


CR 2021/70 - Milton Corporation Ltd - scheme of arrangement, final dividend and special dividend

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Class Ruling

Milton Corporation Ltd – scheme of arrangement, final dividend and special dividend

📌 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 penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences of the final dividend paid by Milton Corporation Ltd (Milton) on 14 September 2021 (Final Dividend), the special dividend paid by Milton on 5 October 2021 (Special Dividend) and the scheme of arrangement whereby Washington H. Soul Pattinson and Company Limited (WHSP) acquired all of the remaining ordinary shares on issue in Milton on 5 October 2021 (Scheme of Arrangement).
2. Full details of the scheme are set out in paragraphs 57 to 87 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* (ITAA 1936) or the *Income Tax Assessment Act 1997* (ITAA 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 Milton shareholder who:
 - held your Milton shares on
 - 1 September 2021 (Final Dividend Record Date) and received the Final Dividend
 - 22 September 2021 (Special Dividend Record Date) and received the Special Dividend, and

- 27 September 2021 (Scheme Record Date) and participated in the Scheme of Arrangement under which WHSP acquired the remaining Milton ordinary shares which it did not already own, and
 - held your Milton shares on capital account; that is, you did not hold your Milton shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)).
5. This Ruling does not apply to you if you:
- are taken to have acquired your Milton shares before 20 September 1985
 - acquired your Milton shares under a Milton employee share plan
 - are subject to the investment manager regime in Subdivision 842-I in relation to your Milton shares, or
 - are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme set out in paragraphs 57 to 87 of this Ruling.
- Note:** Division 230 will not apply to you unless you have made an election for the Division to apply to you.

When this Ruling applies

6. This Ruling applies from 1 July 2021 to 30 June 2022.

Ruling**Final Dividend**

7. The Final Dividend is a 'dividend' as defined in subsection 6(1).
8. The Final Dividend is a frankable distribution pursuant to section 202-40.

Assessability of the Final Dividend, franking credits and tax offsets***Resident shareholders***

9. If you are a resident of Australia as defined in subsection 6(1), you are required to include the Final Dividend in your assessable income (subparagraph 44(1)(a)(i)).
10. If you satisfy the residency requirements in section 207-75, you include the franking credits attached to the Final 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' (as defined in Division 1A of former Part IIIAA).
11. If you received the Final 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, the franking credits attached to the Final Dividend are included in your assessable income, provided you are a qualified person (subsection 207-35(1)).
12. If you are a partner in a partnership or a beneficiary of a trust and the Final Dividend flows indirectly through the partnership or trust to you, you include your share of the Final Dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credit attached to the Final Dividend, provided both you and the partnership or trust, as is relevant, are each a qualified person (section 207-45 and former subsection 160APHU(1)).

13. The tax offset is refundable, subject to the refundable tax offset rules in Division 67.

Non-resident shareholders*Final Dividend attributable to a permanent establishment in Australia*

14. If you are a non-resident and the Final Dividend is attributable to a permanent establishment in Australia, you include the Final Dividend in your assessable income (paragraphs 44(1)(b) and (c)) and you are not liable to pay withholding tax in respect of the Final Dividend (subsection 128B(3E)).

15. If you are also a qualified person (as defined in Division 1A of former Part IIIAA), you include the amount of the franking credits attached to the Final 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)).

Final Dividend not attributable to a permanent establishment in Australia

16. If you are a non-resident and the Final Dividend is not attributable to a permanent establishment in Australia, the Final Dividend is not included in your assessable income (section 128D) and you are not liable to withholding tax in respect of the Final Dividend (paragraph 128B(3)(ga)).

17. You do not include the amount of the franking credits attached to the Final 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

18. The Final Dividend you received constitutes a 'related payment' for the purposes of paragraph 207-145(1)(a) and former section 160APHN and the secondary qualification period therefore applies.

19. You will be a qualified person in relation to the Final Dividend if, during the period from 19 July 2021 to 26 September 2021 (inclusive), you held your Milton 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. The period of 45 days does not include the day on which your Milton shares were acquired or the day of disposal.

Exempting entity

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

21. Therefore, 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 Final Dividend you received, nor to deny the tax offset to which you are otherwise entitled to under Division 207 at the time when the Final Dividend was paid.

Special Dividend

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

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

24. 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)).
25. 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 (as defined in Division 1A of former Part IIIAA).
26. 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, the franking credits attached to the Special Dividend are included in your assessable income, provided you are a qualified person (subsection 207-35(1)).
27. 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 Special Dividend, provided both you and the partnership or trust as is relevant are each a qualified person (section 207-45 and former subsection 160APHU(1)).
28. 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***

29. If you are a non-resident and the Special Dividend is attributable to a permanent establishment in Australia, you include the Special Dividend in your assessable income (paragraphs 44(1)(b) and (c)) and you are not liable to pay withholding tax in respect of the dividend (subsection 128B(3E)).
30. If you are also a qualified person (as defined in 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

31. If you are a non-resident and the Special Dividend is not attributable to a permanent establishment in Australia, the Special Dividend is not included in your assessable income (section 128D) and you are not liable to withholding tax in respect of the dividend (paragraph 128B(3)(ga)).
32. 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

33. The Special Dividend you received constitutes a 'related payment' for the purposes of paragraph 207-145(1)(a) and former section 160APHN and the secondary qualification period therefore applies.

34. You will be a qualified person in relation to the Special Dividend if, during the period from 9 August 2021 to 26 September 2021 (inclusive), you held your Milton 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. The period of 45 days does not include the day on which your Milton shares were acquired or the day of disposal.

Exempting entity

35. Milton 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).

36. Therefore, 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**Section 177EA**

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

Section 204-30

38. 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 Final Dividend or Special Dividend.

Section 207-145

39. Section 207-145 will not apply to the whole, or any part, of the Final Dividend or the Special Dividend. The Commissioner does not consider that the Final Dividend or the Special Dividend were made as part of a dividend stripping operation (under section 207-155) or a distribution washing arrangement (under section 207-157). Accordingly, section 207-145 will not apply to adjust your assessable income to exclude the amount of the franking credits on the Final Dividend or the Special Dividend, nor will it deny the tax offsets to which you would otherwise be entitled.

Capital gains tax consequences**CGT event A1**

40. CGT event A1 happened to you on 5 October 2021 (Scheme Implementation Date) when you disposed of each of your Milton shares to WHSP in accordance with the Scheme of Arrangement (section 104-10).

Capital proceeds

41. The capital proceeds from CGT event A1 happening to your Milton share is the Scheme Consideration of 0.1863 shares in WHSP you received in respect of the disposal of each Milton share (subsection 116-20(1)).
42. The capital proceeds do not include the Final Dividend or the Special Dividend.

Capital gain or capital loss

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

Discount capital gain

45. If you made a capital gain from the disposal of a Milton share, you are eligible to treat the capital gain as a 'discount capital gain' provided you acquired, or are taken to have acquired, your Milton share on or before 4 October 2020 and you satisfy the other requirements of Division 115.

Non-resident shareholders

46. If you were a non-resident shareholder for capital gains tax (CGT) purposes just before the Scheme Implementation Date, you disregard any capital gain or capital loss made as a result of CGT event A1 happening, unless your Milton shares were taxable Australian property for the purposes of section 855-10.

Availability of scrip for scrip roll-over for your Milton Corporation Ltd shares

47. If you make a capital gain from the disposal of your Milton shares, you may choose to obtain scrip for scrip roll-over (section 124-781).
48. Scrip for scrip roll-over cannot be chosen if:
- you were a foreign resident just before the disposal of your Milton shares on the Implementation Date unless, just after you acquired the replacement WHSP shares, the WHSP shares are taxable Australian property (subsection 124-795(1)), or
 - any capital gain you might subsequently make from the replacement WHSP shares would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

Consequences if you choose scrip for scrip roll-over for your Milton Corporation Ltd shares

49. If you choose scrip for scrip roll-over, you disregard the capital gain you made when CGT event A1 happened because of the disposal of your Milton shares in exchange for the WHSP shares you received (subsections 124-785(1)).

50. The first element of the cost base and reduced cost base of each replacement WHSP share is calculated by reasonably attributing to it the cost base and reduced cost base of the Milton share for which it was exchanged (subsections 124-785(2) and (4)).

51. You can calculate the first element of the cost base or reduced cost base of each replacement WHSP share by dividing the aggregate cost bases or reduced cost bases of your Milton shares by the number of replacement WHSP shares you received.

52. For the purposes of determining your eligibility to make a discount capital gain, the acquisition date of replacement shares in WHSP is the date you acquired your original Milton shares (table item 2 of subsection 115-30(1)).

Consequences if you do not, or cannot, choose scrip for scrip roll-over for your Milton Corporation Ltd shares

53. If you do not, or cannot, choose scrip for scrip roll-over, you must account for any capital gain or capital loss from CGT event A1 happening on the disposal of your Milton shares in working out your net capital gain or net capital loss for the income year in which CGT event A1 happens (sections 102-5 and 102-10).

54. If you made a capital gain where you do not, or cannot, choose scrip for scrip roll-over, you can treat the capital gain as a 'discount capital gain' provided that the conditions of Subdivision 115-A are met. In particular, the Milton shares you disposed of must have been acquired, or taken to have been acquired, by you at least 12 months before their disposal to WHSP (section 115-25).

55. If you do not, or cannot, choose scrip for scrip roll-over, the first element of the cost base and reduced cost base of the replacement WHSP shares received is equal to the market value of the Milton shares given in respect of acquiring the WHSP shares (subsections 110-25(2) and 110-55(2)). The market value of the Milton shares is worked out as at the time of the acquisition of WHSP shares on the Implementation Date.

56. If you do not, or cannot, choose scrip for scrip roll-over, you are taken to have acquired your WHSP shares on the Scheme Implementation Date (table item 2 of section 109-10).

Scheme

57. 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.

Background

Milton Corporation Ltd

58. Milton was established as a private investment company in 1938. Milton makes long-term investments in Australian Securities Exchange (ASX)-listed companies and trusts, real property development, fixed interest securities, and other liquid assets.

59. Milton is a Listed Investment Company (LIC) and is currently listed on the ASX.

60. Milton is an Australian resident for tax purposes.

61. As at 30 June 2021, Milton had:

- a total of 674,230,364 ordinary shares on issue. Overseas shareholders (excluding New Zealand) represented only approximately 0.35% of all Milton shareholders, and
- a franking account balance of approximately \$121.5 million.

Washington H. Soul Pattinson and Company Limited

62. WHSP is an ASX-listed investment house headquartered in Sydney, Australia. WHSP was founded in 1872 and is the second-oldest publicly-listed company on the ASX, having listed in 1903.

63. WHSP has a portfolio of investments across listed equities, private equity, property and loans.

64. Prior to the Implementation of the Scheme, WHSP held approximately 3.3% of the ordinary shares in Milton.

Scheme of Arrangement

65. On 22 June 2021, Milton announced that it had entered into a Scheme Implementation Agreement with WHSP under which WHSP would acquire the remaining ordinary shares on issue in Milton by way of a scheme that is subject to shareholder and court approval in accordance with Part 5.1 of the *Corporations Act 2001*.

66. Under the Scheme of Arrangement, each share in Milton held by a Milton shareholder was transferred to WHSP resulting in Milton becoming a wholly-owned subsidiary of WHSP. In exchange for each Milton share, Milton shareholders received 0.1863 WHSP shares (Scheme Consideration).

67. The Exchange Ratio was determined at 7.00pm (AEST) on 2 September 2021 (Calculation Date) by reference to Milton's Net Tangible Assets (NTA) per share adjusted for the Final Dividend and a Special Dividend, plus a 10% premium, in comparison to WHSP's one-month volume-weighted average price (capped at \$31 per WHSP share).

68. At a shareholder meeting held on 13 September 2021, Milton shareholders approved the Scheme of Arrangement.

69. On 21 September 2021 (Effective Date), the Scheme of Arrangement was approved by the Federal Court of Australia. Milton shares were suspended from trading on the ASX from close of trading on the Effective Date.

70. On the Scheme Record Date, each Milton Shareholder's entitlement to the Scheme Consideration was determined.

71. The Scheme Consideration was paid to Milton Shareholders and the Milton shares were transferred to WHSP on the Scheme Implementation Date.

Final Dividend

72. On 23 July 2021, Milton declared a fully franked dividend of 8 cents per Milton share which was payable to Milton shareholders who held their shares at the Final Dividend Record Date.

73. The Final Dividend was paid on the Final Dividend Payment Date.

74. The Final Dividend was sourced entirely from current year profits and retained earnings. The Final Dividend was not debited against Milton's share capital account.

75. The Final Dividend was not subject to the Scheme of Arrangement becoming effective.

Special Dividend

76. On 22 June 2021, Milton announced its intention to declare a Special Dividend of 37 cents per share which would be fully franked and payable to Milton shareholders who held their shares at 7.00pm (AEST) on the Special Dividend Record Date.

77. The Special Dividend was paid on the Special Dividend Payment Date.

78. The Special Dividend was sourced entirely from current year profits and retained earnings. The Special Dividend was not debited against Milton's share capital account.

79. The Special Dividend was subject to the Scheme of Arrangement becoming effective.

Other matters

80. Neither WHSP, nor any of their associates, had any influence or control over the declaration and payment of the Final Dividend or the Special Dividend.

81. WHSP did not facilitate or finance the payment of the Final Dividend or the Special Dividend.

82. The Scheme of Arrangement was not conditional on the Final Dividend or the Special Dividend being declared and WHSP did not have any right to terminate the Scheme Implementation Agreement if Milton did not declare and pay the Final Dividend or the Special Dividend.

83. Milton did not have a significant stakeholder or a common stakeholder in relation to the Scheme of Arrangement as defined in section 124-783.

84. On the Scheme Implementation Date, the sum of the market values of Milton's assets that were taxable Australian real property did not exceed the sum of the market values of its other assets for the purposes of section 855-30.

85. Paragraph 124-780(3)(f) is satisfied in respect of the sale of Milton shares to WHSP.

86. WHSP did not make the choice that Milton shareholders could not obtain Subdivision 124-M roll-over for the purposes of subsection 124-795(4).

Key dates

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

Scheme Implementation Agreement executed	22 June 2021
Announcement Date	22 June 2021
First Court Hearing	5 August 2021
Date of Scheme Booklet	5 August 2021
Final Dividend Record Date	7.00pm (AEST) on 1 September 2021
Scheme Meeting	10.00am (AEST) on 13 September 2021

Final Dividend Payment Date	14 September 2021
Second Court Hearing (court approved scheme)	20 September 2021
Effective Date	21 September 2021
Special Dividend Record Date	22 September 2021
Scheme Record Date	7.00pm (AEST) on 27 September 2021
Special Dividend Payment Date	5 October 2021
Scheme Implementation Date	5 October 2021

Commissioner of Taxation20 October 2021

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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Final Dividend and Special Dividend

88. The term ‘dividend’ is defined in subsection 6(1) to include any distribution made by a company to any of its shareholders, whether in money or other property, but excludes a distribution debited against an amount standing to the credit of the share capital account of the company.

89. The Final Dividend and the Special Dividend are both dividends as they were distributions made by Milton to its shareholders and were not debited against its share capital account.

90. 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.

91. The Final Dividend and the Special Dividend are frankable distributions under section 202-40 as none of the circumstances in section 202-45 apply. In turn, the Franked Dividend and Special Dividend are capable of being franked in accordance with section 202-5.

Assessability of the Final Dividend and Special Dividend

Residents

92. 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)).

93. As the Final Dividend and the Special Dividend were paid by Milton to its shareholders out of profits derived by Milton, shareholders who are residents of Australia as defined in subsection 6(1) are required to include the Final Dividend and 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

94. 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.

95. Subparagraph 44(1)(b)(i) includes the Final Dividend and 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.

96. Subparagraph 44(1)(c)(i) also includes the Final Dividend and 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 Final Dividend and Special Dividend are attributable to the permanent establishment.

97. Accordingly, if you are a non-resident Milton shareholder carrying on a business in Australia at or through a permanent establishment who received the Final Dividend and/or the Special Dividend (otherwise than in their 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 (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

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

99. 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 ITAA 1936 or the ITAA 1997.

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

101. 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 Final Dividend and the Special Dividend were fully franked, they will not be subject to Australian withholding tax.

102. Section 128D operates to treat the Final Dividend and the Special Dividend as non-assessable non-exempt income.

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

Gross-up and tax offset

104. 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)).

105. A shareholder that is not a qualified person in relation to the Final Dividend and/or the Special Dividend:

- does not include the franking credit attached to the respective 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 respective dividend (paragraph 207-145(1)(f)).

106. 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 Final Dividend and/or the Special Dividend (subsection 207-35(1)).

Qualified person, related payment rule and holding period rule

Qualified person

107. 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)).

108. Paragraph 207-145(1)(a), which refers to Division 1A of former 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.

109. 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.

110. 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 requirement in relation to the secondary qualification period.

Related payment rule

111. In order to determine the relevant qualification period, it is necessary to determine whether, under the 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 Final Dividend and/or Special Dividend you received (former subsection 160APHN(2)).

112. 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 the dividend to one or more other persons.

113. Under the terms of the Scheme Implementation Deed, the Scheme Consideration was reduced by the amount of the Final Dividend and the Special Dividend which Milton paid to its shareholders. The reduction of the Scheme Consideration, calculated with reference to the amount of the Final Dividend and the Special Dividend, has the effect of passing the benefit of the Final Dividend and the Special Dividend from a Milton shareholder to WHSP.

114. Therefore, you (or a partner in a partnership or a beneficiary of a trust that has an interest in Milton shares) are taken to have made a related payment in respect of the Final Total Dividend and/or the Special Dividend you received.

Holding period rule

115. The holding period rule requires that you hold your Milton shares on which the Final Dividend and the Special Dividend were 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.

116. 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).

117. 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.

118. In respect of the Final Dividend, the last day on which a person who held a Milton share was entitled to receive the Final Dividend was the record date for the dividend which was 1 September 2021. It follows that the Milton shares became ex dividend (for the purposes of former subsection 160APHE(1)) for the Final Dividend on 2 September 2021. Accordingly, the secondary qualification period is notionally the period beginning 45 days before, and ending 45 days after, 2 September 2021, namely 19 July 2021 to 17 October 2021 (inclusive).

119. In respect of the Special Dividend, the last day on which a person who held a Milton share was entitled to receive the Special Dividend was the record date for the dividend which was 22 September 2021. It follows that the Milton shares became ex dividend (for

the purposes of former subsection 160APHE(1)) for the Special Dividend on 23 September 2021. Accordingly, the secondary qualification period is notionally the period beginning 45 days before, and ending 45 days after 23 September 2021, namely 9 August 2021 to 7 November 2021.

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

121. Under the Scheme of Arrangement, you ceased to hold your Milton shares at risk on the Scheme Record Date of 27 September 2021, because on that day you became committed to dispose of your Milton shares in exchange for the Scheme Consideration.

122. Accordingly, if you disposed of your Milton shares to WHSP under the Scheme of Arrangement, you satisfied the holding period rule if you held those shares at risk for at least 45 continuous days (not including the day on which you acquired the Milton share, or the day on which you disposed of the Milton share), in relation to the:

- Final Dividend during the period 19 July 2021 to 26 September 2021 (inclusive), and
- Special Dividend, during the period 9 August 2021 to 26 September 2021 (inclusive).

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

124. The small shareholder exception in former section 160APHT does not apply as the Final Dividend and the Special Dividend constitute a related payment as discussed in paragraphs 107 to 110 of this Ruling. Therefore, a shareholder who is an individual and who has franking credit offsets not exceeding \$5,000 for the income year ended 30 June 2022 must also satisfy the holding period requirement in relation to the Final Dividend and/or the Special Dividend (former subsection 160APHT(2)).

Refundable tax offset

125. Your entitlement to the franking credit tax offset under Division 207 in relation to the Final Dividend and/or 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.

126. 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 (1D)), and

- non-resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

127. 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

128. 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.

129. Milton is a corporate tax entity. The transfer of the Milton shares under the Scheme of Arrangement is a scheme for the disposition of membership interests. The Final Dividend and the Special Dividend are frankable distributions which were paid to the shareholders of Milton as part of this Scheme of Arrangement, who received imputation benefits. Therefore, the conditions of paragraphs 177EA(3)(a) to (d) are satisfied.

130. 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 Milton, Milton 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)).

131. Considering the circumstances of the Scheme of Arrangement, it cannot be concluded that Milton or Milton shareholders entered into or carried out the scheme for the purpose of enabling the Milton 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 to be received in relation to either the Final Dividend or the Special Dividend.

Section 204-30

132. 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.

133. 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.

134. Under the scheme, you received imputation benefits when Final Dividend and/or the Special Dividend was paid to you. The Final Dividend and the Special Dividend were paid equally to all Milton shareholders and were fully franked regardless of the tax profiles of Milton's shareholders. Accordingly, it cannot be said that Milton selectively directed the flow of franked dividends to certain members.

135. 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 you as a Milton shareholder in relation to the Final Dividend and/or the Special Dividend.

Capital gains tax consequences

CGT event A1

136. 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)).

137. The acquisition of your Milton shares under a court approved Scheme of Arrangement does not involve a disposal of shares under a contract.¹

138. Therefore, CGT event A1 happened when there was a change of ownership in your Milton shares to WHSP under the Scheme Implementation Deed (subsections 104-10(1) and (2)). The change of ownership occurred on the Scheme Implementation Date of 5 October 2021 (paragraph 104-10(3)(b)).

139. 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.

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

Capital proceeds

141. 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 of the event happening) in respect of the event happening (subsection 116-20(1)).

142. 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

143. The Final Dividend and the Special Dividend were not paid in respect of the disposal of Milton shares under the Scheme of Arrangement. The Scheme of Arrangement was not conditional on the declaration of the Final Dividend or the Special Dividend. The Final Dividend and the Special Dividend were not dependent on WHSP or a third party financing or facilitating payment of the Final Dividend or the Special Dividend, or WHSP or a third party being obliged to bring about the result that the Final Dividend or the Special Dividend would be paid to existing shareholders.

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?*

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.*

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

145. Therefore, the capital proceeds that you received from CGT event A1 happening on the disposal of each Milton share is the Scheme Consideration of 0.1863 WHSP shares.

Capital gain or capital loss

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

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

148. The cost base and reduced cost base of the Milton share depends on your individual circumstances.

Discount capital gain

149. If you make a capital gain from the disposal of your Milton share, you are eligible to treat the capital gain as a 'discount capital gain' provided that:

- you are an individual, a 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 that was calculated without reference to indexation (subsection 115-20(1)), and
- you acquired, or were taken to have acquired, your Milton share on or before 4 October 2020, which was at least 12 months prior to CGT event A1 happening (subsection 115-25(1)).

Non-resident shareholders

150. You disregard a capital gain or capital loss you make 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 happens and the CGT event happens in relation to a CGT asset that is not taxable Australian property (subsection 855-10(1)).

151. The term 'taxable Australian property' is defined in the table in section 855-15. Where you are a non-resident or a trustee of a non-resident trust for CGT purposes just before CGT event A1 happened to your Milton shares under the Scheme of Arrangement, you cannot disregard a capital gain or capital loss you made from CGT event A1 happening (under subsection 855-10(1)), if, relevantly, your Milton shares were:

- an indirect Australian real property interest (table item 2 of section 855-15)
- used at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- covered by subsection 104-165(3) (table item 5 of section 855-15).

Availability of scrip for scrip roll-over

152. Scrip for scrip roll-over under Subdivision 124-M enables a shareholder to disregard a capital gain from a share that is disposed of if they receive a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

153. Subdivision 124-M contains a number of conditions and exceptions to, a shareholder or unitholder being able to choose scrip for scrip roll-over. The main requirements that are relevant to the Scheme of Arrangement that is the subject of this Ruling are:

- Milton shares were exchanged for shares in WHSP (paragraph 124-780(1)(a) and subparagraph 124-780(3)(c)(ii))
- the exchange was a consequence of a single arrangement that satisfies paragraphs 124-780(2) or (2A)
- neither WHSP nor any of its wholly-owned subsidiaries issued equity, apart from the WHSP shares issued to Milton shareholders in exchange for their Milton shares, or owed new debt under the arrangement in relation to the issue of those WHSP shares, to an entity that was not a member of the group (paragraph 124-780(3)(f))
- Milton shareholders dealt with WHSP at arm's length (subsection 124-780(4)), and
- WHSP did not make a choice under subsection 124-795(4) that Milton shareholders could not obtain the roll-over.

154. The Scheme of Arrangement that is the subject of this Ruling satisfies the requirements for scrip for scrip roll-over under Subdivision 124-M.

Appendix 2 – Legislative provisions

155. 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>	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>	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>	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 177EA
<i>Income Tax Assessment Act 1936</i>	paragraphs 177EA(3)(a)
<i>Income Tax Assessment Act 1936</i>	paragraphs 177EA(3)(b)
<i>Income Tax Assessment Act 1936</i>	paragraphs 177EA(3)(c)
<i>Income Tax Assessment Act 1936</i>	paragraphs 177EA(3)(d)
<i>Income Tax Assessment Act 1936</i>	paragraphs 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>	subsections 67-25(1C)
<i>Income Tax Assessment Act 1997</i>	subsections 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1DA)
<i>Income Tax Assessment Act 1997</i>	section 102-5
<i>Income Tax Assessment Act 1997</i>	section 102-10
<i>Income Tax Assessment Act 1997</i>	section 104-10
<i>Income Tax Assessment Act 1997</i>	subsections 104-10(1)
<i>Income Tax Assessment Act 1997</i>	subsections 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>	section 109-10
<i>Income Tax Assessment Act 1997</i>	subsection 110-25(2)
<i>Income Tax Assessment Act 1997</i>	subsection 110-55(2)
<i>Income Tax Assessment Act 1997</i>	Division 115
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-A
<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>	section 115-25
<i>Income Tax Assessment Act 1997</i>	subsection 115-25(1)
<i>Income Tax Assessment Act 1997</i>	subsection 115-30(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>	Subdivision 124-M
<i>Income Tax Assessment Act 1997</i>	paragraph 124-780(1)(a)
<i>Income Tax Assessment Act 1997</i>	paragraph 124-780(2)
<i>Income Tax Assessment Act 1997</i>	paragraph 124-780(2A)
<i>Income Tax Assessment Act 1997</i>	subparagraph 124-780(3)(c)(ii)

<i>Income Tax Assessment Act 1997</i>	paragraph 124-780(3)(f)
<i>Income Tax Assessment Act 1997</i>	subsection 124-780(4)
<i>Income Tax Assessment Act 1997</i>	section 124-781
<i>Income Tax Assessment Act 1997</i>	section 124-783
<i>Income Tax Assessment Act 1997</i>	subsection 124-785(1)
<i>Income Tax Assessment Act 1997</i>	subsection 124-785(2)
<i>Income Tax Assessment Act 1997</i>	subsection 124-785(4)
<i>Income Tax Assessment Act 1997</i>	subsection 124-795(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 124-795(2)(a)
<i>Income Tax Assessment Act 1997</i>	subsection 124-795(4)
<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>	section 207-145
<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>	section 207-155
<i>Income Tax Assessment Act 1997</i>	section 207-157
<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)

References*Previous draft:*

Not previously issued as a draft

Legislative references:

- TAA 1953
- Corporations Act 2001 Pt 5.1

Related Rulings/Determinations:

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Income tax ~~ Capital management ~~ Anti avoidance rules ~~
Section 177EA
Income tax ~~ Capital management ~~ Franking credits / tax offsets
Income tax ~~ Capital management ~~ Qualified person rule

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