

# ***CR 2020/52 - Zenith Energy Limited - scheme of arrangement and special dividend***



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## Class Ruling

# Zenith Energy Limited – scheme of arrangement and special dividend

### **❶ Relying on this Ruling**

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or pay any penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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### **What this Ruling is about**

1. This Ruling sets out the tax consequences for shareholders of Zenith Energy Limited (Zenith) who sold their Zenith shares pursuant to the scheme of arrangement which was initially announced on 6 March 2020 (Scheme of Arrangement).
2. Full details of this Scheme of Arrangement are set out in paragraphs 36 to 68 of this Ruling.
3. All legislative references are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (as detailed in the table in Appendix 2 of this Ruling) unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if you:
  - were a Zenith shareholder as at 7.00pm AWST on 14 August 2020 (Scheme Record Date) who participated in the Scheme of Arrangement under which Elemental Infrastructure BidCo Pty Ltd (BidCo) acquired 100% of the shares in Zenith

- held your Zenith shares on capital account, that is, you did not hold your Zenith shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)), and
  - received the Special Dividend.
5. This Ruling does not apply to you if you:
- did not receive the consideration for the transfer of shares to BidCo entirely in cash
  - held Zenith shares which you acquired before 20 September 1985 or were taken to have acquired before 20 September 1985
  - acquired your Zenith shares under a Zenith employee share plan on or after 6 March 2020 (including any shares issued under the vesting of Zenith performance rights plans)
  - are subject to the investment manager regime in Subdivision 842-I in relation to your Zenith shares, or
  - are subject to the taxation of financial arrangement rules in Division 230 in relation to your Zenith shares.

**Note:** Division 230 will not apply to you unless you made an election for the Division to apply to you.

### **When this Ruling applies**

6. This Ruling applies from 1 July 2020 to 30 June 2021.

### **Important note – announced but unenacted legislation**

7. This Ruling only applies based on the law as at the date of publication of the Ruling.
8. In the Mid-Year Economic and Fiscal Outlook 2016-17<sup>1</sup>, the Government announced that it would introduce a specific measure to prevent a company from attaching franking credits to distributions to shareholders made outside or additional to the company's normal dividend cycle, to the extent the distributions are funded directly or indirectly by capital raising activities that result in the issue of new equity interests.
9. This measure is intended to address issues raised by the ATO in Taxpayer Alert TA 2015/2 *Franked distributions funded by raising capital to release franking credits to shareholders*. This measure, if enacted, will apply to distributions made after midday AEDT on 19 December 2016.
10. As at the date of publication of this Ruling, legislation to implement the Government's announced intention remains unenacted. If a provision in respect of which this Ruling is made is amended with retrospective effect, or is affected by another provision enacted with retrospective effect, some of the conclusions reached in this Ruling may be incorrect. Accordingly, the Commissioner provides this Ruling on the basis that it applies only to the current law in its current context. In the event legislation to implement the Government's announced intention does apply to any aspect of the Scheme of Arrangement and Special Dividend described in this Ruling, some of the conclusions in

<sup>1</sup> Australian Government, *Mid-Year Economic and Fiscal Outlook 2016-17*, viewed 25 September 2020, <https://archive.budget.gov.au>

this Ruling may not be able to be relied upon. In such circumstances, the Commissioner may issue an addendum to this Ruling with retrospective effect.

## **Ruling**

### **Special Dividend**

11. The Special Dividend is a 'dividend' as defined in subsection 6(1).
12. The Special Dividend is a 'frankable distribution' pursuant to section 202-40.

### **Assessability of the Special Dividend, franking credits and tax offsets**

#### ***Residents***

13. If you are a resident of Australia as defined in subsection 6(1), you are required to include the Special Dividend in your assessable income (subparagraph 44(1)(a)(i)).
14. If you satisfy the residency requirements in section 207-75, you include the franking credits attached to the Special Dividend in your assessable income and you are entitled to a tax offset equal to the amount of those credits (section 207-20), provided you are a qualified person (paragraph 207-145(1)(a) which refers to Division 1A of former Part IIIAA).
15. If you received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, and you are not a corporate tax entity, you include the franking credit attached to the Special Dividend in your assessable income, provided you are a qualified person (subsection 207-35(1)).
16. If you are a partner in a partnership, or a beneficiary of a trust, and the Special Dividend flows indirectly through the partnership or trust to you, you include your share of the Special Dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credit attached to the dividend, provided both you and the partnership or trustee, as is relevant, are each a qualified person (section 207-45 and former subsection 160APHU(1)).
17. The tax offset is refundable, subject to the refundable tax offset rules in Division 67.

#### ***Non-resident shareholders***

##### ***Special Dividend attributable to a permanent establishment in Australia***

18. If you are a non-resident and the Special Dividend is attributable to a permanent establishment in Australia, you include the dividend in your assessable income (paragraphs 44(1)(b) and 44(1)(c)) and you are not liable to pay withholding tax in respect of the dividend (subsection 128B(3E)).
19. If you are also a qualified person (paragraph 207-145(1)(a) which refers to Division 1A of former Part IIIAA), you include the amount of the franking credits attached to the Special Dividend in your assessable income and you are entitled to a tax offset equal to the amount of those credits (section 207-20 and subsection 207-75(2)). The tax offset is not refundable (subsection 67-25(1DA)).

##### ***Special Dividend not attributable to a permanent establishment in Australia***

20. If you are a non-resident and the Special Dividend is not attributable to a permanent establishment in Australia, you do not include the Special Dividend in your

assessable income (section 128D) and you are not liable to withholding tax in respect of the dividend (paragraph 128B(3)(ga)).

21. You do not include the amount of the franking credits attached to the Special Dividend in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70).

#### *Qualified persons*

22. The Special Dividend you received constitutes a related payment for the purposes of paragraph 207-145(1)(a) and former section 160APHN.

23. You are a qualified person in relation to the Special Dividend if, during the period from 29 June 2020 to 13 August 2020 (inclusive), you held your Zenith shares for a continuous period of at least 45 days during which you did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM) in respect of the shares.

#### *Exempting entity*

24. Zenith was not an exempting entity when the Special Dividend was paid to you, nor was it a former exempting entity at that time (Division 208).

25. Section 208-195 will not apply to deny the gross up of your assessable income by the amount of the franking credit attached to the Special Dividend you received, nor to deny the tax offset to which you are otherwise entitled to under Division 207 at the time when the Special Dividend was paid.

#### **Anti-avoidance provisions**

##### ***Sections 177EA and 204-30***

26. The Commissioner will not make a determination under paragraph 177EA(5)(b) or paragraph 204-30(3)(c) to deny the whole, or any part of, the imputation benefit received in relation to the Special Dividend.

#### **Capital gains tax consequences**

##### ***CGT event A1***

27. CGT event A1 happened on 21 August 2020 (Scheme Implementation Date) when you transferred each of your Zenith shares to BidCo in accordance with this Scheme of Arrangement (section 104-10).

#### *Capital proceeds*

28. The consideration of \$1.05 you received for each Zenith share is your capital proceeds from CGT event A1 happening (subsection 116-20(1)).

29. The capital proceeds include the Special Dividend of 14 cents per share.

#### *Capital gain or capital loss*

30. You made a capital gain if the capital proceeds from the disposal of your Zenith share exceed its cost base (subsection 104-10(4)). The capital gain is the difference.

31. You made a capital loss if the capital proceeds from the disposal of your Zenith share are less than its reduced cost base (subsection 104-10(4)). The capital loss is the difference.

#### *Discount capital gain*

32. If you made a capital gain from the disposal of a Zenith share, you are eligible to treat the capital gain as a 'discount capital gain' provided you acquired, or were taken to have acquired, your Zenith share on or before 21 August 2019, and you satisfy the other requirements of Division 115.

#### *Capital gains tax anti-overlap provision*

33. A capital gain you made when CGT event A1 happened to your Zenith share is reduced by the amount of the Special Dividend that is included in your assessable income under section 44 (section 118-20). This has the effect of reducing the capital gain by the amount that is assessable under another provision. Where the amount of Special Dividend exceeds the capital gain, you cannot make or increase a capital loss (subsection 118-20(2)).

34. A capital gain is not reduced by the amount of the franking credit (attached to the Special Dividend) that you include in your assessable income pursuant to section 207-20 (paragraph 118-20(1B)(b)).

#### *Non-resident shareholders*

35. If you were a non-resident or a trustee of a non-resident trust for capital gains tax (CGT) purposes at the Scheme Implementation Date, you disregard any capital gain when CGT event A1 happened in relation to your Zenith share pursuant to section 855-10 unless:

- you used your Zenith share at any time in carrying on a business through a permanent establishment in Australia (table item 3 in section 855-15), or
- you held your Zenith share as an individual and your share was covered by subsection 104-165(3) (table item 5 in section 855-15).

## **Scheme**

36. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

#### **Relevant entities**

##### **Zenith**

37. Zenith is a public company which was incorporated in 2006 and listed on the Australian Securities Exchange on 9 May 2017.

38. Zenith is an Australian resident for tax purposes.

39. Zenith is an independent power producer and focuses on designing off-grid power generation and service models. Zenith is headquartered in Perth, Western Australia.

40. Zenith has a single class share capital structure consisting of ordinary shares. Immediately prior to the Scheme Implementation Date, Zenith had 149,792,161 ordinary shares on issue.

41. Zenith's shareholders include both resident and non-residents. Non-resident shareholders did not own 95% or more of the shares in Zenith at any time prior to the completion of the Scheme of Arrangement.

### ***Pacific Equity Partners***

42. Pacific Equity Partners Pty Limited (PEP) was founded in 1998 and is a private equity and infrastructure investment firm headquartered in Sydney, New South Wales. PEP has approximately A\$5.5 billion in assets under management across a broad range of industries including industrial services, energy, consumer products, entertainment and financial services.

### ***OPSEU Pension Plan Trust Fund***

43. OPSEU Pension Plan Trust Fund (OPTrust) invests and manages one of Canada's largest public pension plans.

44. OPTrust has global investments, including investments in Australia and New Zealand. As at 25 June 2020, OPTrust had almost C\$22 billion in net assets.

### ***Apex Opportunities Trust***

45. Infrastructure Capital Group (ICG) is a specialist, independent infrastructure fund management firm. ICG manages the Diversified Infrastructure Trust (ICG Trust) which was established in 2006. The ICG Trust is an unlisted unit trust that invests in infrastructure assets on behalf of institutional investors.

46. ICG Trust and an entity controlled by OPTrust established the Apex Opportunities Trust (Apex Trust) on 6 February 2020 with an equal number of units held in Apex Trust directly or indirectly by ICG Trust and OPTrust.

47. Prior to the Scheme of Arrangement, the Apex Trust held 26,309,402 Zenith shares.

48. Shortly before the Scheme Implementation Date, the Apex Trust became wholly owned and controlled by ICG Trust. ICG (or an affiliate of ICG) was appointed as the replacement trustee of the Apex Trust.

### ***BidCo structure***

49. BidCo is an Australian proprietary company which was incorporated on 5 March 2020 for the purpose of acquiring all Zenith shares under the Scheme of Arrangement. BidCo is wholly owned by Elemental Infrastructure MidCo Pty Ltd (MidCo), which is wholly owned by Elemental Infrastructure HoldCo Pty Ltd (HoldCo).

50. As at 25 June 2020, all of the shares in HoldCo were owned by PEP Investor Administration Secure Assets A Pty Limited as trustee for the Pacific Equity Partners Secure Assets Fund A (Australasia).

51. Shortly before the Scheme Implementation Date, five PEP entities, OPTrust and the Apex Opportunities Trust held shares directly or indirectly in HoldCo.

52. Immediately after the Scheme Implementation Date, HoldCo had 166,275,677 ordinary shares on issue.

### **Scheme of arrangement**

53. On 6 March 2020, Zenith initially announced that it had entered into a Scheme Implementation Deed (Initial Scheme Implementation Deed) with BidCo. BidCo proposed to acquire all the issued shares of Zenith by way of a scheme of arrangement under Part 5.1 of the *Corporations Act 2001* for cash consideration of \$1.01 per Zenith share (less the amount of the Special Dividend, if declared and paid). On 21 July 2020, Zenith announced that the cash consideration had increased to \$1.05 per Zenith share (less the amount of the Special Dividend, if declared and paid).

54. Under the terms of the Initial Scheme Implementation Deed, each share in Zenith held by Zenith shareholders would be transferred to BidCo resulting in Zenith becoming a wholly-owned subsidiary of BidCo.

55. On 29 May 2020, Zenith announced it had entered into a Deed of Amendment and Restatement of the Initial Scheme Implementation Deed (Scheme Implementation Deed) with BidCo.

56. As amended and restated, no material changes were made to the terms of the Initial Scheme Implementation Deed. However, amendments were made to accommodate a consortium of the PEP entities, Apex Trust and OPTrust acquiring shares in HoldCo under and in connection with the implementation of the Scheme of Arrangement.

57. The PEP entities, Apex Trust and OPTrust agreed on the arrangements for these shares as well as the conduct and implementation of the Scheme of Arrangement. Although Zenith agreed to amend and restate the Initial Scheme Implementation Deed as noted in this Ruling, Zenith was not a party to these arrangements.

58. The Scheme of Arrangement was approved by Zenith shareholders at the Scheme Meeting held on 31 July 2020. The Federal Court of Australia approved the Scheme of Arrangement and provided orders pursuant to Part 5.1 of the *Corporations Act 2001* on 6 August 2020.

59. Entitlements to the consideration for the transfer of Zenith shares was determined on 7.00pm AWST on 14 August 2020.

60. Payment of the consideration to Zenith shareholders and the transfer of Zenith shares to BidCo occurred on 21 August 2020 (Scheme Implementation Date).

61. Under the Scheme of Arrangement, Zenith's senior management team and the Apex Trust were entitled in effect to elect to receive between 66% and 100% of the consideration for the transfer of Zenith shares in the form of shares in HoldCo, with any remainder in cash. Following the exchange of shares, at least 5% of HoldCo shares were held by resident shareholders.

62. On the Scheme Implementation Date, the sum of the market values of the assets of Zenith and its subsidiaries that are taxable Australian real property did not exceed the sum of the market values of their other assets for the purposes of section 855-30.

### **Special Dividend**

63. On 7 April 2020, Zenith announced its intention to declare a Special Dividend of 13 cents per Zenith share which would be fully franked and payable to Zenith shareholders who held their shares at 12 August 2020 (Special Dividend Record Date). On 21 July 2020, Zenith declared the Special Dividend amount had been increased to 14 cents.



64. The Special Dividend was subject to the Scheme of Arrangement becoming effective and was payable at the discretion of the Zenith Board.
65. Payment of the Special Dividend occurred on 21 August 2020.
66. The Special Dividend was not debited against Zenith's share capital account. The Special Dividend was debited against Zenith's retained earnings account.
67. The Special Dividend was funded by a loan from BidCo to Zenith. This loan, and any other loan which funded the loan from BidCo to Zenith, at the discretion of one or more lenders of each loan, may be converted, exchanged or otherwise repaid wholly or partly by way of the issue of shares.

**Key dates**

68. The following is a summary of the key dates for the Scheme of Arrangement and Special Dividend:

Announcement date	6 March 2020
Scheme Implementation Deed (amended and restated) executed	29 May 2020
First Court hearing (lodged Scheme Booklet with Court)	25 June 2020
Despatch of Scheme Booklet to Zenith shareholders	25 June 2020
Scheme Meeting	31 July 2020
Final Court hearing (court-approved scheme)	6 August 2020
Effective Date	7 August 2020
Special Dividend Record Date	12 August 2020
Scheme Record Date	7.00pm AWST on 14 August 2020
Special Dividend Payment Date	21 August 2020
Scheme Implementation Date	21 August 2020
Zenith delisted from the Australian Securities Exchange	24 August 2020

**Appendix 1 – Explanation**

**❶** *This Explanation 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.*

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**Special Dividend**

69. The term 'dividend' is defined in subsection 6(1) to include any distribution made by a company to any of its shareholders but excludes a distribution debited against an amount standing to the credit of the share capital account of the company.

70. The Special Dividend is a dividend as it was a distribution made by Zenith to its shareholders and was not debited against its share capital account.

71. 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.

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

### **Assessability of the Special Dividend**

#### ***Residents***

73. The assessable income of a resident shareholder includes dividends paid by a company out of profits derived by it from any source (subparagraph 44(1)(a)(i)).

74. As the Special Dividend was paid by Zenith to its shareholders out of profits derived by Zenith, shareholders who are residents of Australia as defined in subsection 6(1) are required to include the Special Dividend in their assessable income under subparagraph 44(1)(a)(i).

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

75. A non-resident's liability to withholding tax on dividend income received in subsection 128B(1) is subject to subsection 128B(3E). Subsection 128B(3E) states that section 128B 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 trustee.

76. Subparagraph 44(1)(b)(i) includes the Special Dividend in the assessable income of a non-resident shareholder as it was paid out of profits derived by a company from sources in Australia.

77. Subparagraph 44(1)(c)(i) also includes the Special Dividend in the assessable income of a non-resident shareholder that is carrying on business in Australia at or through a permanent establishment where the Special Dividend is attributable to the permanent establishment.

78. Accordingly, if you are a non-resident Zenith shareholder that carries on a business in Australia at or through a permanent establishment which received the Special Dividend (otherwise than in the capacity as trustee), you include the dividend in your assessable income, to the extent to which the dividend was attributable to the permanent establishment (subparagraphs 44(1)(b)(i) and 44(1)(c)(i)) and you will not be liable for Australian withholding tax in relation to the dividend.

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

79. The assessable income of a non-resident shareholder includes dividends paid by the company out of profits derived by it from sources in Australia (subparagraph 44(1)(b)(i)).

80. However, subsection 44(1) 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 the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997*.

81. Subsection 128B(1) imposes Australian withholding tax on income which consists of a dividend paid by an Australian resident company to a non-resident on or after 1 January 1968.

82. Subparagraph 128B(3)(ga)(i) 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.

83. Section 128D operates in turn to treat the Special Dividend as non-assessable non-exempt income.

84. Accordingly, a non-resident Zenith shareholder who received the fully franked Special Dividend (other than those who received the Special Dividend in carrying on business in Australia at or through a permanent establishment in Australia) is not required to include the dividend in their assessable income (subparagraph 44(1)(b)(i) and section 128D), and is not liable to Australian withholding tax in relation to the dividend (subparagraph 128B(3)(ga)(i)).

### **Gross up and tax offset**

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

86. A 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)).

87. Subject to satisfying the qualified person rule, the assessable income of a 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 person rules**

#### ***Qualified person***

88. An entity must be a qualified person in relation to a dividend in order to be entitled to a tax offset in respect of the franking credit on the dividend (subsection 207-145(1)).

89. Paragraph 207-145(1)(a), which refers to former Division 1A of Part IIIAA, provides the statutory tests you must satisfy to be a qualified person in relation to a franked distribution you received in order for you to be entitled to a tax offset for the franking credit on the distribution.

90. Former section 160APHU 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.

91. The test of what constitutes a qualified person is set out in former subsection 160APHO(1). Broadly, if you were not under an obligation to make a related payment in relation to the dividend, you are required to satisfy the holding period rule in

relation to the primary qualification period. If you were under an obligation to make a related payment in relation to the dividend, you are required to satisfy the holding period rule in relation to the secondary qualification period.

### ***Related payment rule***

92. In order to determine the relevant qualification period, it is necessary to determine whether, under this Scheme of Arrangement, you or an associate have made, were under an obligation to make, or are likely to make, a related payment in respect of the Special Dividend you received (former subsection 160APHN(2)).

93. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA are set out in former section 160APHN. Broadly, a related payment is where a scheme shareholder has done, or is obliged to do, anything which has the effect of passing the benefit of a dividend to one or more other persons.

94. Under the terms of the Scheme Implementation Deed, the consideration was reduced by the amount of the Special Dividend which Zenith paid to its shareholders. The reduction of the consideration, calculated with reference to the amount of the Special Dividend, has the effect of passing the benefit of the dividend from a Zenith shareholder to BidCo.

95. Therefore, you (or a partner in a partnership or a beneficiary of a trust that had an interest in Zenith shares) are taken to have made a related payment in respect of the Special Dividend.

### ***Holding period rule***

96. The holding period rule requires that you hold your Zenith shares on which the Special Dividend was paid, at risk for a continuous period of at least 45 days during the relevant qualification period (former paragraph 160APHO(2)(a)). The relevant qualification period is the secondary qualification period.

97. The secondary qualification period is the period beginning 45 days before, and ending 45 days after, the day on which a share becomes ex dividend (former section 160APHD).

98. Under former subsection 160APHE(1), a share becomes ex dividend on the day after the last day on which the acquisition by a person of the share entitles them to receive the dividend. The last day on which a person who acquired a Zenith share was entitled to receive the Special Dividend was the record date for the dividend which was 12 August 2020. It follows that Zenith shares became ex dividend on 13 August 2020. Accordingly, the secondary qualification period is notionally the period beginning 45 days before, and ending 45 days after, 13 August 2020, namely 29 June 2020 to 27 September 2020 (inclusive).

99. Any days on which a Zenith shareholder has materially diminished risks of loss or opportunities for gain in respect of their Zenith shares are excluded, but the exclusion is not taken to break the continuity period during which they held the shares (former subsection 160APHO(3)).

100. You will need to determine whether you satisfy the holding period rule having regard to your personal circumstances. This is outside of the scope of this Ruling but will require you to take into account any positions you entered into that resulted in 'materially diminished risks of loss or opportunities for gain' (as defined under former 160APHM) in respect of your Zenith shares.

101. Under this Scheme of Arrangement, you no longer held your Zenith shares at risk on the Scheme Record Date of 14 August 2020 (at which time you became committed to dispose of your Zenith shares to BidCo under this Scheme of Arrangement).

102. Accordingly, if you disposed of your Zenith shares to BidCo under this Scheme of Arrangement, you satisfied the holding period rule if you held those shares at risk for at least 45 continuous days during the period 29 June 2020 to 13 August 2020 (inclusive), not including the day on which the Zenith shares were acquired, or the day on which the Zenith shares were disposed of.

103. The small shareholder exception in former section 160APHT does not apply as the Special Dividend was a related payment, as discussed in paragraphs 92 to 95 of this Ruling. Therefore, a Zenith shareholder who is an individual and who has franking tax offsets which do not exceed A\$5,000 for the year of income ended 30 June 2021 must, nevertheless, satisfy the holding period requirement in relation to the dividend (former subsection 160APHT(2)).

### **Refundable tax offset**

104. Your entitlement to the franking tax offset under Division 207 in relation to the Special Dividend is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25.

105. Certain taxpayers are specifically excluded from the operation of the refundable tax offset rules under section 67-25. These excluded entities include:

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A))
- trustees of a trust who are liable to be assessed under sections 98 or 99A (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)), or
- non-resident entities that carry on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

106. 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 your income tax liability, you are entitled to a refund of the difference (table item 40 of section 63-10).

### **The anti-avoidance provisions**

#### **Section 177EA**

107. Section 177EA 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.

108. Zenith is a corporate tax entity. The transfer of Zenith shares under this Scheme of Arrangement was a scheme for the disposition of membership interests. The Special Dividend is a frankable distribution which was paid to Zenith shareholders as part of this

Scheme of Arrangement, and who received imputation benefits. Therefore, the conditions of paragraphs 177EA(3)(a) to (d) are satisfied.

109. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided by subsection 177EA(17)), it would be concluded that, on the part of Zenith, Zenith shareholders or any other relevant party, there is a more than merely incidental purpose of conferring an imputation benefit under the Scheme of Arrangement (paragraph 177EA(3)(e)).

110. Considering the circumstances of this Scheme of Arrangement, it cannot be concluded that Zenith or Zenith shareholders entered into or carried out the scheme for the purpose of enabling the Zenith shareholders to obtain an imputation benefit. Therefore, the Commissioner considers that the requisite purpose is not present, and accordingly, the Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefit received by a Zenith shareholder in relation to 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, you received imputation benefits when the Special Dividend was paid. The Special Dividend was paid equally to all Zenith shareholders and was fully franked regardless of the tax profiles of Zenith's shareholders. Accordingly, it cannot be said that Zenith selectively directed the flow of franked dividends to certain members.

114. 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 benefits received by a Zenith shareholder in relation to the Special Dividend.

### **Capital gains tax consequences**

#### **CGT event A1**

115. 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 an asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

116. The acquisition of your Zenith shares under a Court approved Scheme of Arrangement does not involve a disposal of shares under a contract.<sup>2</sup>

<sup>2</sup> 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?*

117. Therefore, CGT event A1 happened when there was a change of ownership in your Zenith shares to BidCo under the Scheme Implementation Deed (subsections 104-10(1) and (2)). The change of ownership happened on the Scheme Implementation Date of 21 August 2020 (paragraph 104-10(3)(b)).

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

### **Capital proceeds**

119. The capital proceeds you received 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 the event happened) in respect of the event happening (subsection 116-20(1)).

120. 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.<sup>3</sup>

121. However, in this case, the circumstances in which the Special Dividend was paid did not occur independently of the transfer of your Zenith shares pursuant to this Scheme for the following reasons:

- the consideration for the transfer of Zenith shares was reduced by the amount of any Special Dividend declared
- the payment of the Special Dividend was contingent on this Scheme proceeding, and
- BidCo loaned the funds to Zenith which enabled Zenith to pay the Special Dividend to its shareholders.

122. Therefore, the Special Dividend forms part of the capital proceeds you received in respect of CGT event A1 happening to your Zenith share.

123. The capital proceeds you received from CGT event A1 happening for the disposal of your Zenith share therefore consists of the cash consideration and the Special Dividend, being \$1.05 per Zenith share.

### **Capital gain or capital loss**

124. You made a capital gain if the capital proceeds from the disposal of your Zenith share exceeded its cost base (subsection 104-10(4)). The capital gain is the difference.

125. You reduce a capital gain you made when CGT event A1 happened to your Zenith share by the amount of the Special Dividend that you include in your assessable income under section 44 (section 118-20). Where the amount of Special Dividend exceeds the capital gain, you cannot make or increase a capital loss (subsection 118-20(2)).

126. You do not reduce a capital gain by the amount of the franking credits (attached to the Special Dividend) that you include in your assessable income pursuant to section 207-20 (paragraph 118-20(1B)(b)).

<sup>3</sup> 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.*



127. You made a capital loss if the capital proceeds from the disposal of each Zenith share are less than its reduced cost base (subsection 104-10(4)). The capital loss is the difference. You cannot increase the capital loss by the amount of the Special Dividend (subsection 118-20(2)).

128. The cost base and reduced cost base of each Zenith share depends on your individual circumstances.

## ***Discount capital gain***

129. If you made a capital gain from the disposal of your Zenith share, you are eligible to treat the capital gain as a discount capital gain provided that:

- you are an individual, complying superannuation entity or, subject to the rules in Subdivision 115-C, a trust (section 115-10)
- the capital gain was worked out using a cost base which was calculated without reference to indexation (subsection 115-20(1)), and
- you acquired, or were taken to have acquired, your Zenith share on or before 21 August 2019 which was at least 12 months prior to when CGT event A1 happened (subsection 115-25(1)).

## ***Non-resident shareholders***

130. You disregard a capital gain or capital loss you made from a CGT event if:

- you are a non-resident, or the trustee of a non-resident trust for CGT purposes just before the CGT event happened, and
- your Zenith share is not taxable Australian property (subsection 855-10(1)).

131. Your Zenith share was not an indirect Australian real property interest (table item 2 of section 855-15). Therefore, your Zenith share is not taxable Australian property unless you:

- did not use your Zenith share at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- held your Zenith share as an individual and the share was covered by subsection 104-165(3) which is about individuals who defer capital gains upon ceasing to be Australian residents (table item 5 of section 855-15).

**Appendix 2 – Legislative provisions**

132. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

<i>Income Tax Assessment Act 1936</i>	subsection 6(1)
<i>Income Tax Assessment Act 1936</i>	section 44
<i>Income Tax Assessment Act 1936</i>	subsection 44(1)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(a)(i)
<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(b)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(b)(i)
<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(c)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(c)(i)
<i>Income Tax Assessment Act 1936</i>	section 98
<i>Income Tax Assessment Act 1936</i>	section 99A
<i>Income Tax Assessment Act 1936</i>	Division 1A of former Part IIIAA
<i>Income Tax Assessment Act 1936</i>	former section 160APHD
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHE(1)
<i>Income Tax Assessment Act 1936</i>	former section 160APHM
<i>Income Tax Assessment Act 1936</i>	former section 160APHN
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHN(2)
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHO(1)
<i>Income Tax Assessment Act 1936</i>	former paragraph 160APHO(2)(a)
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHO(3)
<i>Income Tax Assessment Act 1936</i>	former section 160APHT
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHT(2)
<i>Income Tax Assessment Act 1936</i>	former section 160APHU
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHU(1)
<i>Income Tax Assessment Act 1936</i>	section 128B
<i>Income Tax Assessment Act 1936</i>	subsection 128B(1)
<i>Income Tax Assessment Act 1936</i>	paragraph 128B(3)(ga)
<i>Income Tax Assessment Act 1936</i>	subparagraph 128B(3)(ga)(i)
<i>Income Tax Assessment Act 1936</i>	subsection 128B(3E)
<i>Income Tax Assessment Act 1936</i>	section 128D
<i>Income Tax Assessment Act 1936</i>	section 177EA
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(b)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(c)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(d)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(e)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 177EA(17)
<i>Income Tax Assessment Act 1997</i>	Division 63

<i>Income Tax Assessment Act 1997</i>	section 63-10
<i>Income Tax Assessment Act 1997</i>	Division 67
<i>Income Tax Assessment Act 1997</i>	section 67-25
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1A)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1B)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1C)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1DA)
<i>Income Tax Assessment Act 1997</i>	section 104-10
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(1)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(2)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(3)
<i>Income Tax Assessment Act 1997</i>	paragraph 104-10(3)(b)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(4)
<i>Income Tax Assessment Act 1997</i>	subsection 104-165(3)
<i>Income Tax Assessment Act 1997</i>	Division 115
<i>Income Tax Assessment Act 1997</i>	section 115-10
<i>Income Tax Assessment Act 1997</i>	subsection 115-20(1)
<i>Income Tax Assessment Act 1997</i>	subsection 115-25(1)
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-C
<i>Income Tax Assessment Act 1997</i>	subsection 116-20(1)
<i>Income Tax Assessment Act 1997</i>	section 118-20
<i>Income Tax Assessment Act 1997</i>	paragraph 118-20(1B)(b)
<i>Income Tax Assessment Act 1997</i>	subsection 118-20(2)
<i>Income Tax Assessment Act 1997</i>	section 202-5
<i>Income Tax Assessment Act 1997</i>	section 202-40
<i>Income Tax Assessment Act 1997</i>	section 202-45
<i>Income Tax Assessment Act 1997</i>	section 204-30
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(3)(c)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(8)
<i>Income Tax Assessment Act 1997</i>	Division 207
<i>Income Tax Assessment Act 1997</i>	section 207-20
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(1)
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(2)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(1)
<i>Income Tax Assessment Act 1997</i>	section 207-45
<i>Income Tax Assessment Act 1997</i>	section 207-70
<i>Income Tax Assessment Act 1997</i>	section 207-75
<i>Income Tax Assessment Act 1997</i>	subsection 207-75(2)
<i>Income Tax Assessment Act 1997</i>	subsection 207-145(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(a)

<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(e)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(f)
<i>Income Tax Assessment Act 1997</i>	Division 208
<i>Income Tax Assessment Act 1997</i>	section 208-195
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	Subdivision 842-I
<i>Income Tax Assessment Act 1997</i>	section 855-10
<i>Income Tax Assessment Act 1997</i>	subsection 855-10(1)
<i>Income Tax Assessment Act 1997</i>	section 855-15
<i>Income Tax Assessment Act 1997</i>	section 855-30
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)
<i>Taxation Administration Act 1953</i>	
<i>Corporations Act 2001</i>	Part 5.1

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