

CR 2022/63 - Crestone Holdings Limited - scheme of arrangement and dividends



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Status: **legally binding**

Class Ruling

Crestone Holdings Limited – scheme of arrangement and dividends

① Relying on this Ruling

This publication (excluding appendix) 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 dividends paid by Crestone Holdings Limited (CHL) on 2 May 2022 and the scheme of arrangement whereby LGT Holding (Australia) Pty Ltd (LGT) acquired all the shares in CHL on 12 May 2022 (Scheme of Arrangement).
2. Full details of this scheme are set out in paragraphs 42 to 69 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:
 - held your shares in CHL on
 - 14 February 2022 (Initial Dividend Record Date) and received the initial dividend paid on 2 May 2022 (Initial Dividend)
 - 29 April 2022 (Further Dividend Record Date) and received the further dividend paid on 2 May 2022 (Further Dividend), and
 - 5 May 2022 (Scheme Record Date) and participated in the Scheme of Arrangement

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- held your CHL shares on capital account; that is, your shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)), and
 - are a resident of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).
5. This Ruling does not apply to you if you:
- held your CHL shares as partners in a partnership
 - acquired your CHL shares pursuant to an employee share scheme, or
 - are subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on your CHL shares.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2021 to 30 June 2027.

Ruling

Dividends

7. The Initial Dividend and Final Dividend are 'dividends' as defined in subsection 6(1) of the ITAA 1936.
8. The Initial Dividend and Final Dividend are frankable distributions pursuant to section 202-40.

Assessability of the Initial Dividend and Further Dividend, franking credits and tax offsets

9. If you are a resident of Australia as defined in subsection 6(1) of the ITAA 1936, you are required to include the Initial Dividend and the Further Dividend in your assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).
10. If you satisfy the residency requirements in section 207-75, you include the franking credits attached to the Initial Dividend and the Further 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 IIIA of the ITAA 1936).
11. If you received the Initial Dividend and the Further Dividend as a trustee of a trust (not being a complying superannuation entity) and you are not a corporate tax entity, the franking credits attached to the Initial Dividend and the Further Dividend are included in your assessable income, provided you are a qualified person (subsection 207-35(1)).
12. If you are a beneficiary of a trust and the Initial Dividend and the Further Dividend flows indirectly through the trust to you, you include your share of the Initial Dividend and the Further Dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credit attached to the Initial Dividend and the Further

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Dividend, provided both you and the trust are each a qualified person (section 207-45 and former subsection 160APHU(1) of the ITAA 1936).

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

Related payment and qualified persons

Initial Dividend

14. The Initial Dividend you received constitutes a 'related payment' for the purposes of paragraph 207-145(1)(a) and former section 160APHN of the ITAA 1936 and the secondary qualification period therefore applies.

15. You will be a qualified person in relation to the Initial Dividend if, during the period from 1 January 2022 to 1 April 2022 (inclusive), you held your CHL 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 of the ITAA 1936) in respect of the shares. The period of 45 days does not include the day on which your CHL shares were acquired or the day of disposal.

Further Dividend

16. The Further Dividend you received does not constitute a related payment for the purposes of paragraph 207-145(1)(a) and former section 160APHN of the ITAA 1936 and the primary qualification period therefore applies.

17. You will be a qualified person in relation to the Further Dividend if, during the period from when you acquired your CHL shares to 4 May 2022 (inclusive), you held your CHL 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 of the ITAA 1936) in respect of the shares. The period of 45 days does not include the day on which your CHL shares were acquired or the day of disposal.

Exempting entity

18. CHL was not an 'exempting entity' when the Initial Dividend, the Further Dividend, or both, was paid to you, nor was it a 'former exempting entity' at that time (Division 208).

19. 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 Initial Dividend or the Further Dividend you received, nor to deny the tax offset to which you are otherwise entitled to under Division 207 at the time when the Initial Dividend and the Further Dividend was paid.

Anti-avoidance provisions

Section 177EA of the ITAA 1936

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

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Section 204-30

21. 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 Initial Dividend or Further Dividend.

Disposal of Crestone Holdings Limited shares – capital gains tax consequences**CGT event A1**

22. CGT event A1 happened on 12 May 2022 (Scheme Implementation Date) in relation to your CHL shares when you disposed of each of your CHL shares to LGT (section 104-10).

Capital proceeds

23. The capital proceeds received in respect of CGT event A1 happening to each CHL share is \$5.74 per share (subsection 116-20(1)). This consists of:

- \$5.07 cash you received per CHL share, and
- \$0.67 per CHL share being the market value of the right (Earnout Right) you received to a future payment determined in accordance with the terms of the Scheme Implementation Deed (SID) CHL and LGT entered into on 14 December 2021.

24. The capital proceeds do not include the Initial Dividend or Further Dividend.

Capital gain or capital loss

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

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

Discount capital gain

27. If you made a capital gain from the disposal of your CHL share, you are eligible to treat the capital gain as a 'discount capital gain' provided you acquired, or are taken to have acquired, your CHL share on or before 11 May 2021 and the other conditions of Division 115 are satisfied (subsection 115-25(1)).

Earnout Right**Look-through earnout rights**

28. The Earnout Right is not a look-through earnout right under subsection 118-565(1) and the rules in Subdivision 118-I do not apply to the Earnout Right.

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Assessability of the Earnout Right and Earnout Scheme Consideration

29. The receipt of the Earnout Right does not result in an amount being included in your assessable income under sections 6-5, 15-15, 26BB or 159GQ of the ITAA 1936.

30. If you receive a future payment in respect of the Earnout Right determined in accordance with the terms of the SID (Earnout Scheme Consideration), that amount is not included in your assessable income under sections 6-5, 15-15, 26BB or 159GQ of the ITAA 1936.

Time of acquisition

31. The Earnout Right is property, and a CGT asset, you receive in respect of the disposal of your CHL share.

32. The acquisition date of your Earnout Right is 12 May 2022 (Scheme Implementation Date) (section 109-5).

Cost base of the Earnout Right

33. The first element of the cost base of the Earnout Right is equal to the market value of the Earnout Right as at the Scheme Implementation Date, being \$0.67 per CHL share (paragraph 110-25(2)(b) and subsection 112-30(1)).

CGT event C2

34. CGT event C2 will happen when the Earnout Right ends, either by being satisfied by the payment of the Earnout Scheme Consideration by LGT or by expiry without any amounts becoming payable (subsection 104-25(1)).

35. CGT event C2 happens at the time the payment of the Earnout Scheme Consideration is made or at the date the Earnout Right expires without any amounts becoming payable (subsection 104-25(2)).

Capital proceeds

36. The capital proceeds when CGT event C2 happens will be the amount of the Earnout Scheme Consideration received in respect of the Earnout Right, if payable (paragraph 116-20(1)(a)).

37. Where the Earnout Right ends by expiry without any Earnout Scheme Consideration amount becoming payable, there will be no capital proceeds from CGT event C2 happening.

38. The market value substitution rule in subsections 116-30(1) and (2) will not apply to replace the capital proceeds received when CGT event C2 happens.

Capital gain or capital loss

39. You will make a capital gain from CGT event C2 happening to your Earnout Right if the capital proceeds from the event exceed the cost base of your Earnout Right (subsection 104-25(3)). The capital gain is the difference.

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40. You will make a capital loss if the capital proceeds from CGT event C2 are less than the reduced cost base of your Earnout Right (subsection 104-25(4)). The capital loss is the difference.

Discount capital gain

41. If you make a capital gain when CGT event C2 happens to your Earnout Right, you may be eligible to treat the capital gain as a 'discount capital gain' provided the other conditions of Division 115 are satisfied (subsection 115-25(1)).

Scheme

42. 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

Crestone Holdings Limited

43. CHL is an Australian incorporated company and an Australian resident for tax purposes. CHL is the head entity of the Crestone Group.

44. The Crestone Group provides wealth advice and portfolio management services to high-net-worth clients and family offices, not-for-profit organisations and financial institutions.

45. As at 12 May 2022, CHL had 47,904,647 ordinary shares on issue, comprising of Class A and Class B shares. Class A and Class B ordinary shares in the capital of CHL rank equally, entitle the holder to one vote per share and participate equally on a *pari passu* basis with each other ordinary share in any dividend of CHL.

46. Class B options were issued with the Class B shares and were exercisable in 2019 at a \$1.10 strike price. Some option holders converted early in 2017 at a strike price of \$1.00, due to capital needs in the business. Approximately 99.5% of options were converted to Class B shares by March 2019 and the remaining Class B options lapsed.

LGT Holding (Australia) Pty Ltd and LGT Group Foundation

47. LGT is an Australian incorporated company.

48. LGT is wholly owned by LGT Group Foundation (LGT Group). LGT Group is a global and privately structured wealth management firm.

Scheme of Arrangement

49. On 14 December 2021, CHL entered into the SID with LGT for the acquisition of 100% of the share capital in CHL pursuant to a Scheme of Arrangement.

50. Under the terms of the SID, for each CHL share, CHL shareholders receive consideration (Scheme Consideration) comprised of:

- \$5.15 cash per CHL share less the amount of any Initial Dividend declared and paid (the Initial Scheme Consideration), and

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- the Earnout Right, being the right to receive the Earnout Scheme Consideration should CHL meet the relevant performance hurdles in the financial years 2024 to 2026 in accordance with the SID.

51. Under the terms of the SID, Disqualifying Conduct by a CHL shareholder may cause the expiry of that shareholder's Earnout Right without any amount being payable in respect of the Earnout Right.

52. An independent external valuer engaged by CHL has valued the Earnout Right at between \$31 million and \$34 million, with a midpoint of \$32.5 million. This equates to a value of \$0.67 per CHL share. A copy of the independent valuation report is set out in Annexure G of the Scheme Booklet.

53. At the Scheme Meeting held on 22 April 2022, CHL shareholders approved the Scheme of Arrangement.

54. On 27 April 2022, the court approved the Scheme of Arrangement and provided orders pursuant to Part 5.1 of the *Corporations Act 2001*.

55. The Scheme of Arrangement became effective on 27 April 2022 (Effective Date).

56. The Scheme was implemented on the Scheme Implementation Date. On this date, CHL shareholders received:

- \$5.07 cash per CHL share, and
- the Earnout Right.

Initial Dividend and Further Dividend

57. On 1 February 2022, CHL declared an Initial Dividend of \$0.08 per CHL share prior to the implementation of the Scheme of Arrangement.

58. Entitlement to the Initial Dividend was determined on 14 February 2022 (Initial Dividend Record Date).

59. On 19 April 2022, CHL declared a Further Dividend of \$0.05 per CHL share prior to the implementation of the Scheme of Arrangement.

60. Entitlement to the Further Dividend was determined on 29 April 2022 (Further Dividend Record Date).

61. Payment of the Initial Dividend and Further Dividend occurred on 2 May 2022. Both the Initial Dividend and Further Dividend were fully franked.

62. The Initial Dividend and Further Dividend were each:

- paid out of CHL's current year profits and debited against CHL's current earnings account
- financed from CHL's existing cash reserves, and
- determined by CHL in its sole discretion.

63. CHL did not debit the Initial Dividend or the Further Dividend to its share capital account.

64. Immediately prior to the payment of the Initial Dividend and Further Dividend, CHL had a franking account balance of \$2,725,327.

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Other matters

65. Prior to the Scheme Implementation Date, there was no CHL shareholder that held a greater than 10% interest in CHL.

66. Neither LGT nor any of its associates had any influence or control over the declaration and payment of the Initial Dividend or Further Dividend.

67. Neither LGT nor any of its associates facilitated or financed the payment of the Initial Dividend or Further Dividend.

68. The Scheme of Arrangement was not conditional on the Initial Dividend or Further Dividend being declared and LGT did not have any right to terminate the SID if CHL did not declare and pay the Initial Dividend, the Further Dividend or both.

Key dates

69. The following table is a summary of the key dates for the Scheme of Arrangement, the Initial Dividend and the Further Dividend:

Table 1: Summary of key dates

Date	Event
14 December 2021	Scheme Implementation Deed executed
14 February 2022	Initial Dividend Record Date
22 April 2022	Scheme Meeting
27 April 2022	Second Court Date (court-approved scheme)
27 April 2022	Scheme Effective Date
29 April 2022	Further Dividend Record Date
2 May 2022	Initial Dividend and Further Dividend Payment Date
5 May 2022	Scheme Record Date
12 May 2022	Scheme Implementation Date

Commissioner of Taxation

13 July 2022

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Appendix – 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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Initial Dividend and Further Dividend

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

71. The Initial Dividend and Further Dividend are both dividends as they were both distributions made by CHL to its shareholders and were not debited against its share capital account.

72. 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.

73. The Initial Dividend and the Further Dividend are frankable distributions under sections 202-40 as none of the circumstances of section 202-45 apply. In turn, the Initial Dividend and the Further Dividend are capable of being franked in accordance with section 202-5.

Assessability of the Initial Dividend and Further Dividend

74. The assessable income of a resident shareholder includes dividends paid by the company out of profits derived by it from any source (subparagraph 44(1)(a)(i) of the ITAA 1936).

75. As the Initial Dividend and the Further Dividend were paid to shareholders out of profits derived by CHL, you are required to include the Initial Dividend and the Further Dividend in your assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross-up and tax offset

76. 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)).

77. A shareholder that is not a qualified person in relation to the Initial Dividend or the Further 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)).

78. 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 trustee of a trust (not being a complying superannuation fund) includes the amount of the franking credit attached to the Initial Dividend or the Further Dividend (subsection 207-35(1)).

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Qualified person, related payment rule and holding period rule***Qualified person***

79. 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 a dividend (subsection 207-145(1)).

80. Paragraph 207-145(1)(a), which refers to Division 1A of former Part IIIAA of the ITAA 1936, provides the statutory tests you must satisfy to be a qualified person in relation to a franked distribution you have received in order for you to be entitled to a tax offset for the franking credit on the distribution.

81. Former section 160APHU of the ITAA 1936 provides that a partner in a partnership or the beneficiary of a trust cannot be a qualified person in relation to a dividend unless the partnership or the trustee of the trust is also a qualified person in relation to the dividend.

82. The test of what constitutes a qualified person is set out in former subsection 160APHO(1) of the ITAA 1936. Broadly, if you were not under an obligation to make a related payment in relation to the dividend, you will have 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 will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

83. 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 dividend you have received (former subsection 160APHN(2) of the ITAA 1936).

84. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 are set out in former section 160APHN of the ITAA 1936. Broadly, a related payment is where a scheme shareholder has done or is obliged to do anything having the effect of passing the benefit of the dividend to one or more other persons.

Initial Dividend

85. Under the terms of the SID, the Scheme Consideration was reduced by the amount of the Initial Dividend which CHL paid to its shareholders. The reduction of the Scheme Consideration, calculated with reference to the amount of the Initial Dividend, has the effect of passing the benefit of the Initial Dividend from a CHL shareholder to LGT.

86. Therefore, you (or a beneficiary of a trust that has an interest in CHL shares) are taken to have made a related payment in respect of the Initial Dividend you received.

Further Dividend

87. Under the terms of the SID, the Scheme Consideration was not reduced by the amount of the Further Dividend.

88. As the Scheme Consideration was not reduced by the Further Dividend, you are not considered to be under an obligation to make a related payment in relation to the Further Dividend.

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Holding period rule

89. The holding period rule requires that you hold your CHL shares, on which the Initial Dividend and the Further Dividend were paid, 'at risk' for a continuous period of at least 45 days during the relevant qualification period (former paragraph 160APHO(2)(a) of the ITAA 1936).

Initial Dividend

90. With regards to the Initial Dividend, the relevant qualification period is the secondary qualification period.

91. 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 of the ITAA 1936).

92. Under former subsection 160APHE(1) of the ITAA 1936, 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.

93. In respect of the Initial Dividend, eligibility to receive the Initial Dividend was determined on the Initial Dividend Record Date (14 February 2022), being the last day on which the acquisition by a person of a CHL share entitled the person to receive the Initial Dividend. It follows that the CHL shares became ex dividend for the Initial Dividend on 15 February 2022.

94. Therefore, if you held your CHL share without 'materially diminished risks of loss or opportunities for gain' for a continuous period of at least 45 days during the period from 1 January 2022 to 1 April 2022 (inclusive), you will be a qualified person in respect of the Initial Dividend. The dates of acquisition and disposal of your CHL shares are not included in the relevant 45 day period.

Further Dividend

95. With regards to the Further Dividend, the relevant qualification period is the primary qualification period.

96. The primary qualification period is the period beginning on the day after the date of acquisition of the share and ends 45 days after the day on which a share becomes ex dividend (former section 160APHD of the ITAA 1936).

97. In respect of the Further Dividend, eligibility to receive the Further Dividend was determined on the Further Dividend Record Date (29 April 2022), being the last day on which the acquisition by a person of CHL share entitled the person to receive the Further Dividend. It follows that the CHL shares became ex dividend for the Further Dividend on 30 April 2022.

98. However, once you had been identified as a CHL shareholder eligible to receive the Scheme Consideration on the Scheme Record Date (5 May 2022), you would no longer be considered to hold your CHL shares 'at risk' for the purposes of Division 1A of former Part IIIA of the ITAA 1936 because, at that time, you had committed to dispose of your CHL shares in exchange for the known Scheme Consideration. This means as at and from the Scheme Record Date, you no longer held your CHL shares 'at risk'. The days from 5 May 2022 and onward are not counted towards the 45-day holding period.

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99. Accordingly, the primary qualification period for the Further Dividend is the period beginning on the day after the day on which you acquired your CHL share until 4 May 2022 (inclusive).

100. Therefore, if you acquired your CHL shares on or before 20 March 2022 and disposed of them to LGT under the Scheme of Arrangement, you satisfied the holding period rule if you held those shares at risk for at least 45 continuous days.

Refundable tax offset

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

102. 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)).

103. 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).

Anti-avoidance provisions

Section 177EA of the ITAA 1936

104. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of a particular scheme is to enable a taxpayer to obtain an imputation benefit.

105. Considering the circumstances of the Scheme of Arrangement, it cannot be concluded that CHL or CHL shareholders entered into or carried out the scheme for the purpose of enabling CHL shareholders to obtain an imputation benefit.

106. Therefore, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit to be received in relation to either the Initial Dividend or the Further Dividend.

Section 204-30

107. Section 204-30 applies where a corporate tax entity streams the payment of dividends to its members in such a way that members to whom distributions are streamed must derive a greater benefit from franking credits than another member entity. The term

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'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.

108. Under the scheme, you received imputation benefits when the Initial Dividend and the Further Dividend were each paid. The Initial Dividend and the Further Dividend were paid equally to all CHL shareholders and was fully franked regardless of the tax profiles of CHL's shareholders. Accordingly, it cannot be said that CHL selectively directed the flow of franked dividends to those members who obtained the most benefit from the franking credits.

109. As the conditions in subsection 204-30(1) are 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 CHL shareholder in relation to the Initial Dividend or the Further Dividend.

Disposal of Crestone Holdings Limited shares – capital gains tax consequences

CGT event A1

110. 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)).

111. The acquisition of shares in CHL under a court approved Scheme of Arrangement does not involve a disposal of shares under a contract.

112. Therefore, CGT event A1 happened when there was a change of ownership in your CHL shares to LGT under the SID (subsections 104-10(1) and (2)). The change of ownership occurred on the Scheme Implementation Date (12 May 2022) (paragraph 104-10(3)(b)).

Capital proceeds

113. The capital proceeds received by you 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)).

114. For the purpose of section 116-20, an earnout right is not an entitlement to money, but 'other property... received' by the seller in respect of the disposal of the original asset. Accordingly, the seller's capital proceeds from that event includes the market value of that right (worked out at the time of the CGT event).

115. Accordingly, your capital proceeds from CGT event A1 includes the market value of the Earnout Right, worked out at the time of the CGT event. The Earnout Right has been valued at \$0.67 per CHL share by an independent valuer engaged by CHL. The Commissioner has accepted the independent valuation of the market value of the Earnout Right.

116. 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.

117. The Initial Dividend and the Further Dividend were not paid in respect of the disposal of CHL shares under the Scheme of Arrangement. The Scheme of Arrangement

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was not conditional on the declaration of the Initial Dividend or the Final Dividend. The Initial Dividend and Further Dividend were not dependent on LGT or a third-party financing or facilitating payment of the Initial Dividend or Final Dividend, or LGT or a third party being obliged to bring about the result that the Initial Dividend or the Further Dividend would be paid to existing shareholders.

118. The Commissioner considers that the Initial Dividend and the Further Dividend were not received in respect of the disposal of the CHL shares under the Scheme of Arrangement. Accordingly, the Initial Dividend and the Further Dividend do not form part of the capital proceeds in respect of CGT event A1 happening.

Capital gain or capital loss

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

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

121. The cost base and reduced cost base of the CHL share depends on your individual circumstances.

Discount capital gain

122. If you make a capital gain from the disposal of your CHL 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 CHL share on or before 11 May 2021 which was at least 12 months prior to CGT event A1 happening (subsection 115-25(1)).

Earnout Right

Look-through earnout rights

123. Division 118 (and its related provisions) sets out various exemptions for capital gains and losses, one of these being special rules relating to look-through earnout rights (Subdivision 118-I). A right will be a look-through earnout right if all the requirements in subsection 118-565(1) are satisfied.

124. As there was no CHL shareholder that held a greater than 10% interest in CHL, there was no CHL shareholder that was either a CGT concession stakeholder of CHL or had a small business participation percentage in CHL of at least 20% (paragraph 118-570(1)(c)). Accordingly, the CHL share was not an active asset of a CHL shareholder just before CGT event A1 happened to the CHL share, and the Earnout Right will not be a look-through earnout right under subsection 118-565(1). Accordingly, Subdivision 118-I will not apply to the Earnout Right.

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Assessability of the Earnout Right and Earnout Scheme Consideration

Ordinary income

125. Subsection 6-5(1) provides that an amount is included in assessable income if it is income according to ordinary concepts (ordinary income). However, as there is no definition of 'ordinary income' in income tax legislation it is necessary to apply principles developed by the courts to the facts of each case.

126. Whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient. In *GP International Pipecoaters Pty Ltd v Commissioner of Taxation (Cth)* [1990] HCA 25, the High Court stated:

To determine whether a receipt is of an income or of a capital nature, various factors may be relevant. Sometimes, the character of receipts will be revealed most clearly by their periodicity, regularity or recurrence; sometimes, by the character of a right or thing disposed of in exchange for the receipt; sometimes, by the scope of the transaction, venture or business in or by reason of which money is received and by the recipient's purpose in engaging in the transaction, venture or business.

127. Based on the circumstances of this case, neither the receipt of the Earnout Right nor the Earnout Scheme Consideration (if payable) are considered to result in an amount being assessable as ordinary income under section 6-5.

Profit-making undertaking or plan

128. Section 15-15 provides that your assessable income includes profit from the carrying on or carrying out of a profit-making undertaking or plan.

129. Based on the circumstances of this case, it is considered that section 15-15 does not apply to include an amount with respect to the receipt of the Earnout Right or the Earnout Scheme Consideration (if payable) in your assessable income.

Sections 26BB and 159GQ of the ITAA 1936

130. Sections 26BB and 159GQ of the ITAA 1936 deal with the taxation of 'traditional securities' and 'qualifying securities', respectively.

131. The terms 'traditional security' and 'qualifying security' are defined in subsection 26BB(1) of the ITAA 1936 and 159GP(1) of the ITAA 1936, respectively, with reference to the meaning of 'security' in subsection 159GP(1) of the ITAA 1936. Pursuant to subsection 159GP(1) of the ITAA 1936, 'security' means:

- (a) stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security;
- (b) a deposit with a bank or other financial institution;
- (c) a secured or unsecured loan; or
- (d) any other contract, whether or not in writing, under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

132. Based on the circumstances of this case, neither the Earnout Right nor the Earnout Scheme Consideration are considered to be securities as defined in subsection 159GP(1) of the ITAA 1936, and are therefore not traditional securities or qualifying securities. Accordingly, sections 26BB and 159GQ of the ITAA 1936 do not apply.

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Time of acquisition

133. An earnout right is property, and a CGT asset, in the hands of the seller. The seller acquires the earnout right when the seller becomes the owner of the right. This will occur at the time when the CGT event happens that gives rise to the capital proceeds that include the right (in other words, the time at which the disposal of the original asset takes place).

134. The Earnout Right is acquired, for the purposes of section 109-5, at the Scheme Implementation Date (12 May 2022). You become the owner of an enforceable right against LGT at this time.

Cost base of the Earnout Right

135. The first element of the cost base of an earnout right includes the market value of property given, or required to be given, in respect of its acquisition. The market value of property given is worked out as at the time of acquisition of the earnout right (paragraph 110-25(2)(b)).

136. If a CGT asset is sold for a combination of money and an earnout right, the first element of the cost base for the right is that part of the market value of the CGT asset (being property) sold that is reasonably attributable to the acquisition of the right (subsection 112-30(1)).

137. In this case, the amount that is reasonably attributable to the acquisition of the Earnout Right is equal to the market value of the Earnout Right at the Scheme Implementation Date. The first element of the cost base of the Earnout Right is therefore \$0.67 per CHL share.

CGT event C2

138. CGT event C2 happens when the ownership of an intangible asset, such as a right, ends by the asset being redeemed, cancelled, released, discharged, expiring, or being abandoned, surrendered or forfeited (subsection 104-25(1)).

139. CGT event C2 will happen when your ownership of the Earnout Right comes to an end, either by being satisfied by payment of the Earnout Scheme Consideration amount by LGT, if payable, or by expiring without any amounts becoming payable (whichever is applicable), in accordance with the terms of the SID.

140. The time of the CGT event is when the Earnout Scheme Consideration payment is made, or at the date the Earnout Right expires without any amounts becoming payable (subsection 104-25(2)).

Capital proceeds

141. The capital proceeds when CGT event C2 happens will be the amount of the Earnout Scheme Consideration payment received, if payable (paragraph 116-20(1)(a)). The market value substitution rule in subsection 116-30(2) does not apply.

142. Where the Earnout Right ends by expiry without any amounts becoming payable, there will be no capital proceeds from CGT event C2 happening. The market value substitution rule in subsection 116-30(1) also does not apply (subparagraph 116-30(3)(a)(i)).

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Capital gain or capital loss

143. You will make a capital gain from CGT event C2 happening to your Earnout Right if the capital proceeds from the event exceed the cost base of your Earnout Right (subsection 104-25(3)). The capital gain is the difference.

144. You will make a capital loss if the capital proceeds from CGT event C2 are less than the reduced cost base of your Earnout Right (subsection 104-25(4)). The capital loss is the difference.

Discount capital gain

145. If you make a capital gain when CGT event C2 happens to your Earnout Right, you may be 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 the Earnout Right at least 12 months prior to CGT event C2 happening (subsection 115-25(1)).

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References

Legislative references:

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- ITAA 1936 26BB(1)
- ITAA 1936 44(1)(a)(i)
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- ITAA 1997 207-145(1)(a)
- ITAA 1997 207-145(1)(e)
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- ITAA 1997 995-1(1)
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Cases relied on:

- GP International Pipecoaters Pty Ltd v Commissioner of Taxation [1990] HCA 25; 170 CLR 124; 64 ALJR 392; 90 ATC 4413; 21 ATR 1

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