


CR 2018/33 - Income tax: LifeHealthcare Group Limited - Scheme of Arrangement and payment of Interim Dividend and Special Dividend

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Class Ruling

Income tax: LifeHealthcare Group Limited – Scheme of Arrangement and payment of Interim Dividend 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provisions

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subparagraph 44(1)(a)(i) of the ITAA 1936
- former section 160APHM of the ITAA 1936
- former section 160APHN of the ITAA 1936
- former paragraph 160APHO(1)(a) of the ITAA 1936
- paragraph 177EA(5)(b) 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(1) of the ITAA 1997
- section 104-10(2) of the ITAA 1997
- section 104-10(4) 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
- paragraph 204-30(3)(c) of the ITAA 1997
- Division 207 of the ITAA 1997
- section 207-20 of the ITAA 1997
- subsection 207-35(1) of the ITAA 1997
- paragraph 207-145(1)(a) of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of LifeHealthcare Group Limited (LifeHealthcare) who:

- participated in the scheme of arrangement (as described in paragraphs 10 to 30 of this Ruling) under which Pacific Equity Partners (PEP) acquired 100% of the shares in LifeHealthcare (the Scheme of Arrangement)
- held their shares in LifeHealthcare 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))
- were 'residents of Australia' as defined in subsection 6(1) of the ITAA 1936
- 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 'LifeHealthcare Shareholder'.

Qualifications

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

6. This Ruling does not consider the taxation consequences in relation to LifeHealthcare shares acquired pursuant to employee incentive plans.

7. 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 10 to 30 of this Ruling.

8. 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
- this Ruling may be withdrawn or modified.

Date of effect

9. 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 *Public Rulings*).

Scheme

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

- Scheme Implementation Deed (SID) dated 5 February 2018, and
- Scheme Booklet dated 29 March 2018.

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

LifeHealthcare

11. LifeHealthcare is an Australian resident company that has been listed on the Australian Securities Exchange since 2013.

12. LifeHealthcare's principal activities are the distribution of medical devices and the provision of clinician training, product development and specialised clinical services.

13. On 11 May 2018, LifeHealthcare had 47,753,621 ordinary shares on issue.

Pacific Equity Partners

14. PEP is a private equity fund manager.

15. On 25 January 2018, PEP incorporated a number of Australian resident special purpose companies. Pacific Health Supplies BidCo Pty Limited (Pacific Health) is wholly-owned by PEP and was incorporated in Australia for the purpose of acquiring 100% of LifeHealthcare.

16. Prior to the Implementation Date of 25 May 2018, neither Pacific Health nor PEP held any LifeHealthcare shares directly or indirectly.

Scheme of Arrangement

17. On 5 February 2018, LifeHealthcare announced that it had entered into a SID under which PEP, through its wholly-owned subsidiary Pacific Health, would acquire 100% of the issued capital of LifeHealthcare by way of a Scheme of Arrangement under Part 5.1 of the *Corporations Act 2001* (Corporations Act).

18. The Scheme Resolution was approved by the requisite majority of LifeHealthcare Shareholders at the Scheme Meeting held on 3 May 2018.

19. The Scheme of Arrangement was approved by the Federal Court of Australia at the hearing held on 10 May 2018. The Scheme of Arrangement became effective on 11 May 2018 when LifeHealthcare lodged the court order with the Australian Securities and Investments Commission. LifeHealthcare shares were suspended from trading at the close of trading on 11 May 2018.

20. On the Scheme Record Date of 7.00pm AEST on 21 May 2018, a LifeHealthcare Shareholder was entitled to participate in the Scheme of Arrangement.

21. On the Scheme Implementation Date of 25 May 2018, LifeHealthcare Shareholders disposed of each share they held in LifeHealthcare to Pacific Health.

22. LifeHealthcare Shareholders received a total cash payment of \$3.75 comprising:

- a fully franked Interim Dividend of \$0.075 which was paid on 21 March 2018
- a fully franked Special Dividend of \$0.18 which was paid on 25 May 2018, and

- the Scheme Consideration of \$3.495 which was paid on 25 May 2018 (Implementation Date).

Interim Dividend

23. On 20 February 2018, the Board of Directors of LifeHealthcare declared a fully franked Interim Dividend of \$0.075 per LifeHealthcare share to LifeHealthcare Shareholders for every share that they held on the Interim Dividend Record Date of 6 March 2018. The Interim Dividend was paid on 21 March 2018.

24. The Interim Dividend was not contingent on the Scheme of Arrangement proceeding.

25. The Interim Dividend was paid out of retained earnings derived by LifeHealthcare and was funded from existing cash reserves. The Interim Dividend was not debited against LifeHealthcare's share capital account. Neither PEP nor Pacific Health financed or facilitated financing for the payment of the Interim Dividend.

26. The Interim Dividend complied with the requirements of the Corporations Act, including section 254T of that Act.

Special Dividend

27. On 10 May 2018, the Board of Directors of LifeHealthcare declared a fully franked Special Dividend of \$0.18 per LifeHealthcare share to LifeHealthcare Shareholders for every share they held on the Special Dividend Record Date of 7.00pm AEST 16 May 2018. The Special Dividend was paid on 25 May 2018.

28. The declaration of the Special Dividend was conditional on the Scheme of Arrangement becoming effective and was payable at the discretion of the LifeHealthcare Board. Neither PEP nor Pacific Health influenced the decision of the LifeHealthcare Board to declare the Special Dividend.

29. The Special Dividend was paid entirely from LifeHealthcare's cash reserves and existing debt facilities. It was not debited against LifeHealthcare's share capital account. Neither PEP nor Pacific Health financed or facilitated financing for the payment of the Special Dividend.

30. The Special Dividend complied with the requirements of the Corporations Act, including section 254T of that Act.

Ruling***Interim Dividend***

31. The Interim Dividend paid to LifeHealthcare Shareholders is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

32. The Interim Dividend is a frankable distribution pursuant to section 202-40.

Special Dividend

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

34. The Special Dividend is a frankable distribution pursuant to section 202-40.

Assessability of the Interim Dividend and the Special Dividend and tax offset

35. A LifeHealthcare Shareholder includes the Interim Dividend and the Special Dividend in their assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).

36. A LifeHealthcare Shareholder:

- includes the amount of the franking credits on the Interim Dividend and the Special Dividend in their assessable income, and
- is entitled to a tax offset equal to the amount of the franking credits on the Interim Dividend and the Special Dividend

in the income year they are paid (section 207-20), subject to being a 'qualified person' in relation to the Interim Dividend and the Special Dividend.

37. A LifeHealthcare Shareholder (not being a corporate tax entity), who received the Interim Dividend and 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 Interim Dividend and the Special Dividend in its assessable income under subsection 207-35(1), subject to the trustee or the partnership being a 'qualified person'.

Qualified persons

Interim Dividend

38. The payment of the Interim Dividend is not a 'related payment' for the purposes of former section 160APHN of the ITAA 1936.

39. A LifeHealthcare Shareholder will be a qualified person in relation to the Interim Dividend if, in the period from the day after they acquired the shares to 21 April 2018 (inclusive), they continued to hold their LifeHealthcare shares and did not have materially diminished risks of loss or opportunities for gain in respect of their LifeHealthcare shares for a continuous period of at least 45 days (not counting the day on which the shares were acquired or the day of disposal of the shares).

Special Dividend

40. The payment of the Special Dividend constitutes a 'related payment' for the purposes of former section 160APHN of the ITAA 1936 (paragraph 207-145(1)(a)).

41. A LifeHealthcare Shareholder will be a qualified person in relation to the Special Dividend if from 2 April 2018 to 20 May 2018 (inclusive), they continued to hold their LifeHealthcare shares and did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of their LifeHealthcare shares for a continuous period of at least 45 days.

Refundable tax offset

42. The franking credit tax offsets that a LifeHealthcare Shareholder is entitled to under Division 207 in relation to the Interim Dividend and the Special Dividend are subject to the refundable tax offset rules in Division 67, provided the LifeHealthcare Shareholder is not excluded by the operation of section 67-25.

Capital Gains Tax (CGT) consequences

CGT event A1

43. CGT event A1 happened on 25 May 2018 (Scheme Implementation Date) when a LifeHealthcare Shareholder disposed of each of their LifeHealthcare shares to Pacific Health in accordance with the Scheme of Arrangement (subsections 104-10(1) and 104-10(2)).

Capital proceeds

44. The Scheme Consideration of \$3.495 for each LifeHealthcare share is the capital proceeds from CGT event A1 happening to the share (subsection 116-20(1)).

45. The Interim Dividend of \$0.075 and the Special Dividend of \$0.18 are not included in the capital proceeds.

Capital gain or capital loss

46. A LifeHealthcare Shareholder will make a capital gain if the capital proceeds from the disposal of a LifeHealthcare share exceed its cost base (subsection 104-10(4)). The capital gain is the amount of the excess.

47. A LifeHealthcare Shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the LifeHealthcare share (subsection 104-10(4)). The capital loss is the amount of the difference.

Discount capital gain

48. If a LifeHealthcare Shareholder makes a capital gain from the disposal of a LifeHealthcare share they will be eligible to treat the capital gain as a 'discount capital gain' provided they satisfy the requirements of Division 115.

The anti-avoidance provisions

49. 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 benefits received in relation to the Interim Dividend and the Special Dividend.

50. 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 Interim Dividend and the Special Dividend.

Commissioner of Taxation

25 July 2018

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 Interim and Special Dividends

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

52. The payments of the Interim Dividend and the Special Dividend were a distribution of money made by LifeHealthcare to its shareholders. LifeHealthcare did not debit the Interim Dividend or the Special Dividend against its share capital account.

53. Therefore, the exclusion in paragraph (d) does not apply and the Interim Dividend and the Special Dividend each constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Interim Dividend and the Special Dividend

54. 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).

55. As the Interim Dividend and the Special Dividend are paid to LifeHealthcare Shareholders out of profits derived by LifeHealthcare, the assessable income of LifeHealthcare Shareholders includes the Interim Dividend and the Special Dividend (paragraph 44(1)(a) of the ITAA 1936).

Gross-up and tax offset

56. 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.

57. None of the circumstances in section 202-45 applies to the Interim Dividend and the Special Dividend. Accordingly, the Interim Dividend and the Special Dividend are frankable distributions under section 202-40.

58. 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 a tax offset equal to the franking credit on the distribution (subsection 207-20(2)).

59. Therefore, subject to satisfying the 'qualified person' rule, the assessable income of a LifeHealthcare Shareholder who receives the Interim Dividend and the Special Dividend directly, includes the amounts of the franking credits attached to the Interim Dividend and the Special Dividend, and will be entitled to a tax offset equal to the amounts of the franking credits, in the income year in which the Scheme of Arrangement happened.

60. Subject to satisfying the 'qualified person' rule, the assessable income of a LifeHealthcare 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 amounts of the franking credits attached to the Interim Dividend and the Special Dividend (subsection 207-35(1)).

Qualified persons, related payment and holding period rule

Qualified person

61. 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)).

62. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) of the ITAA 1936. Broadly, if the LifeHealthcare Shareholder is not under an obligation to make a related payment in relation to the Interim Dividend, as is the case, they are required to satisfy the holding period requirement within the primary qualification period. If the LifeHealthcare Shareholder is under an obligation to make a related payment in relation to the Special Dividend, as is the case, they will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

63. In order to determine the relevant qualification period, it is necessary to determine whether, under the Scheme of Arrangement, a LifeHealthcare Shareholder has made, or is under an obligation to make, or is likely to make, a related payment in respect of the Interim Dividend or the Special Dividend they receive (former subsection 160APHN(2) of the ITAA 1936).

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

65. Former subsection 160APHN(3) of the ITAA 1936 lists examples of what may have the effect of passing that benefit 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) of the ITAA 1936).

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

67. Under the terms of the SID, the Scheme Consideration was reduced by the amount of the Interim Dividend paid by LifeHealthcare Shareholders but was not contingent upon the Scheme of Arrangement being implemented. Therefore, it is considered that the payment of the Interim Dividend is not an integral part of the Scheme of Arrangement.

68. However, under the terms of the SID, the Scheme Consideration was to be reduced by the amount of the Special Dividend paid by LifeHealthcare Shareholders and was contingent upon the Scheme of Arrangement being implemented. It is considered that the payment of the Special Dividend is an integral part of the Scheme of Arrangement.

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

Holding period requirement

70. The holding period rule requires shareholders to hold their ordinary shares at-risk for a continuous period of not less than 45 days during the relevant qualification period (former paragraph 160APHO(2)(a) of the ITAA 1936).

71. The primary qualification period (as defined in former section 160APHD of the ITAA 1936) begins from the day after the date of acquisition of the share and ends on the 45th day after the day on which the share becomes ex dividend. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the share are not counted.

Interim Dividend

72. LifeHealthcare Shareholders are not taken, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to be under an obligation to make a related payment in respect of the Interim Dividend as a result of the Scheme of Arrangement. Therefore, the relevant holding period for the Interim Dividend is the primary qualification period pursuant to former paragraph 160APHO(1) of the ITAA 1936.

73. Former subsection 160APHO(3) of the ITAA 1936 stipulates that any days on which a taxpayer has materially diminished risks of loss or opportunities for gain are to be excluded in determining whether the shares are held 'at risk'.

74. As of 21 May 2018, the Scheme Record Date, LifeHealthcare Shareholders ceased to hold their shares 'at risk' as they were committed to dispose of their shares in exchange for the Scheme Consideration.

75. Accordingly, in the context of the Scheme of Arrangement (and assuming LifeHealthcare Shareholders have not already satisfied the primary qualification period in respect of an earlier dividend), the primary qualification period begins on the day after the day on which the shareholder acquired the shares and ends 45 days after the ex-dividend day. This means that the primary qualification period ended on 21 April 2018.

Special Dividend

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

77. As the LifeHealthcare shares are not preference shares, LifeHealthcare Shareholders, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, are required to hold their shares for at least 45 days during the secondary qualification period.

78. Former section 160APHD of the ITAA 1936 defines the 'secondary qualification period' as follows:

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

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

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

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

80. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 16 May 2018, being the last day on which acquisition by a person of a LifeHealthcare share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date of a LifeHealthcare share for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 17 May 2018.

81. The secondary qualification period runs from 45 days before and ends on 45 days after the ex-dividend date of 17 May. In practical terms, this means that the secondary qualification period runs from 2 April 2018 to 1 July 2018. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a LifeHealthcare Shareholder has materially diminished risks of loss or opportunities for gain in respect of the LifeHealthcare share is to be excluded. This means that the secondary qualification period runs from 2 April 2018 until the date that the LifeHealthcare Shareholders are no longer holding their shares at risk for the purposes of Division 1A of former Part IIIA of the ITAA 1936.

82. Entitlement to participate in the Scheme of Arrangement was determined on the Scheme Record Date (21 May 2018). LifeHealthcare Shareholders who disposed of their shares under the Scheme of Arrangement are no longer considered to have held their LifeHealthcare shares at risk for the purposes of Division 1A of former Part IIIA of the ITAA 1936 as of 21 May 2018.

83. Accordingly, for a LifeHealthcare Shareholder who disposes of their shares under the Scheme of Arrangement, the secondary qualification period will run for a period of 2 April 2018 to 20 May 2018 (being the day prior to the Scheme Record Date). A LifeHealthcare Shareholder who received the Special Dividend will need to have held its shares at risk for a continuous period of not less than 45 days during this period in order to be a qualified person for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Further, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, neither the date of acquisition nor the date of disposal is included in the relevant 45 day period.

84. The small shareholder exception in former section 160APHT of the ITAA 1936 does not apply as the Special Dividend constitutes a related payment as discussed at paragraphs 63 to 69 of this Ruling. Therefore, a LifeHealthcare Shareholder who is an individual and who has franking credit offsets not exceeding \$5,000 for the year of income ended 30 June 2018 must also satisfy the holding period requirement in relation to the Special Dividend (former section 160APHT(2) of the ITAA 1936).

Refundable tax offset

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

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

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

87. 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 LifeHealthcare Shareholder can get a refund of the remaining amount (item 40 of section 63-10).

CGT consequences

CGT Event A1

88. CGT event A1 happens if there is a change in the ownership of an asset (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)).

89. The acquisition of shares under a court approved scheme of arrangement does not involve a disposal of shares under a contract.¹

90. Therefore, CGT event A1 happened when there was a change of ownership in a LifeHealthcare share from a LifeHealthcare Shareholder to PEP pursuant to the SID (subsections 104-10(1) and 104-10(2)). The change of ownership occurred on the Scheme Implementation Date of 25 May 2018 (paragraph 104-10(3)(b)).

91. 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.

92. A LifeHealthcare Shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a LifeHealthcare share are more than the cost base of the share. A LifeHealthcare Shareholder makes a capital loss if the capital proceeds are less than the reduced cost base of the LifeHealthcare share (subsection 104-10(4)).

Capital proceeds

93. The capital proceeds received by a LifeHealthcare 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)).

¹ See paragraph 9 of the Taxation Determination TD 2002/4 *Income tax: capital gains: what is the first element of the cost base and reduced cost base of a share in a company you acquire in exchange for a share in another company in a takeover or merger?*

94. The term 'in respect of the event happening' in subsection 116-20(1) requires the relationship between the event and the receipt of the money, or the entitlement to receive the money, to be more than coincidental. An amount is not capital proceeds received or entitled to be received in respect of a CGT event merely because it is received in association with the CGT event.²

95. In this case, the Interim Dividend and the Special Dividend were not paid in respect of the disposal of LifeHealthcare shares under the Scheme of Arrangement. The determination to pay the dividends was at the discretion of the LifeHealthcare Board. PEP had no control over LifeHealthcare's decision to pay the Interim and Special Dividends, or their amounts.

96. The payments of the Interim Dividend and the Special Dividend were funded entirely by LifeHealthcare's cash reserves and existing debt facilities with no actual or contingent funding support from PEP.

97. The Commissioner considers that the Interim Dividend and the Special Dividend were not received in respect of the disposal of LifeHealthcare shares under the Scheme of Arrangement. Accordingly, the Interim Dividend and the Special Dividend do not form part of the capital proceeds in respect of CGT event A1 happening.

98. Therefore, the capital proceeds that a LifeHealthcare Shareholder received for the disposal of a LifeHealthcare share is the Scheme Consideration of \$3.495 per share.

Discount capital gain

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

100. One of these 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)).

101. This means that a capital gain made by a LifeHealthcare Shareholder is a discount capital gain if they acquired the share at least 12 months before the date of disposal under the Scheme of Arrangement, being the Scheme Implementation Date of 25 May 2018, and the other requirements in Division 115 are satisfied.

² 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.*

The anti-avoidance provisions

Section 177EA

102. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that operates to prevent franking credit trading. For section 177EA to apply, the conditions of paragraphs 177EA(3)(a) to (e) must be satisfied.

103. The conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied as LifeHealthcare is a corporate tax entity, the Scheme of Arrangement is a scheme involving the disposal of LifeHealthcare shares in which there is a franked distribution and franking credits were received by LifeHealthcare Shareholders (the relevant taxpayers) that participated in the scheme and who could, therefore, reasonably be expected to receive imputation benefits.

104. Paragraph 177EA(3)(e) of the ITAA 1936, in broad terms, requires that in considering the relevant circumstances of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme, did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the taxpayer to obtain an imputation benefit.

105. 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.

106. The relevant circumstances are that the disposition of the ordinary shares in LifeHealthcare was made pursuant to a takeover by PEP by way of the Scheme of Arrangement under the Corporations Act voted upon by LifeHealthcare Shareholders entitled to vote. The Scheme of Arrangement is a normal commercial transaction under which LifeHealthcare was acquired by PEP.

107. LifeHealthcare Shareholders have different tax and residency profiles. The fully franked Interim Dividend and Special Dividend were paid to all existing shareholders of LifeHealthcare in proportion to the number of shares that each shareholder held on the Interim Dividend Record Date and the Special Dividend Record Date irrespective of their ability to utilise the relevant franking credits. The Interim Dividend and the Special Dividend allowed LifeHealthcare Shareholders to share in the accumulated profits of LifeHealthcare.

108. In considering the manner, form and substance of the Scheme of Arrangement, it is considered that the scheme was not entered into by LifeHealthcare Shareholders for more than an incidental purpose of enabling LifeHealthcare Shareholders to obtain imputation benefits. The provision of imputation benefits to LifeHealthcare Shareholders remains incidental, in the sense of being subservient to, the purpose of transferring their shares in LifeHealthcare to PEP in exchange for the Scheme Consideration.

109. Having regard to the relevant circumstances of the Scheme of Arrangement, it cannot be concluded that LifeHealthcare or the LifeHealthcare Shareholders entered into or carried out the scheme for the purpose of enabling the LifeHealthcare Shareholders to obtain an imputation benefit.

110. As the requisite purpose is not present, 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 which LifeHealthcare Shareholders received in relation to the Interim Dividend and the Special Dividend.

Section 204-30

111. Section 204-30 applies where a corporate tax entity streams the payment of dividends to its members in such a way that certain shareholders, referred to as favoured members, obtain imputation benefits, and other shareholders, referred to as disadvantaged members, obtain lesser or no imputation benefits, whether or not they receive other benefits. The favoured members are those that derive a greater benefit from imputation benefits than disadvantaged members.

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

113. Under the Scheme of Arrangement, LifeHealthcare Shareholders received imputation benefits when the Interim Dividend and the Special Dividend were paid. The Interim Dividend and the Special Dividend were paid equally to all LifeHealthcare Shareholders, and were fully franked regardless of their tax profiles. Accordingly, it cannot be said that LifeHealthcare selectively directed the flow of franked dividends to those members who obtained the most benefit from the franking credits.

114. 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 benefits received by a LifeHealthcare Shareholder in relation to the Interim Dividend and the Special Dividend.

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