



***CR 2009/14 - Income tax: Goldman Sachs JBWere
Capital Markets Limited; Goldman Sachs JBWere
Group Holdings Pty Limited - Goldman Sachs
JBWere Redeemable Capital Securities***

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Class Ruling

Income tax: Goldman Sachs JBWere Capital Markets Limited; Goldman Sachs JBWere Group Holdings Pty Limited – Goldman Sachs JBWere Redeemable Capital Securities

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What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 26BB of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 44 of the ITAA 1936;
- section 45 of the ITAA 1936;
- section 45A of the ITAA 1936;

- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 70B of the ITAA 1936;
- section 159GP of the ITAA 1936;
- Division 1A of former Part IIIAA of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 202-40 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 207-70 of the ITAA 1997;
- section 207-145 of the ITAA 1997;
- section 207-155 of the ITAA 1997; and
- section 974-120 of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are the selected Australian resident institutional and wholesale clients (hereafter referred to as 'RCS holders') who subscribe for and are allotted Goldman Sachs JBWere Redeemable Capital Securities (RCS) by Goldman Sachs JBWere Capital Markets Limited (GSJBWCM).

4. The class of entities to which this Ruling applies does not include investors who acquire the RCS otherwise than by subscription.

Qualifications

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 16 of this Ruling.

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

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

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Date of effect

8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on and incorporates the following information provided by the applicant:

- Letter dated 6 July 2007 from Ernst & Young in relation to a request for a Class Ruling enclosing:
 - Summary of key facts and income tax issues;
- Draft RCS Trust Deed dated 15 October 2007 in relation to the issue of the RCS.
- Further information received from Ernst & Young on 27 July 2007, 10 August 2007, 2 October 2007, 10 October 2007, 15 October 2007, 9 November 2007, 28 November 2007 and 29 September 2008.
- Letter dated 16 April 2010 from Ernst & Young in relation to a request for an addendum to CR 2009/14.
- A draft Private Placement Memorandum of November 2008.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

10. Goldman Sachs JBWere Group Holdings Pty Limited (GSJBWGH) is an Australian resident company that conducts an investment banking business, primarily in Australia and New Zealand. GSJBWGH is owned by Australian resident and non-resident shareholders. GSJBWGH is the head company of the tax consolidated group of which GSJBWCM is a subsidiary member. GSJBWCM will issue the RCS to a limited number of sophisticated and professional investors (Wholesale investors).

10A. Goldman Sachs JBWere (GSJBW) is part of the GSJBWGH tax consolidated group. The franking account balance of GSJBW has been transferred to GSJBWGH.

11. The RCS are, in legal form, a debt instrument. The RCS have a set face value and are issued for a period of 20 and one-half years, after which the RCS will mature.

12. Under the terms of issue of the RCS, as set out in the draft PPM of November 2008, Distributions under the RCS are fixed for the first five and one-half years, after which the rate at which Distributions are calculated can be reset. The payment of Distributions during this time is subject to the solvency of GSJBWCM. The payment of Distributions after year five and one-half is at the discretion of the Directors of GSJBWCM. GSJBWCM also has a discretion to make payments of Optional Distributions. However, in certain circumstances GSJBWCM cannot declare dividends or return capital on its ordinary shares.

13. Under the terms of issue an RCS holder may, at the end of twelve and one-half years, request that the Issuer redeem, for the Redemption Amount, all of that holder's RCS on any Distribution Payment Date.

14. GSJBWGH advises that it expects to fully frank all frankable distributions made by it. GSJBWGH advises that it intends to continue paying fully franked dividends to all of its shareholders in the foreseeable future.

15. GSJBWGH advises that the RCS will satisfy the definition of APRA Tier 2 capital.

16. GSJBWGH advises that the proceeds from the issue of the RCS will be used in the ordinary business operations of the New Zealand branch of GSJBWGH and any surplus will be used to lend to GSJBWGH for its Australian operations on an arm's length basis on commercial terms.

Assumptions

17. This Ruling is made on the basis that:

- (a) To the extent that Distributions paid on the RCS are non-share dividends, the Distributions are expected to be fully franked;

- (b) Immediately before the payment of a non-share dividend, GSJBWGH and/or GSJBWCM will have available frankable profits to pay the non-share dividend at least equal to the amount of the franked distribution;
- (c) A Distribution or Optional Distribution under the RCS will not be debited to GSJBWGH's and/or GSJBWCM's non-share capital account and/or share capital account;
- (d) The terms and conditions under which the RCS were originally issued will not be altered in any material way during the period to which this Ruling applies;
- (e) GSJBWCM will pay at least one Distribution due in the first five and one-half years of the RCS before the Redemption Date of the RCS;
- (f) The RCS holder does not hold the RCS as trading stock;
- (g) RCS holders will not dispose of their RCS before a period of at least 90 days (excluding the date of acquisition and disposal) beginning the day after the allotment of the RCS; and
- (h) Throughout the period to which this Ruling applies, the material supplied to the Commissioner, and taken into account in determining the application of the taxation provisions discussed in this Ruling, remain an accurate description of all of the activities of GSJBWGH, GSJBWCM and any other members of the group that are a material or relevant consideration in respect of any of those taxation provisions.

Ruling

Each RCS is not a 'qualifying security'

18. Each RCS will not be a qualifying security as defined in subsection 159GP(1).

Each RCS will be a 'traditional security'

19. For RCS holders who do not hold the RCS as trading stock, each RCS will be a traditional security as defined in section 26BB.

Cost of the RCS

20. For the purposes of calculating any gain or loss under sections 26BB or 70B, the cost to an RCS holder of acquiring their RCS at the time of initial issue, will be the face value of the RCS (that is \$10,000) plus any incidental costs incurred in relation to the subscription for the RCS.

Distributions and Optional Distributions paid to the RCS holders on the RCS are non-share dividends and may be franked

21. On the basis of the information provided, and having regard to the assumptions and qualifications set out in this Ruling:

- (a) Distributions and Optional Distributions on the RCS made by the Issuer to RCS holders will constitute non-share dividends pursuant to section 974-120 of the ITAA 1997, provided that Distributions are not debited to GSJBWGH's and/or GSJBWCM's non-share capital account and/or share capital account; and
- (b) The non-share dividend is a frankable distribution pursuant to subsection 202-40(2) of the ITAA 1997.

RCS holders include the Distributions, Optional Distributions and franking credits in their assessable income

22. Each Distribution and Optional Distribution made in respect of each RCS will be included in the assessable income of a RCS holder under subparagraph 44(1)(a)(ii).

23. An amount attributable to the RCS holder's share of the franking credit on the franked distributions will also be included in the RCS holder's assessable income under subsection 207-20 of the ITAA 1997.

Tax offset

24. Where franked Distributions are paid to RCS holders and the whole or part of the franked Distributions are included in their assessable income along with an amount equal to their share of the franking credits attached to the franked Distributions then, pursuant to subsection 207-20(2) of the ITAA 1997, the RCS holder is entitled to a tax offset equal to the RCS holder's share of the franking credit attached to the franked Distribution.

25. A non-resident RCS holder is not required to include (or gross-up) the amount of the franking credit in their assessable income and is not entitled to a tax offset; paragraphs 207-70(a) and (b) of the ITAA 1997.

Application of imputation system anti-manipulation provisions

26. Each RCS holder will be taken to be a 'qualified person' for the purposes of paragraph 207-145(1)(a) of the ITAA 1997 and Division 1A of former Part IIIA of the ITAA 1936, in respect of a franked Distribution or Optional Distribution made by the Issuer.

27. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or part, of the imputation benefits received by the RCS holders.

28. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by the RCS holders.

29. Section 207-155 of the ITAA 1997 will not apply to treat a Distribution or Optional Distribution as if it has been made as part of a dividend stripping operation.

30. Section 207-145 of the ITAA 1997 will not cancel the effect of the franking credit gross-up and tax offset rules for RCS holders.

Application of sections 45, 45A or 45B

31. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) that section 45C applies in respect of the issue of the RCS to the RCS holders or the payment of the Redemption Amount to the RCS holders in respect of the RCS.

Commissioner of Taxation

11 March 2009

Appendix 1 – Explanation

① *This Appendix 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.*

Each RCS is not a 'qualifying security'

32. Division 16E applies to securities with certain characteristics called 'qualifying securities'. A qualifying security is defined under subsection 159GP(1) as a security issued after 16 December 1984 for a period that is reasonably likely to exceed 12 months, under terms whereby it is reasonably likely that the security will produce receipts (other than of periodic interest) which are in excess of the issue price of the security.

33. A 'security' is defined in subsection 159GP(1) as:

- (a) Stock, bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security;
- (b) A deposit with a bank, building society 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.

34. Each RCS is in the form of a note akin to a debenture and is not a share. Accordingly, the RCS will satisfy paragraph (a) of the definition of 'security' on the basis that it includes 'other securities' similar to those foregoing in that paragraph.

35. However, the RCS will not satisfy the definition of 'qualifying security' on the basis that the RCS do not have an 'eligible return' as required under paragraph (e) of the definition in subsection 159GP(1). An 'eligible return' is defined in subsection 159GP(3) as follows:

For the purposes of this Division, there shall be taken to be an eligible return in relation to a security if at the time when the security was issued it is reasonably likely, by reason that the security was issued at a discount, bears deferred interest or is capital indexed or for any other reason, having regard to the terms of the security, for the sum of all payments (other than periodic interest payments) under the security to exceed the issue price of the security, and the amount of the eligible return is the amount of the excess.

36. 'Periodic interest payments' are further defined in subsection 159GP(6) as an amount of interest payable under a security where the period in respect of which interest is expressed to be payable and the time at which the interest is payable is less than or equal to one year. A payment that is economically equivalent to interest, but which is not interest cannot be periodic interest; refer to paragraph 13 of Taxation Ruling TR 96/3 Income tax: 'periodic interest' in Division 16E of the *Income Tax Assessment Act 1936*. In the first five and one-half years of the term of the RCS, the return on the RCS constitutes periodic interest because the Distributions are an amount of interest payable on a legal form debt instrument. Accordingly, the Distributions made on the RCS in the first five and one-half years will constitute periodic interest and will, accordingly, be disregarded in determining whether the RCS have an 'eligible return'.

37. From year five and one-half the payment of Distributions and/or Optional Distributions is at the discretion of the Directors of GSJBWCM. Therefore it cannot be said that it is reasonably likely that the RCS will provide an eligible return from year five and one-half as the only amount that it is reasonably likely the RCS holders will receive, at either Redemption or Maturity, is the face value of the RCS.

38. Therefore the only payment (other than periodic interest payments) that it is reasonably likely that the holder of the RCS will receive at the time of Issue is the Redemption Amount of the RCS to be received at the time of Redemption or Maturity of the RCS. It is not expected that the Redemption Amount would be greater than the original issue price of the RCS.

39. Accordingly, the RCS do not have an eligible return. As a result, the RCS fail paragraph (e) of the definition of 'qualifying security' and will therefore not constitute qualifying securities.

Each RCS will be a 'traditional security'

40. A 'traditional security' is defined in subsection 26BB(1) as a security that is held by the taxpayer that was acquired by the taxpayer after 10 May 1989 and does not have an eligible return, is not a prescribed security within section 26C and is not trading stock of the taxpayer.

41. The RCS will constitute traditional securities because they satisfy the requirements of the definition, specifically they are a security that does not have an eligible return. However, the RCS will only constitute traditional securities for those RCS holders who do not hold the RCS as trading stock.

Cost of the RCS

42. A gain made on the disposal or redemption of a traditional security is included in a RCS holder's assessable income of the year of income in which the disposal or redemption takes place under subsection 26BB(2). Subsection 70B(2) provides that a loss on disposal or redemption of a traditional security may be an allowable deduction, subject to the application of subsection 70B(4), to the RCS holder of the year of income in which the disposal or redemption takes place.

43. The cost of an RCS to a RCS holder, for the purposes of determining any gain or loss pursuant to sections 26BB or 70B, is the consideration for the acquisition of the RCS plus any relevant or incidental costs associated with the acquisition/subscription for the RCS; refer to Taxation Ruling TR 96/14 Income tax: traditional securities.

Distributions and Optional Distributions paid to the RCS holders on the RCS are non-share dividends and may be franked

44. The RCS are non-share equity interests pursuant to the definition of that term in subsection 995-1(1) of the ITAA 1997.

45. The Distributions and Optional Distributions on the RCS by GSJBWCM will be non-share distributions under section 974-115 of the ITAA 1997. Provided that the Distributions and Optional Distributions are not debited to GSJBWGH's and/or GSJBWCM's non-share capital account and/or share capital account, the Distributions and Optional Distributions will constitute a non-share dividend pursuant to section 974-120 of the ITAA 1997.

46. Subsection 202-40(2) of the ITAA 1997 provides that a non-share dividend is a frankable distribution to the extent that it is not made unfrankable under section 202-45 of the ITAA 1997. Paragraph 202-45(f) states that distributions will be unfrankable if section 215-15 of the ITAA 1997 applies. Section 215-15 states that a non-share dividend will be unfrankable where a corporate tax entity pays a non-share dividend and immediately before the payment, the amount of the available profits of the entity is nil, or less than nil. Under the terms of the RCS, a Distribution cannot be paid in the first 5 and one-half years of the term of the RCS if the Issuer is insolvent at the time of payment or the payment would cause the Issuer to become insolvent. After the first 5 and one-half years, payments of Distributions are at the discretion of the Issuer.

47. Where GSJBWGH and/or GSJBWCM frank a non-share dividend paid on the RCS to a RCS holder, in accordance with section 202-5 of the ITAA 1997, the non-share dividend will be a franked distribution.

RCS holders include the Distributions, Optional Distributions and franking credits in their assessable income

48. Paragraph 43B(1)(b) of the ITAA 1936 provides that Subdivision D of Division 2 of Part III of the ITAA 1936 (which includes section 44) applies to an equity holder in the same way as it applies to a shareholder. An 'equity holder' is an entity that holds an equity interest pursuant to the definition in subsection 995-1(1) of the ITAA 1997. As the RCS satisfy the equity test in subsection 974-75(1) of the ITAA 1997 they are an equity interest. Therefore each RCS holder is an equity holder.

49. Accordingly under paragraph 44(1)(a)(ii) each Distribution and Optional Distribution made in respect of each RCS will be included in the assessable income of a RCS holder as a non-share dividend paid to the equity interest holder by the Issuer.

50. RCS holders will have an amount of assessable income for an income year that is attributable to the whole or part of the franked distributions received in that year. Therefore, under subsection 207-20 of the ITAA 1997, RCS holders will include in their assessable income (or gross-up) so much of the franking credit as is equal to their share of the franking credits on the franked distributions.

Tax offset

51. GSJBWGH intends to fully frank the relevant Distributions. Subsection 207-20(2) of the ITAA 1997 states that an entity that includes the amount of the franking credit on a franked distribution in its assessable income is entitled to a tax offset for the income year in which the distribution is made, equal to the amount of the franking credit on the distribution.

52. Where franked Distributions are paid to RCS holders and the whole or part of the franked Distributions are included in their assessable income along with an amount equal to their share of the franking credits attached to the franked Distributions then, pursuant to subsection 207-20(2) of the ITAA 1997, the RCS holder is entitled to a tax offset equal to the RCS holder's share of the franking credit attached to the franked Distribution.

53. A similar set of rules to section 207-20 of the ITAA 1997 apply in respect of franked distributions that flow indirectly to an entity through a partnership or trust; refer to sections 207-35 and 207-45 of the ITAA 1997.

54. Paragraph 207-70(a) of the ITAA 1997 states that if a franked distribution is made to a non-resident, no amount of franking credits is required to be included in their assessable income and no tax offset is available, under paragraph 207-70(b) of the ITAA 1997, to a non-resident in respect of that franked distribution.

Gross-up and tax offset denied in certain circumstances

55. Pursuant to Subdivision 207-F of the ITAA 1997 the gross-up and tax offset can be denied in the circumstances set out in section 207-145 of the ITAA 1997. These circumstances include the following:

- (a) The RCS holder does not satisfy the definition of 'qualified person' in relation to each Distribution and Optional Distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 (the holding period rules);
- (b) The Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in respect of the Distribution to the RCS holder;
- (c) The Commissioner has made a determination under subsection 204-30(3) of the ITAA 1997 that no imputation benefit is to arise in respect of the Distribution to the RCS holder;
- (d) The Distribution is made as part of a dividend stripping operation.

Qualified person

56. The recipient of a franked distribution that is a non-share distribution must be a qualified person in relation to that non-share distribution. The rules in Division 1A of former Part IIIAA of the ITAA 1936 determine whether an entity is a qualified person for the purposes of paragraph 207-145(1)(a) of the ITAA 1997 (refer to Taxation Determination TD 2007/11). By virtue of section 160AOA of the ITAA 1936, the holding period rules apply to non-share equity interests, equity holders and non-share dividends in the same way as they apply to shares, shareholders and dividends respectively.

57. Division 1A of former Part IIIAA sets out the circumstances in which a taxpayer will be a qualified person in respect of dividends paid on shares. Under section 160APHO a taxpayer will be a qualified person if the relevant interest in the shares are held 'at risk' during the relevant 'qualification period' for a continuous period (not counting the day on which the taxpayer acquired the interest in the shares or, if the taxpayer has disposed of the interest in the shares, the day on which the disposal occurred) of not less than 90 days where the underlying shares are preference shares.

58. Section 160APHD defines preference shares to mean:

...shares in the company that:

- (a) have a fixed dividend entitlement or, having regard to the terms of their issue, are likely to have a fixed dividend return; or
- (b) having regard to the terms of their issue and other relevant matters, are less risky than ordinary shares in the company.

59. Having regard to the terms of issue of the RCS, the RCS are less risky than ordinary shares in GSJBWCM because GSJBWCM cannot declare dividends on the ordinary shares or return capital on the ordinary shares for a prescribed timeframe, unless the Directors of GSJBWCM exercise their discretion and resolve to make the Distribution or Optional Distribution on the RCS. Accordingly, for the purposes of the holding period rule, the RCS are preference shares and the holding period requirement is 90 days.

60. Section 160APHD defines 'qualification period' as either the 'primary qualification period' or the 'secondary qualification period'. The primary qualification period means the period beginning on the day after the day on which the taxpayer acquired the interests and, in the case of preference shares, ending on the 90th day after the day on which the interests became ex-dividend. The secondary qualification period means, if the shares are preference shares, the period beginning on the 90th day before and ending on the 90th day after the day on which the shares became ex-dividend.

61. Therefore, in determining whether the 90 day holding rule is satisfied, the following days are not counted:

- (a) The day on which the RCS were acquired (paragraph 160APHO(2)(a));
- (b) If the RCS holder has disposed of any of the RCS (including by way of redemption), the day of disposal (paragraph 160APHO(2)(a)); and
- (c) Any days on which the RCS holder had materially diminished risks of loss or opportunities for gain in respect of the RCS (that is, the securities are not held 'at-risk') (subsection 160APHO(3)). Positions taken by RCS holders that diminish the risks or opportunities by more than 70% are taken to be positions of materially diminished risks of loss or opportunities for gain (subsection 160APHM(2)).

62. Accordingly, provided that the RCS holder holds each RCS 'at risk' for at least 90 days during the relevant qualification period, then the RCS holder will satisfy the definition of a qualified person.

Section 177EA

63. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to certain types of schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares.

64. Specifically, subsection 177EA(3) provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity (paragraph 177EA(3)(a)); and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests (subparagraph 177EA(3)(b)(i)); 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 subparagraph 177EA(3)(b)(ii); and
- (c) the distribution was, or is expected to be, a franked distribution (paragraph 177EA(3)(c)); and
- (d) except for section 177EA, a person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution (paragraph 177EA(3)(d)); 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 a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit (paragraph 177EA(3)(e)).

65. Under subsection 177EA(14) a scheme for a disposition of membership interests is defined widely and includes the issuing of a membership interest or creating an interest in membership interests.

66. Paragraph 177EA(3)(a) of the ITAA 1936 refers to a disposition of membership interests in a *corporate* tax entity. Pursuant to section 960-115 of the ITAA 1997, a corporate tax entity is a company, a corporate limited partnership, a corporate unit trust or a public trading trust. Subsection 177EA(12) of the ITAA 1936 provides that section 177EA of the ITAA 1936 applies to non-share equity interests, equity holders and non-share dividends in the same way as it applies to membership interests, members and distributions. The RCS represent non-share equity interests, which for the purposes of section 177EA are to be treated in the same way as membership interests. Consequently, the issue of the RCS by the Issuer will represent a disposition of a membership interest.

67. In the present case the conditions of paragraphs 177EA(3)(a) to (d) are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that a person who entered into or carried out the scheme did so for a more than merely incidental purpose of enabling the RCS holders to obtain an imputation benefit. For present purposes the relevant scheme comprises all of the circumstances surrounding the issue of the RCS.

68. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17). The relevant circumstances listed there encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances some may not be present at any one time in any one scheme.

69. Having examined all the relevant material it is considered that, with two exceptions, the 'relevant circumstances' listed in subsection 177EA(17) do not provide any assistance in determining whether paragraph 177EA(3)(e) is satisfied. The two exceptions are paragraphs 177EA(17)(b) and 177EA(17)(c) which are considered in detail below.

Paragraph 177EA(17)(b)

70. Paragraph 177EA(17)(b) is concerned with whether a taxpayer derives a greater benefit from franking credits than other taxpayers who hold membership interests.

71. The note to subsection 177EA(19) of the ITAA 1936 explains that where a distribution is made directly to a taxpayer subsections 204-30(7), (8), (9) and (10) of the ITAA 1997 set out 'a list of circumstances in which the taxpayer will be treated as having derived a greater benefit from franking credits than another entity'. Paragraph 204-30(8)(a) of the ITAA 1997 states that a taxpayer derives a greater benefit from franking credits than another member of the entity if 'the other member is a foreign resident'.

72. As GSJBWCM is a subsidiary member of the GSJBWGH tax consolidated group, it is GSJBWGH's franking account from which franking credits on the Distributions will be allocated; refer to Subdivision 709-A of the ITAA 1997. GSJBWGH is partly owned by a non-resident company and other non-resident individuals and partly owned by Australian resident companies and individuals. GSJBWGH is more than 50% owned by Australian residents with the remaining ordinary shares being owned by non-resident entities. Consequently, RCS holders derive a greater benefit from franking credits than the non-resident entities.

73. This points towards a conclusion that either GSJBWGH and/or GSJBWCM will enter into or carry out the scheme for the more than incidental purpose of conferring an imputation benefit upon the RCS holders.

Paragraph 177EA(17)(c)

74. Paragraph 177EA(17)(c) is concerned with whether, apart from the scheme, GSJBWGH would have retained the franking credits or used franking credits to pay a franked distribution to another entity.

75. GSJBWGH states that it intends to continue to pay fully franked dividends to its ordinary shareholders and that it expects to have sufficient franking credits to pay such dividends and to fully frank the distributions to the RCS holders. A natural conclusion to be drawn from this statement is that some or all of those franking credits that would not have been used to frank the fully franked dividends to ordinary shareholders will be used to frank the distributions to RCS holders. To put it another way in the absence of the payment of the franked Distribution on the RCS, GSJBWGH would have retained the franking credits.

76. On the basis of the information provided it is reasonable to conclude that the issuing of the RCS will have the effect in the near to medium term of directing franking credits that would otherwise have been retained by GSJBWGH to resident taxpayers. A likely effect of issuing the RCS is a reduction in GSJBWGH's franking account balance. This supports a conclusion that GSJBWGH and/or GSJBWCM will enter into or carry out the scheme, for the more than incidental purpose of conferring an imputation benefit(s) upon the RCS holders.

77. After weighing this and all the other relevant circumstances it is considered that GSJBWGH and/or GSJBWCM will enter into or carry out the scheme for the more than incidental purpose of conferring an imputation benefit upon the RCS holders.

78. Where section 177EA applies the Commissioner may make a determination under either paragraph 177EA(5)(a) or paragraph 177EA(5)(b). In this case it is not considered appropriate to make a determination under paragraph 177EA(5)(b).

Section 204-30

79. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and

- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

80. Relevantly, if section 204-30 of the ITAA 1997 applies the Commissioner is vested with a discretion under subsection 204-30(3) to make a determination in writing either:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); or
- (b) that no imputation benefit is to arise in respect of any distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

81. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who do not participate in the RCS issue. The words 'derives a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8).

Paragraph 204-30(8)(a) states that a taxpayer derives a greater benefit from franking credits than another member of the entity if 'the other member is a foreign resident'. Consequently, RCS holders will receive a greater benefit as a significant portion of GSJBWGH's shareholding is held by a non-resident company.

82. However, on the basis of the information provided it is considered that the non-resident entities will not receive a lesser imputation benefit. GSJBWGH advises that GSJBWGH and GSJBWCM have, and will continue to, pay fully franked dividends (to the extent of franking credits in the franking account) to all its shareholders including the RCS holders and non-resident entities. Accordingly, it cannot be said that GSJBWGH and/or GSJBWCM are streaming the provision of franking credits to RCS holders away from non-resident entities.

83. As the conditions in subsection 204-30(1) of the ITAA 1997 for the provision to apply have not been met, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997.

Dividend stripping operation

84. Section 207-155 of the ITAA 1997 provides that a distribution is taken to be made as part of a dividend stripping operation if the making of the distribution arose out of or was made in the course of a scheme that was by way of, or in the nature of dividend stripping or has substantially the same effect of a scheme by way of, or in the nature of, dividend stripping.

85. Based on the information provided and having regard to the circumstances there is no evidence to suggest that the Distributions and/or Optional Distributions will arise as part of a dividend stripping operation.

Conclusion – imputation anti-manipulation provisions

86. Accordingly subsection 207-145(1) of the ITAA 1997 will not apply to cancel the effect of the franking credit gross-up and tax offset rules if a RCS holder holds each RCS 'at risk' for at least 90 days during the relevant qualification period for each Distribution or Optional Distribution.

Application of sections 45, 45A or 45B

Section 45

87. Sections 45, 45A and 45B are anti-avoidance provisions which, if they apply, either deem the value of shares or other capital benefits received by a shareholder to be an unfranked dividend paid by the company, out of profits of that company, to the shareholder or allow the Commissioner to make a determination to that effect.

88. Section 45 applies where a company streams the provision of shares and the payment of minimally franked dividends to its shareholders in such a way that the shares are received by some shareholders and minimally franked dividends are received by other shareholders. Minimally franked dividends are dividends which are franked to less than 10%.

89. Section 43B states that section 45 applies to a non-share equity interest, equity holder and non-share dividend in the same way as it applies to a share, shareholder and dividend respectively.

90. GSJBWGH has consistently paid fully franked dividends and intends to continue paying fully franked dividends to all its shareholders into the foreseeable future. The benchmark franking rule will effectively require GSJBWGH to frank the distributions on its ordinary shares to the same extent of franking of the Distributions on the RCS, which are expected to be fully franked.

91. Based on the information provided and having regard to the circumstances, section 45 will not apply to the issue of the RCS.

Section 45A

92. Section 45A is an anti-avoidance provision that applies in circumstances where capital benefits are streamed to certain shareholders who derive a greater benefit from the receipt of capital (the advantaged shareholders) and it is reasonable to assume that the other shareholders have received or will receive dividends (the disadvantaged shareholders).

93. Under section 43B the allotment of RCS to RCS holders is the provision of a capital benefit pursuant to paragraph 45A(3)(a).

94. Although a capital benefit is provided to RCS holders under the arrangement, the circumstances of the issue of the RCS indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly section 45A has no application to the issue of the RCS.

Section 45B

95. Section 45B applies where certain capital payments are provided to shareholders in substitution for dividends. In broad terms, section 45B applies where:

- (a) There is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- (b) Under the scheme, a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- (c) 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 a purpose (whether or not the dominant purpose but not including an incidental purpose), of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

96. Under section 43B the allotment of RCS to RCS holders is the provision of a capital benefit pursuant to paragraph 45B(5)(c), in satisfaction of paragraph 45B(2)(a). The issue of the RCS also meets the condition in paragraph 45B(2)(b).

97. Having regard to the relevant circumstances of the scheme as listed in subsection 45B(8) it cannot be concluded that GSJBWGH, GSJBWCM, the RCS holders or any other person entered into or carried out the issue of the RCS for the purpose of enabling the RCS holders to obtain a tax benefit. In particular, the view that section 45B would not apply is based on the conclusion that the RCS cannot be said to be attributable to the profits of the company, nor does the pattern of distributions indicate that the RCS are being issued in substitution for a dividend. The issue of a RCS merely reflects the capital invested by the RCS holder in GSJBWCM.

98. If the circumstances as disclosed in this Ruling remain unchanged the same conclusion would be reached in relation to the Redemption of the RCS. Accordingly, neither the issue of a RCS nor the Redemption of a RCS will trigger the application of section 45B.

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 96/3; TR 96/14; TR 2006/10;
TD 2007/11

Subject references:

- dividend stripping
- franked dividends
- non-share equity interest
- qualifying securities
- traditional securities

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and royalty income
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securities
Income Tax ~~ Entity specific matters ~~ franking of
dividends - company matters
Income Tax ~~ Tax integrity measures ~~ qualified
persons - franking credits