk, as it represents a period of materially diminished risk. As such, a Scheme Shareholder who received the Special Dividend would need to have held their shares at risk for a continuous period of not less than 45 days during the period 3 September 2017 and 22 October 2017 in order to be a qualified person for the purposes of former Division 1A of former Part IIIAA of the ITAA 1936. Pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, the dates of acquisition and disposal are not included in the relevant 45 day period.

81. Scheme Shareholders could only satisfy the holding period requirement in relation to a Programmed Share if they acquired that Programmed Share on or before 7 September 2017 and continued to hold it at-risk until 22 October 2017.

Refundable tax offset

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

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

84. Accordingly, a holder of Programmed Shares is subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities under section 67-25.

85. Division 63 sets out the rules on how, and in what order, tax offsets are applied against income tax liability. Where a tax offset that is subject to the refundable tax offset rules in Division 67 exceeds the income tax liability, the Scheme Shareholder can get a refund of the remaining amount (item 40 of section 63-10).

CGT consequences

CGT event A1

86. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10). The event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

87. CGT event A1 happened when a Scheme Shareholder disposed of a Programmed Share to Autalent pursuant to the Scheme (subsections 104-10(1) and 104-10(2)). The disposal occurred on the Implementation Date of 27 October 2017 when the Programmed Share was disposed of by a Scheme Shareholder (paragraph 104-10(3)(b)).

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

89. A Scheme Shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Programmed Share is more than the cost base of the Programmed Share. A Scheme Shareholder makes a capital loss if those capital proceeds are less than the reduced cost base of the Programmed Share (subsection 104-10(4)).

Capital proceeds

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

91. The term 'in respect of the event happening' in subsection 116-20(1) requires the relationship between the event and the receipt of money, or the entitlement to receive 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 (Taxation Ruling TR 2010/4 *Income tax: capital gains: when a dividend will be included in the capital proceeds from a disposal of shares that happens under a contract or a scheme of arrangement*).

92. In this case, the Special Dividend was not paid in respect of the disposal of Programmed Shares under the Scheme. The determination to pay the Special Dividend was at the discretion of Programmed's Board. Autalent had no control over Programmed's decision to pay it, or its quantum.

93. The payment of the Special Dividend was funded entirely by Programmed's cash reserves and debt facilities with no actual or contingent funding support from Autalent.

94. The Commissioner considers that the Special Dividend does not form part of the capital proceeds in respect of CGT event A1 happening.

95. What the Scheme Shareholder received in respect of CGT event A1 happening was the cash received for the disposal of their Programmed Shares to Autalent.

96. Therefore, the capital proceeds Scheme Shareholders received for the disposal of a Programmed Share was the Scheme Consideration of \$2.86.

Discount capital gain

97. If a Scheme Shareholder made a capital gain from the disposal of their Programmed Share, the Scheme Shareholder may be eligible to treat the capital gain as a discount capital gain provided that all relevant requirements of Division 115 are met.

98. One of those requirements is that the capital gain must result from a CGT event happening to 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)).

99. This means that a capital gain made by a Scheme Shareholder is a discount capital gain if they acquired the Programmed Share at least 12 months before the date of disposal under the Scheme, being the Implementation Date of 27 October 2017, and the other requirements in Division 115 are satisfied.

The anti-avoidance provisions

Section 177E

100. Section 177E of the ITAA 1936 is an anti-avoidance provision that is designed to prevent tax benefits being obtained as part of a dividend stripping scheme or a scheme with substantially the same effect as a dividend stripping scheme.

101. The term 'dividend stripping' has no precise legal meaning. In its traditional form, a dividend stripping operation occurs when shares in a company with substantial retained profits are acquired by shareholders who pay the existing shareholders a capital sum reflecting the value of the retained profits. The new shareholders then liberate those profits through the payment of a dividend post acquisition. Generally, the new shareholders who derive dividend income from the company would not be liable to tax upon those dividends.

102. Therefore, a scheme by way of, or in the nature of, dividend stripping, or one that has substantially the effect of a scheme by way of, or in the nature of, dividend stripping, would be one that has the effect of delivering a shareholder's entitlement to a dividend in a tax advantaged manner.

103. The retained profits of Programmed that were distributed to its existing shareholders as the Special Dividend prior to the implementation of the Scheme are not provided in a tax advantaged manner. The Special Dividend was paid to Programmed Shareholders on the Special Dividend Payment Date. The Special Dividend was funded from existing cash reserves and from existing external financiers. Consequently section 177E of the ITAA 1936 will not apply.

Section 177EA

104. Section 177EA of the ITAA 1936 is an 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.

105. Programmed is a corporate tax entity. The sale of the ordinary shares in Programmed pursuant to a scheme of arrangement is a scheme for the disposition of membership interests. The fully franked Special Dividend is 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.

106. 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 relevant circumstances of the scheme (as provided for in subsection 177EA(17)), it would be concluded that, on the part of Programmed, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the scheme.

107. 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 diverse matters which, taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the imputation benefit is more than an incidental purpose of the scheme.

108. The relevant circumstances are that the disposition of the ordinary shares in Programmed was made pursuant to an acquisition by PERSOL by way of scheme of arrangement under the Corporations Act voted upon by Scheme Shareholders entitled to vote.

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

110. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by Programmed or Scheme Shareholders for more than an incidental purpose of enabling Scheme Shareholders to obtain imputation benefits. The provision of imputation benefits to Scheme Shareholders remains incidental, in the sense of being subservient to, the purpose of transferring their shares to Autalent.

111. Having regard to the relevant circumstances of the scheme, the Commissioner has concluded that the requisite purpose is not present. Therefore, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the dividends.

Section 204-30

112. 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.

113. 'Streaming' is not defined for the purposes of section 204-30. However, paragraph 3.28 of the *Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002* states that streaming occurs when a company selectively directs the flow of franked distributions to those members who can most benefit from the imputation credits.

114. 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.

115. Under the current arrangement, all Scheme Shareholders 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 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.

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

117. 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, or any part, of the imputation benefit received in relation to the Special Dividend.

Section 207-145(1)(d)

118. 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 if the making of the distribution arose out of, or was made in the course of, a scheme that was by way of, or in the nature of, dividend stripping; or had substantially the effect of a scheme by way of, or in the nature of, dividend stripping (section 207-155).

119. As stated above in paragraph 101, a dividend stripping operation occurs when shares in a company with substantial retained profits are acquired by shareholders who pay the existing shareholders a capital sum reflecting the value of the retained profits.

120. Having regard to the circumstances of the scheme under which Scheme Shareholders disposed of their Programmed Shares to Autalent, the Commissioner considers that the payment of the Special Dividend to Scheme Shareholders was not made as part of a dividend stripping operation.

121. Therefore, paragraph 207-145(1)(d) will not apply to the Special Dividend received by the Scheme Shareholders.

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Income tax ~~ Capital gains tax ~~ Capital proceeds

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