


CR 2018/44 - Income tax: APN Outdoor Group Limited - Scheme of Arrangement and payment of Special Dividend

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Class Ruling

Income tax: APN Outdoor Group Limited – Scheme of Arrangement and payment of 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)
 - subsection 44(1) of the ITAA 1936
 - subparagraph 44(1)(b)(i) of the ITAA 1936
 - subparagraph 44(1)(c)(i) of the ITAA 1936
 - paragraph 128B(3)(ga) of the ITAA 1936
 - subsection 128B(3E) of the ITAA 1936
 - section 128D 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
- 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
- subsection 207-75(2) of the ITAA 1997
- section 207-145 of the ITAA 1997
- paragraph 207-145(1)(a) of the ITAA 1997
- section 855-10 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 APN Outdoor Group Limited (APN) who:

- participated in the scheme of arrangement (as described in paragraphs 9 to 27 of this Ruling) under which JCDecaux ANZ Pty Limited (JCDecaux ANZ) acquired 100% of the shares in APN (Scheme of Arrangement)
- held their shares in APN 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))
- are not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their APN 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 2018 to 30 June 2019. The Ruling continues to apply after 30 June 2019 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

9. This Ruling applies to the following scheme which is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling should not be relied upon. Other information referenced is as follows:

- Scheme Implementation Deed (SID) dated 26 June 2018, and
- the Scheme Booklet dated 10 September 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***APN Outdoor Group Limited***

10. APN is an Australian tax resident that is listed on the Australian Securities Exchange (ASX).

11. APN's principal activity is the supply of out-of-home media and advertising services in Australia and New Zealand.

12. As at 10 September 2018 APN had 167,005,841 ordinary shares on issue. At that time 99.92% of APN shareholders had a registered address in Australia.

13. As at 10 September 2018, no non-residents, either alone or together with any associates, beneficially held more than 10% of the shares in APN.

JCDecaux ANZ Pty Limited

14. JCDecaux ANZ was established for the purpose of acquiring all of the shares in APN. JCDecaux is a wholly-owned subsidiary of JCDecaux SA (JCDecaux).

15. Prior to the implementation date of 31 October 2018, neither JCDecaux ANZ nor JCDecaux held any APN shares directly or indirectly.

Scheme of Arrangement

16. On 26 June 2018 APN announced that it had entered into the SID under which JCDecaux had agreed to acquire 100% of the issued share capital of APN by way of a court ordered Scheme of Arrangement under Part 5.1 of the *Corporations Act 2001* Cth (Corporations Act).

17. Under the terms of the Scheme of Arrangement, the Scheme Consideration payable by JCDecaux was \$6.70 per APN share held at 7.00pm AEST on 25 October 2018 (Scheme Record Date) less the amount of any Special Dividend paid by APN.

18. The requisite majority of Scheme Shareholders approved the Scheme of Arrangement at a meeting held on 15 October 2018.

19. The Scheme of Arrangement was approved by order of the Federal Court of Australia on 18 October 2018.

20. The Scheme of Arrangement became effective on 18 October 2018 when APN lodged the court order with ASIC. APN shares were suspended from trading at the close of trading on 18 October 2018.

21. On the Scheme Record Date of 7.00pm AEST on 25 October 2018 a Scheme Shareholder was entitled to participate in the Scheme of Arrangement.

22. On 31 October 2018 (Scheme Implementation Date), the Scheme Shareholders disposed of each share they held in APN to JCDecaux ANZ.

23. Scheme Shareholders received a total cash payment of \$6.70 per share comprising of:

- a fully franked special dividend of \$0.30 which was paid on 29 October 2018, and
- the Scheme Consideration of \$6.40 which was paid on 31 October 2018 (Implementation Date).

Special Dividend

24. On 15 October 2018 the Board of Directors of APN (APN Board) declared a fully franked special dividend of \$0.30 per APN share to APN shareholders for every share that they held on the Special Dividend Record Date of 22 October 2018. The Special Dividend was paid on 29 October 2018.

25. The Special Dividend was subject to the Scheme of Arrangement becoming effective and was payable at the discretion of the APN Board. Neither JCDecaux nor JCDecaux ANZ influenced the decision of the APN Board to declare the Special Dividend.

26. The Special Dividend was paid entirely from APN's existing cash reserves and banking facilities. The Special Dividend was debited against APN's retained earnings account. Neither JCDecaux nor any wholly owned subsidiary such as JCDecaux ANZ financed or otherwise facilitated financing for the payment of the Special Dividend.

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

Ruling

Special Dividend

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

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

Assessability of the Special Dividend and withholding tax

Residents

30. A Scheme Shareholder includes the Special Dividend in their assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).

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

31. A non-resident Scheme Shareholder who received the fully franked 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 is not liable to Australian withholding tax in respect of the dividend (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

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

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

Gross-up and tax offset

33. A resident Scheme Shareholder and a non-resident Scheme Shareholder that is carrying on business in Australia at or through a permanent establishment:

- 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

in the income year it is paid (section 207-20), subject to the Scheme Shareholder being a 'qualified person' in relation to the Special Dividend.

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

Qualified persons

35. 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)).

36. A Scheme Shareholder will be a qualified person in relation to the Special Dividend, if from 8 September 2018 to 24 October 2018 (inclusive), they continued to hold their APN 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 APN shares for a continuous period of at least 45 days.

Refundable tax offset

37. The franking credit tax offset that a Scheme Shareholder is entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, provided the Scheme Shareholder is not excluded by the operation of section 67-25.

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

Capital Gains Tax (CGT) consequences

CGT event A1

39. CGT event A1 happened on 31 October 2018 (Scheme Implementation Date) when each Scheme Shareholder disposed of each of their APN shares to JCDecaux ANZ in accordance with the Scheme of Arrangement (section 104-10).

Capital proceeds

40. The Scheme Consideration of \$6.40 received by a Scheme Shareholder for each APN share is the capital proceeds from CGT event A1 happening (subsection 116-20(1)).

41. The Special Dividend of \$0.30 is not included in the capital proceeds.

Capital gain or capital loss

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

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

Discount capital gain

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

Non-resident shareholders

45. A non-resident Scheme shareholder who participated in the scheme may disregard any capital gain or capital loss made when CGT event A1 happened if the APN share was not 'taxable Australian property' (section 855-10).

The anti-avoidance provisions

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

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

Commissioner of Taxation

14 November 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.*

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 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 of money which APN made to its shareholders. APN did not debit the Special Dividend against its share capital account.

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

51. 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.

52. None of the circumstances in section 202-45 apply to the Special Dividend. Therefore, the Special Dividend is a frankable distribution under section 202-40 and in turn is capable of being franked in accordance with section 202-5.

Assessability of the Special Dividend and withholding tax

Residents

53. 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.

54. As the Special Dividend was paid to Scheme Shareholders out of profits derived by APN, Scheme Shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Special Dividend in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

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

55. 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.

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

57. Subsection 128B(1) of the ITAA 1936 imposes Australian withholding tax on income which:

- (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. Subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes from subsection 128B(1) income derived by a non-resident that consists of the franked part of a dividend. As the Special Dividend was fully franked, it will not be subject to Australian withholding tax when derived by a non-resident Scheme Shareholder.

59. Section 128D of the ITAA 1936 operates to treat the Special Dividend as non-assessable non-exempt income.

60. Accordingly, non-resident Scheme Shareholders who received the fully franked Special Dividend (other than those shareholders who received the Special Dividend in carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as assessable income pursuant to subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and are not liable to Australian withholding tax in relation to the dividend (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

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

61. A non-resident's liability to withholding tax on dividend income received pursuant to subsection 128B(1) of the ITAA 1936 is subject to subsection 128B(3E) of the ITAA 1936. Subsection 128B(3E) of the ITAA 1936 states that section 128B of the ITAA 1936 does not apply to dividend income that:

- (a) is paid to a person who is a non-resident carrying on business in Australia at or through a permanent establishment of the person in Australia; and
- (b) is attributable to the permanent establishment; and
- (c) is not paid to the person in the person's capacity as a trustee.

62. 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.

63. Subparagraph 44(1)(c)(i) of the ITAA 1936 includes dividends in the assessable income of a non-resident shareholder of a resident company, where the non-resident shareholder is carrying on business in Australia at or through a permanent establishment of the shareholder in Australia which:

... are attributable to the permanent establishment, to the extent to which they are paid out of profits derived by the company from sources outside Australia.

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

Gross-up and tax offset

65. A Scheme Shareholder (other than a partnership or a trust) that is a qualified person in accordance with paragraph 207-145(1)(a) which refers to Division 1A of former Part IIIAA of the ITAA 1936:

- also includes the franking credit attached to the Special Dividend in their assessable income (subsection 207-20(1)), and
- is entitled to a tax offset equal to the amount of the franking credit attached to the Special Dividend (subsection 207-20(2))

in the income year the Special Dividend is paid.

66. A Scheme Shareholder that is not a qualified person in relation to the Special Dividend:

- does not include the franking credit attached to the dividend in their assessable income (paragraph 207-145(1)(e)), and
- is not entitled to a tax offset equal to the amount of the franking credit attached to the dividend (paragraph 207-145(1)(f)).

67. Subject to satisfying the 'qualified person' rule, the assessable income of a Scheme Shareholder (not being an entity taxed as a corporate tax entity) that is a partnership or a trustee of a trust (not being a complying superannuation fund), includes the amount of the franking credit attached to the Special Dividend (subsection 207-35(1)).

Qualified persons

68. The impact of the qualified person rules as to inclusion of franking credits in assessable income and entitlement to tax offsets or otherwise are described in paragraphs 65 and 66 of this Ruling.

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. Paragraph 207-145(1)(a) which refers to former Division 1A of Part IIIAA of the ITAA 1936 provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' in relation to a franked distribution they have received and thus be entitled to a tax offset for the franking credit on the distribution.

71. The test of what constitutes a 'qualified person' is set out in former subsection 160APHO(1) of the ITAA 1936. Broadly, if the Scheme Shareholders were not under an obligation to make a related payment in relation to the Special Dividend, they are required to satisfy the holding period requirement within the primary qualification period. If the Scheme Shareholders were under an obligation to make a related payment in relation to the Special Dividend, they are required to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

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

73. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 are set out 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.

74. 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) of the ITAA 1936).

75. 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 Special Dividend.

76. Under the terms of the SID, the Scheme Consideration is reduced by the amount of the Special Dividend paid by APN to Scheme Shareholders. On this basis, it is considered that the payment of the Special Dividend is an integral part of the Scheme. Therefore, the requirements of former paragraphs 160APHN(3)(f) and 160APHN(4)(c) of the ITAA 1936 are satisfied.

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

Holding period requirement

78. 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).

79. As the Scheme 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, the relevant qualification period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

80. 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*...

81. 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.

82. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 22 October 2018, being the last day on which acquisition by a person of an APN share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date of an APN share for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 23 October 2018.

83. The secondary qualification period runs from 45 days before and ends on 45 days after the ex-dividend date of 23 October 2018. In practical terms, this means that the secondary qualification period runs from 8 September 2018 to 7 December 2018. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the APN share is to be excluded. This means that the secondary qualification period runs from 8 September 2018 until the date that the Scheme Shareholders are no longer holding their shares at risk for the purposes of former Division 1A of Part III of the ITAA 1936.

84. Entitlement to participate in the Scheme of Arrangement was determined on the Scheme Record Date (25 October 2018). Scheme Shareholders who disposed of their shares under the SID are no longer considered to have held their APN shares at risk for the purposes of former Division 1A of Part IIIA of the ITAA 1936 as of 25 October 2018.

85. Accordingly, for a Scheme Shareholder who disposed of their shares under the SID, the secondary qualification period will run for a period of 8 September 2018 to 24 October 2018 (being the day prior to the Scheme Record Date). A Scheme 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 former Division 1A of Part IIIA 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.

86. 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 72 to 77 of this Ruling. Therefore, a Scheme Shareholder who is an individual and who has franking credit offsets not exceeding \$5,000 for the year of income ended 30 June 2019 must also satisfy the holding period requirement in relation to the Special Dividend (former section 160APHT(2) of the ITAA 1936).

Refundable tax offset

87. A Scheme Shareholder who is entitled to a tax offset pursuant to 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.

88. 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)), and
- 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)).

89. 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).

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

90. CGT event A1 happens if there is a change in the ownership of a CGT 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)).

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

92. Therefore, CGT event A1 happened when there was a change of ownership in an APN share from a Scheme Shareholder to JCDcaux ANZ under the SID (subsections 104-10(1) and 104-10(2)). The change of ownership occurred on the Scheme Implementation Date of 31 October 2018 (paragraph 104-10(3)(b)).

¹ See paragraph 9 of 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?*

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

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

Capital proceeds

95. 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)).

96. 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

97. In this case, the Special Dividend was not paid in respect of the disposal of APN shares under the Scheme of Arrangement. The determination to pay the Special Dividend was at the discretion of the APN Board. JCDecaux ANZ had no control over APN's decision to pay the Special Dividend. JCDecaux ANZ had no control over the quantum of the Special Dividend.

98. The payment of the Special Dividend was funded entirely by APN's cash reserves and existing debt facilities with no actual or contingent funding support from JCDecaux ANZ.

99. The Commissioner considers that the Special Dividend was not received in respect of the disposal of APN shares under the Scheme of Arrangement. Accordingly, the Special Dividend does not form part of the capital proceeds in respect of CGT event A1 happening.

100. Therefore, the capital proceeds that a Scheme Shareholder received for the disposal of an APN share is the Scheme Consideration of \$6.40.

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.*

Discount capital gain

101. If a Scheme Shareholder made a capital gain from the disposal of their APN share, the Scheme 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.

102. One of those requirements is that the entity which made the capital gain as a result of a CGT event happening to its CGT asset must have acquired that asset at least 12 months before the CGT event (subsection 115-25(1)).

103. This means that a capital gain made by a Scheme Shareholder is a discount capital gain if they acquired the APN share at least 12 months before the date of disposal under the Scheme, being 12 months before the Scheme Implementation Date of 31 October 2018, and the other requirements in Division 115 are satisfied.

Non-resident Scheme Shareholders

104. Under subsection 855-10(1), an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

105. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these five categories of CGT assets:

| | |
|--------|--|
| Item 1 | taxable Australian real property |
| Item 2 | an indirect Australian real property interest not covered by item 5 |
| Item 3 | a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2 or 5 |
| Item 4 | an option or right to acquire a CGT asset covered by item 1, 2 or 3; and |
| Item 5 | a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident). |

106. Item 2 of the table in section 855-15 defines taxable Australian property to include an indirect Australian real property interest. An indirect Australian real property interest under section 855-25 is an interest held by an entity in another entity if it passes:

- the non-portfolio interest test under section 960-195, and
- the principal asset test in section 855-30.

107. The non-portfolio interest test under section 960-195 is as follows:

An interest held by an entity (the *holding entity*) in another entity (the *test entity*) passes the non-portfolio interest test at a time if the sum of the direct participation interests held by the holding entity and its associates in the test entity at that time is 10% or more.

108. A non-resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens, cannot disregard under subsection 855-10(1) a capital gain or capital loss from CGT event A1 happening if their shares in APN are indirect Australian real property interests (item 2 of the table in section 855-15).

109. On the basis that there were no non-residents, either alone or together with any associates, who beneficially hold more than 10% of the shares in APN, none of the APN shares disposed of as part of the scheme passes the non-portfolio interest test. Consequently, Scheme shares held by non-residents do not constitute indirect Australian real property interests.

110. Since the first condition of an indirect Australian real property interest under section 855-25 is not satisfied, it is not necessary to consider the application of the principal asset test. The APN shares do not constitute 'taxable Australian property' of non-resident Scheme Shareholders.

The anti-avoidance provisions

Section 177EA

111. 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.

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

113. 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.

114. 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 in the subsection 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 of Arrangement.

115. The relevant circumstances are that the disposition of the ordinary shares in APN was made pursuant to a takeover by JCDecaux ANZ by way of a Scheme of Arrangement under the Corporations Act voted upon by APN shareholders entitled to vote.

116. The Scheme of Arrangement under which APN was acquired by JCDecaux ANZ is a normal commercial transaction.

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

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

119. 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 Scheme Shareholders received in relation to the Special Dividend.

Section 204-30

120. 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.

121. 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 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 use imputation benefits.

122. Under the Scheme of Arrangement, Scheme Shareholders received an imputation benefit when the Special Dividend was paid. 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 APN selectively directed the flow of franked dividends to those members who obtained the most benefit from the franking credits.

123. As the conditions in subsection 204-30(1) were not 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 by a Scheme Shareholder in relation to the Special Dividend.

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