



CR 2003/78 - Income tax: Jupiters / TABCORP merger - Special Dividend

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Class Ruling

Income tax: Jupiters / TABCORP merger – Special Dividend

Contents	Para
What this Class Ruling is about	1
Date of effect	8
Withdrawal	9
Arrangement	10
Ruling	15
Explanation	19
Detailed contents list	28

Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a ‘public ruling’ and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law(s)’ identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax laws dealt with in this Ruling are:

- Section 6 of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Section 177EA of the ITAA 1936;
- Section 177E of the ITAA 1936; and
- Section 204-30 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of persons

3. The class of persons to which this Ruling applies is the holders of ordinary shares in Jupiters Limited (Jupiters) on the record date for the Special Dividend.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 10 to 14.

6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- (b) this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 August 2003.

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 31 December 2003. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to the withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Application for Class Ruling dated 21 May 2003;
- A Merger Implementation Agreement (MIA) dated 12 June 2003;
- Correspondence from Ernst and Young dated 17 April 2003 and 31 July 2003;
- Correspondence from Jupiters and TABCORP dated 11 August 2003; and
- Correspondence from Ernst and Young dated 22 August 2003.

11. Jupiters and TABCORP (a widely held public company listed on the Australian Stock Exchange) have agreed to pursue a merger. The terms governing the implementation of the merger have been set out in a Merger Implementation Agreement (MIA) and furnished to the ATO.

12. The merger is to be achieved via two separate schemes of arrangement under Part 5.1 of the *Corporations Act* between Jupiters and its shareholders.

13. The schemes are as follows;

- a) Ordinary Share Scheme:
- All the ordinary shareholders of Jupiters will be paid a fully franked Special Dividend of \$0.75 per share, debited solely against Jupiters' current year earnings and prior year retained earnings accounts;
 - All the holders of ordinary shares in Jupiters will also be paid a further fully franked dividend (Centrebet Dividend) representing the distribution of proceeds from the sale of Centrebet assets, where the sale is completed and a favourable tax ruling has been obtained by 30 September 2003. This dividend will also be debited solely against Jupiters' current year

earnings and prior year retained earnings accounts;

- Under this scheme, the holders of ordinary shares in Jupiters will be offered a combination of cash and scrip in TABCORP in exchange for the transfer of their holdings to a subsidiary of TABCORP; and
- TABCORP will subscribe for additional shares in Jupiters. However, under no circumstances will TABCORP or a related entity of TABCORP hold an interest in Jupiters that will entitle it to either the Special Dividend or the Centrebet Dividend.

b) RPS Scheme:

- The current holders of reset preference shares in Jupiters will be entitled to \$105.26 cash plus accrued preference share dividend as compensation for the transfer of their RPSs to TABCORP.

14. Jupiters has also entered into individual Option Cancellation Deeds with their option holders, whereby their options will be cancelled in return for the payment of a cancellation fee.

Ruling

15. The 'special dividend' would constitute a dividend for the purposes of the ITAA 1936.

16. The Commissioner will not seek to make a determination pursuant to Section 177EA (5)(b) of the ITAA 1936 (franking credit benefit rules) in respect of the payment of the Special Dividend or any part of it because of the scheme for the disposition of Jupiters ordinary shares under the ordinary scheme.

17. Section 177E of the ITAA 1936 does not apply in respect of the special dividend or any part of it as a result of the ordinary scheme.

18. The Commissioner will not seek to make any determination pursuant to Section 204-30(3)(c) of the ITAA 1997 (franking credit streaming rules) in respect of the payment of the Special Dividend or any part of it by Jupiters to the Jupiters ordinary shareholders.

Note: See Class Ruling CR 2003/77 for the Commissioner's opinion on the Centrebet Dividend component of the arrangement.

Explanation

Section 6 of the ITAA 1936

19. Section 6 of the ITAA 1936, defines a dividend to include:
- (a) any distribution made by a company to any of its shareholders, whether in money or other property; and
 - (b) any amount credited by a company to any of its shareholders as shareholders.

The special dividend satisfies this part of the definition.

20. The definition goes on to state that a distribution as discussed above would **not** constitute a dividend in certain circumstances, including if:

- (d) moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company.

The special dividend proposed by Jupiters is to be sourced in its current and retained earnings. Consequently, it will be debited against current and retained earnings rather than the share capital account.

Section 177EA of the ITAA 1936

21. Section 177EA is primarily directed at schemes involving franking credit trading. Its introduction was designed to secure the integrity of one of the underlying principles of the dividend imputation system. Namely, to ensure that the benefits of imputation are restricted to the true economic owners of the shares and only to the extent that those shareholders are able to use those franking credits themselves.

22. The conditions that must be satisfied for section 177EA to operate are set out in sub-section 177EA (3). Broadly they are as follows:

- (a) There must be a Scheme for the disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) Either:

- (i) a frankable distribution has been paid, or is payable, or is expected to be payable to a person in respect of the membership interests; or
- (ii) a frankable distribution has flowed indirectly, or flows indirectly, or is expected to flow indirectly to a person in respect of the interest in membership interests as the case may be; and
- (c) The distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) Except for this section, the person (referred to as the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) Having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

23. In this case the taxpayer to whom the membership interests are transferred under the ordinary scheme (TABCORP's subsidiary) does not obtain an imputation benefit. Having considered the relevant circumstances associated with the scheme involving the disposition of Jupiters ordinary shares by its ordinary shareholders to TABCORP, the requisite purpose is not present. However, schemes for the disposition of Jupiters' ordinary shares outside of the ordinary scheme (for example, the transfer of a non-resident's shares to a resident just before payment of the special dividend) could, depending on the circumstances, attract section 177EA.

Section 177E of the ITAA 1936

24. Section 177E deals with situations where any property of a company is disposed of as a result of a scheme entered into after 27 May 1981, whether in Australia or outside Australia;

- by way of or in the nature of dividend stripping; or
- having substantially the effect of a scheme by way of or in the nature of a dividend stripping.

25. Having regard to the purpose of the ordinary scheme and the relevant circumstances (including the fact that the dividend is paid to the ordinary shareholders prior to transfer of the shares), section 177E

does not apply in relation to the special dividend as a result of the ordinary scheme.

Sub-section 204-30(3)(c) of the ITAA 1997

26. Section 204-30 is a general anti streaming measure. It is designed to curb the unintended use of franking credits through streaming arrangements. It permits the Commissioner to make determinations where an entity streams one or more distribution whether in a single franking period or in a number of franking periods, in such a manner whereby:

- an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of a distribution or distributions;
- that member derives a 'greater benefit from franking credits' than another member of the entity; and
- the other member of the entity receives a lesser imputation benefit, or receives no imputation benefits, whether or not the other member receives other benefits.

27. The relevant circumstances surrounding payment of the special dividend indicate that there is no 'streaming'. The extent of franking credits to be attached to the distribution will not be determined in any manner that may be associated with the recipient's ability to utilise the franking credits. Franking of the special dividend is to occur at Jupiters' benchmark franking percentage of 100% regardless of the member's ability to utilise the franking credits.

Detailed contents list

28. Below is a detailed contents list for this Class Ruling:

	Paragraph
What this Class Ruling is about	1
Tax law(s)	2
Class of persons	3
Qualifications	4
Date of effect	8
Withdrawal	9
Arrangement	10
Ruling	15

CR 2003/78

Explanation	19
Section 6 of the ITAA 1936	19
Section 177EA of the ITAA 1936	21
Section 177E of the ITAA 1936	24
Sub-section 204-30(3)(c) of the ITAA 1997	26
Detailed contents list	28

Commissioner of Taxation

3 September 2003

<i>Previous draft:</i>	- ITAA 1936 177EA
Not previously issued as a draft	- ITAA 1936 177EA(3)
	- ITAA 1936 177EA(5)(b)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 204-30
CR 2001/1; TR 92/1; TR 97/16	- ITAA 1997 204-30(3)(c)
	- Copyright Act 1968
<i>Legislative references:</i>	- TAA 1953 Part IVAAA
- ITAA 1936 6	
- ITAA 1936 177E	

ATO references

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