

CR 2023/47 - Blackmores Limited - scheme of arrangement and special dividend



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Status: **legally binding**

Class Ruling

Blackmores Limited – scheme of arrangement and special dividend

❶ Relying on this Ruling

This publication 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 Special Dividend paid and the scheme of arrangement under which Kirin Health Science Australia Pty Ltd (KHSA) acquired 100% of the shares in Blackmores Limited (Blackmores) on 10 August 2023.
2. Details of this scheme are set out in paragraphs 34 to 57 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 were a Blackmores shareholder who:
 - held your Blackmores shares on 26 July 2023 (Record Date for Special Dividend) and 2 August 2023 (Scheme Record Date)
 - held your Blackmores shares on capital account – that is, your Blackmore 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
 - received the Special Dividend.

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5. This Ruling does not apply to you if you:
- acquired your Blackmores shares under an employee share plan
 - are a non-resident, and
 - you used your Blackmores shares in carrying on a business at or through a permanent establishment in Australia, or
 - your Blackmore share was covered by subsection 104-165(3) (table item 5 of section 855-15)
 - are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 34 to 57 of this Ruling, or
 - are subject to the investment manager regime in Subdivision 842-I in respect to your Blackmores 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 2023 to 30 June 2024.

Ruling

Special Dividend

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

Assessability of the Special Dividend, franking credits and tax offsets

Residents

9. If you are a resident of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), you are required to include the Special 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 credit 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 of the ITAA 1936.
11. 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 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 dividend flows indirectly through the trust to you, you include your share of the dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credit attached to the dividend, provided both you and the 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.

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14. You are specifically excluded from the operation of the refundable tax offset rules pursuant to section 67-25 if you are a:

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

15. Division 63 sets out the rules on how, and in what order, tax offsets are applied against an 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).

Non-resident shareholders

16. If you are a non-resident, the Special Dividend is not included in your assessable income (section 128D of the ITAA 1936) and you are not liable to withholding tax in respect of the dividend (paragraph 128B(3)(ga) of the ITAA 1936).

17. The franking credits attached to the Special Dividend are also not included 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. You will be a qualified person in relation to the Special Dividend if, during the period from 12 June 2023 to 1 August 2023 (inclusive), you held your Blackmores shares 'at risk' for a continuous period of at least 45 days¹ 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. This is because:

- The Special Dividend you received constitutes a 'related payment' for the purposes of former section 160APHN of the ITAA 1936 and therefore the secondary qualification period applies.
- The secondary qualification period is the period beginning 45 days before, and ending 45 days after, the day on which a share became ex-dividend (former section 160APHD of the ITAA 1936).
- The shares became ex-dividend on 27 July 2023, being the day after 26 July 2023 which was the last day on which acquisition by a person would entitle them to receive the Special Dividend (former subsection 160APHE(1) of the ITAA 1936).
- Any days you had a materially diminished risk of loss or opportunities for gain in respect of the shares are excluded (former subsection 160APHO(3)

¹ This does not include the day on which your Blackmores shares were acquired or the day of disposal.

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of the ITAA 1936). Under the Scheme of Arrangement, you no longer held your Blackmores shares at risk on the Scheme Record Date, being 2 August 2023 (when you became committed to dispose of your Blackmores shares to KHSA under the Scheme of Arrangement).

19. You will need to determine whether you satisfy the holding period rule having regard to your circumstances. This will require taking into account any positions entered into that have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of your Blackmores shares.

20. The small shareholder exception in former section 160APHT of the ITAA 1936 does not apply as the dividend is a 'related payment' for the purposes of paragraph 207-145(1)(a) and former section 160APHN of the ITAA 1936 (former subsection 160APHT(2) of the ITAA 1936).

21. This means a Blackmores shareholder who is an individual and who has total franking tax offsets which do not exceed \$5,000 for the 2023–24 income year must still satisfy the holding period rule in relation to the dividend.

Exempting and former exempting entity

22. Blackmores was not an exempting entity (section 208-20) but was a 'former exempting entity' (section 709-160) for the purposes of Division 208 when the Special Dividend was paid. However, as no exempting credits were allocated to the Special Dividend, Division 208 does not apply to the Specific Dividend.

23. This means Division 208 will not deny the gross-up of your assessable income by the amount of the franking credit attached to the dividend you received or deny the tax offset to which you are otherwise entitled under Division 207 at the time when the dividend was paid.

Section 177EA of the ITAA 1936

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

Section 204-30

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

Capital gains tax consequences

CGT event A1

26. CGT event A1 happened on 10 August 2023 (Scheme Implementation Date) when you disposed of each of your Blackmores shares to KHSA (section 104-10).

Capital proceeds

27. The Scheme Consideration of \$91.71 you received for each Blackmores share is your capital proceeds from CGT event A1 happening (subsection 116-20(1)).

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28. The capital proceeds do not include the Special Dividend.

Capital gain or capital loss

29. You made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of your Blackmores share exceed its cost base (subsection 104-10(4)). The capital gain is the difference.

30. You made a capital loss from CGT event A1 happening if the capital proceeds from the disposal of your Blackmores share is less than its reduced cost base (subsection 104-10(4)). The capital loss is the difference.

31. However, where you are taken to have acquired your Blackmores shares before 20 September 1985, this capital gain or capital loss is disregarded (subsection 104-10(5)).

Discount capital gain

32. If you made a capital gain from the disposal of your Blackmores share, you are entitled to treat the capital gain as a 'discount capital gain' provided you acquired, or are taken to have acquired, your Blackmores share on or before 9 August 2022 and the conditions in Division 115 are satisfied (subsection 115-25(1)).

Non-resident shareholders

33. If you were a non-resident shareholder just before CGT event A1 happened to your Blackmores shares on 10 August 2023, you disregard any capital gain or capital loss you made from CGT event A1 happening as your Blackmores shares were not taxable Australian property for the purposes of section 855-10.

Scheme

34. 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.

35. Other information referred to is the Scheme Implementation Deed released on the Australian Securities Exchange (ASX) on 27 April 2023 and the Scheme Booklet released on the ASX on 8 June 2023.

Background

Blackmores Limited

36. Blackmores is an Australian-resident company that was listed on the ASX until the business day immediately following Scheme Implementation Date.

37. Blackmores is the head company of an income tax consolidated group under Part 3-90 and is a leading healthcare company that is primarily engaged in the development, marketing and sales of natural health products for humans and animals, including vitamins and herbal and mineral nutritional supplements, with operations across Australia, New Zealand, South East Asia, China and India.

38. As of 10 August 2023, Blackmores had 19,450,635 ordinary shares on issue and no other classes of shares on issue.

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39. Less than 50% of the sum of the market values of Blackmores' total assets constitute taxable Australian real property.
40. Blackmores acquired Catalent Australia Holding Pty Ltd in October 2019 which prior to purchase was an exempting entity.

Kirin Health Science Australia Pty Ltd

41. KHSA is an Australian special purpose company, which was incorporated to acquire and hold Blackmores shares.
42. KHSA is wholly-owned by Kirin Holdings Australia Pty Ltd (KHA) which is also an Australian special purpose company.
43. KHA is wholly-owned by Kirin Holdings Company Limited (Kirin).
44. Kirin is a Japanese company listed on the Tokyo, Nagoya, Sapporo and Fukuoka Stock Exchanges.
45. The Kirin Group (Kirin and subsidiaries) is engaged in the integrated beverage, pharmaceutical and health science businesses.

Scheme of arrangement

46. On 27 April 2023, Blackmores and Kirin announced that they had executed a Scheme Implementation Deed under which Kirin agreed to acquire 100% of the ordinary shares in Blackmores by way of a scheme of arrangement under Part 5.1 of the *Corporations Act 2001*, subject to shareholder and court approval.
47. Under the terms of the Scheme Implementation Deed, as consideration for the disposal of their Blackmores shares, Scheme Shareholders received Scheme Cash Consideration of \$95.00 per share reduced to the extent any Special Dividends were paid.

Shareholder meeting and implementation

48. At the shareholder meeting on 18 July 2023, Blackmores' shareholders approved the scheme of arrangement.
49. On 20 July 2023, the Federal Court of Australia approved the scheme of arrangement and provided orders pursuant to Part 5.1 of the *Corporations Act 2001*.
50. Entitlement to the Scheme Cash Consideration for Blackmores shareholders occurred on the Scheme Record Date (2 August 2023).
51. The transfer of shares to KHSA under the scheme of arrangement occurred on the Scheme Implementation Date of 10 August 2023.
52. This resulted in Blackmores becoming a wholly-owned subsidiary of KHSA and the shares in Blackmores were then delisted from the ASX.

Special Dividend

53. On 1 August 2023, the Blackmores Board paid a fully franked Special Dividend of \$3.29 per share. Entitlements to the Special Dividend was determined on 26 July 2023 (Special Dividend Record Date). The payment of the Special Dividend reduced the Scheme Consideration to \$91.71 per share.

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54. The Special Dividend was:

- sourced from current year profits and retained earnings
- funded from a combination of Blackmores' cash balance, repayments of intercompany balances from subsidiaries in the Blackmores Group, dividends from Blackmores' wholly-owned subsidiaries and external third-party debt
- not funded, directly or indirectly, by the Kirin Group or associates
- compliant with the requirements of *Corporations Act 2001* including section 254T, and
- fully franked.

55. No proceeds from an equity issue by the Kirin Group or any of its associates has been or will be applied towards the repayment of any portion of the external third-party debt that was entered into to pay the Special Dividend.

56. Neither the Kirin Group nor any of its associates had any influence or control over the determination and payment of the Special Dividend. The decision to pay the Special Dividend was entirely at the discretion of the Blackmores Board.

Key dates

57. The following table is a summary of the key dates for the scheme of arrangement and the Special Dividend:

Table 1: Summary of key dates

Date	Event
26 April 2023	Scheme Implementation Deed executed
8 June 2023	First Court Date
18 July 2023	Scheme Meeting
20 July 2023	Court hearing to approve the Scheme (Second Court Date)
21 July 2023	Effective Date
26 July 2023	Special Dividend Record Date
1 August 2023	Special Dividend Payment Date
2 August 2023	Scheme Record Date
10 August 2023	Scheme Implementation Date

Commissioner of Taxation
30 August 2023

Status: **not legally binding**

References

Legislative references:

- ITAA 1936 6(1)
 - ITAA 1936 44(1)(a)(i)
 - ITAA 1936 128B(3)(ga)
 - ITAA 1936 128D
 - ITAA 1936 Pt IIIAA Div 1A
 - ITAA 1936 160APHD
 - ITAA 1936 160APHE(1)
 - ITAA 1936 160APHM
 - ITAA 1936 160APHN
 - ITAA 1936 160APHO(3)
 - ITAA 1936 160APHT
 - ITAA 1936 160APHT(2)
 - ITAA 1936 160APHU(1)
 - ITAA 1936 177EA
 - ITAA 1936 177EA(5)(b)
 - ITAA 1997 Div 63
 - ITAA 1997 63-10
 - ITAA 1997 Div 67
 - ITAA 1997 67-25
 - ITAA 1997 67-25(1A)
 - ITAA 1997 67-25(1B)
 - ITAA 1997 67-25(1C)
 - ITAA 1997 67-25(1D)
 - ITAA 1997 67-25(1DA)
 - ITAA 1997 104-10
 - ITAA 1997 104-10(4)
 - ITAA 1997 104-10(5)
 - ITAA 1997 104-165(3)
 - ITAA 1997 Div 115
 - ITAA 1997 115-25(1)
 - ITAA 1997 116-20(1)
 - ITAA 1997 202-40
 - ITAA 1997 204-30
 - ITAA 1997 204-30(3)(c)
 - ITAA 1997 Div 207
 - ITAA 1997 207-20
 - ITAA 1997 207-35(1)
 - ITAA 1997 207-45
 - ITAA 1997 207-70
 - ITAA 1997 207-75
 - ITAA 1997 207-145(1)(a)
 - ITAA 1997 Div 208
 - ITAA 1997 208-20
 - ITAA 1997 Div 230
 - ITAA 1997 709-160
 - ITAA 1997 Subdiv 842-I
 - ITAA 1997 855-10
 - ITAA 1997 855-15
 - ITAA 1997 977-50
 - ITAA 1997 995-1(1)
 - Corporations Act 2001 Pt 5.1
 - Corporations Act 2001 254T
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ATO references

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