


# ***CR 2010/57 - Income tax: Healthscope Limited Scheme of Arrangement and Proposed Special Dividend***

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## Class Ruling

# Income tax: Healthscope Limited Scheme of Arrangement and Proposed Special Dividend

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### **1 This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) 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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 44(1) of the ITAA 1936;
- paragraph 128B(3)(ga) of the ITAA 1936;
- section 128D of the ITAA 1936;
- former section 160APHM of the ITAA 1936;
- former section 160APHN of the ITAA 1936;
- former section 160APHO of the ITAA 1936;
- paragraph 177EA(5)(b) of the ITAA 1936;

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- subsection 116-20(1) of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1936 unless otherwise indicated.

## Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Healthscope Limited (Healthscope), who hold Healthscope shares on capital account and:

- receive the Final Dividend and Special Dividend; or
- participate in the Healthscope Scheme of Arrangement (Scheme) under which Asia Pacific Healthcare Group Pty Ltd (APH) would acquire 100% of the shares in Healthscope, and who also receive the Final Dividend and Special Dividend; or
- participate in the Scheme under which APH would acquire 100% of the shares in Healthscope; and
- are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their Healthscope shares.

**Note:** Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply them.

## Qualifications

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

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 30 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

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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 a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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9. The following description of the Scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- the application for a Class Ruling dated 30 July 2010;
- the Scheme Implementation Agreement, together with its schedules, between Healthscope and APH, entered on 18 July 2010;
- the Scheme Explanatory Booklet dated 23 August 2010; and
- Healthscope results for year ended 30 June 2010 released on 19 August 2010.

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

### Healthscope Limited

10. Healthscope is a public company listed on the Australian Securities Exchange. It is incorporated and domiciled in Australia with trading operations in Australia, New Zealand and South East Asia.

11. The shareholders in Healthscope are a mix of individuals, companies, superannuation funds and other institutional investors.

12. At the date that the Scheme Implementation Agreement (Agreement) was entered into in excess of 95% of issued capital of Healthscope was held by resident Australian shareholders. The total issued capital of Healthscope as at the date of issue of the Scheme Explanatory Booklet was:

- 317,335,186 shares;
- 100,001 options; and
- 1,393,086 performance rights.

## **Asia Pacific Healthcare Group Pty Ltd**

13. APH is an Australian resident proprietary company established for the sole purpose of acquiring all the shares in Healthscope.

14. APH was formed by a consortium of private equity funds.

## **Proposed Healthscope Scheme**

15. On 14 May 2010 the Board of Healthscope announced that they had received an indicative, non-binding and confidential proposal to acquire all of the issued capital of Healthscope by a scheme of arrangement under the *Corporations Act 2001* (the Scheme).

16. On 18 July 2010 Healthscope and APH executed an Agreement under which Healthscope and APH agreed to implement the Scheme.

17. On 19 August 2010 Healthscope announced its results for the income year ended 30 June 2010. On this day the Board of Healthscope declared a fully franked Final Dividend of \$0.12 cash per Healthscope share. On 22 September 2010 the Board of Healthscope declared a fully franked Special Dividend of \$0.09 cash per Healthscope share should the Scheme proceed.

18. On 22 September 2010 the Healthscope shareholders approved the resolution to approve the Scheme. On 24 September 2010 Healthscope applied for orders of the Supreme Court of Victoria under section 411 of the *Corporations Act 2001* to give effect to the Scheme.

19. The Healthscope shareholders who hold Healthscope shares at 7.00 pm on the Scheme Record Date will be entitled to participate in the Scheme. The Scheme Record Date is 5 October 2010.

20. On the Scheme Implementation Date the Healthscope shares held by Healthscope shareholders will be transferred to APH. The Scheme Implementation Date is 12 October 2010.

21. The Scheme Explanatory Booklet sets out the total cash payment (including Scheme Consideration) that participating Healthscope shareholders will receive if the Scheme is approved, including details of the payment of the Final Dividend and proposed Special Dividend.

### **Final Dividend**

22. On 19 August 2010 the Board of Healthscope declared a Final Dividend of \$0.12 cash per Healthscope share for the income year ended 30 June 2010. The dividend represents the ordinary dividend payable to all Healthscope shareholders from profits of the income year ended 30 June 2010. The Final Dividend Record Date is 1 October 2010, and the ex-dividend Date is 2 October 2010.

23. The Final Dividend will be fully franked and debited against Healthscope's retained earnings account. The dividend will be funded from existing cash reserves and/or, drawing down existing loan facilities of Healthscope. Healthscope will not fund the Final Dividend through loans from APH, nor through loans from the private equity firms with an interest in APH.

24. The Final Dividend will be paid on 4 October 2010. The Scheme Consideration of \$6.26 cash per Healthscope share is reduced by the fully franked Final Dividend of \$0.12 per Healthscope share.

### **Special Dividend**

25. On 19 August 2010 the Board of Healthscope stated it intended to pay a Special Dividend of \$0.09 per Healthscope share for the income year ended 30 June 2010 should the Scheme proceed. The Special Dividend is to be fully franked.

26. At a Healthscope Board meeting on 22 September 2010 the Healthscope Board declared the Special Dividend subject to the approval of the Scheme. The Record Date for the Special Dividend is 7.00pm on 1 October 2010, and the ex-dividend Date is 2 October 2010.

27. In clause 1 of the Agreement, Healthscope and APH acknowledge and agree to the definition of the 'permitted additional dividend' (Special Dividend).

28. The Special Dividend will be debited against Healthscope's retained earnings, and no amount of the Special Dividend will be debited to Healthscope's share capital account. The Special Dividend will be paid on 4 October 2010.

29. The Scheme Consideration of \$6.26 cash per Healthscope share is reduced by the amount of the fully franked Special Dividend of \$0.09 cash per Healthscope share.

30. Healthscope shareholders will receive Scheme Consideration of \$6.05 cash per Healthscope share, plus the Final Dividend of \$0.12 cash per Healthscope share, plus the Special Dividend of \$0.09 cash per Healthscope share.

## Ruling

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### The Final Dividend

31. The Final Dividend of \$0.12 cash per share paid to Healthscope shareholders will constitute a 'dividend' as defined in subsection 6(1).

32. Healthscope shareholders who receive the fully franked Final Dividend and are residents of Australia as defined in subsection 6(1) are required to include the Final Dividend as assessable income under subparagraph 44(1)(a)(i).

33. Healthscope shareholders who receive the fully franked Final Dividend and are non-residents (other than those carrying on a business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) (section 128D) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga)).

34. Healthscope shareholders who receive the Final Dividend and are non-residents carrying on business in Australia at or through a permanent establishment in Australia, where the Final Dividend is attributable to the permanent establishment, are required to include the Final Dividend as assessable income under subparagraphs 44(1)(b)(i) and 44(1)(c)(i).

### The Special Dividend

35. The Special Dividend of \$0.09 cash per share paid to Healthscope shareholders will constitute a 'dividend' as defined in subsection 6(1).

36. Healthscope shareholders who receive the fully franked Special Dividend and are residents of Australia as defined in subsection 6(1) are required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i).

37. Healthscope shareholders who receive the fully franked Special Dividend and are non-residents (other than those carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) (section 128D) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga)).

38. Healthscope shareholders who receive the fully franked Special Dividend and are non-residents carrying on business in Australia at or through a permanent establishment in Australia, where the Special Dividend is attributable to the permanent establishment, are required to include the Special Dividend as assessable income under subparagraphs 44(1)(b)(i) and 44(1)(c)(i).

### **Gross up and Tax Offset**

39. Healthscope shareholders who receive the fully franked Final Dividend and who receive the fully franked Special Dividend directly:

- must include the amount of the franking credit attached to the Final Dividend and the Special Dividend in their assessable income; and
- will be entitled to a tax offset equal to the amount of the franking credit (tax offset);

under section 207-20 of the ITAA 1997, subject to being a qualified person.

### **Qualified Persons**

40. Having regard to the relevant circumstances of the Scheme, nothing in the Scheme documents indicate that a Healthscope shareholder has made, is under an obligation to make, or is likely to make a related payment in respect of the Final Dividend.

41. Accordingly, each Healthscope shareholder will need to hold their Healthscope shares at risk for a continuous period of at least 45 days in the primary qualification period in order to be a qualified person in respect to the Final Dividend.

42. Each Healthscope shareholder who has not previously satisfied the primary qualification period for the purpose of Division 1A of the former Part IIIAA (former Division 1A) will be considered to have satisfied the holding period rule under former section 160APHO and therefore be a qualified person in relation to the Final Dividend if:

- (a) the Healthscope shareholder acquired the Healthscope share, or interest in the share, on or before 20 August 2010; and
- (b) during the period when the Healthscope Share or interest in the share was held, the shareholder did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM) for a continuous period of at least 45 days.

43. Having regard to the relevant circumstances of the Scheme, the payment of the Special Dividend as part of the Healthscope Scheme will constitute a related payment for the purposes of former section 160APHN.

44. Accordingly, each Healthscope shareholder will need to hold their Healthscope shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person in respect to the Special Dividend.

45. Each Healthscope shareholder will be considered to have satisfied the holding period rule under former section 160APHO and therefore be a qualified person in relation to the Special Dividend if:

- (a) the Healthscope shareholder acquired the Healthscope share or interest in the share on or before 20 August 2010; and
- (b) during the period when the Healthscope Share or interest in the share was held, the shareholder did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM) for a continuous period of at least 45 days.

## **Capital gains tax**

### ***CGT event A1***

46. CGT event A1 will happen when participating Healthscope shareholders dispose of their Healthscope shares pursuant to the Scheme (subsections 104-10(1) and (2) of the ITAA 1997).

47. The time of the CGT event will be the Implementation Date of 12 October 2010 (subsection 104-10(3) of the ITAA 1997).

48. A participating Healthscope shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Healthscope share exceed its cost base. A participating Healthscope shareholder will make a capital loss if those proceeds are less than the Healthscope share's reduced cost base (subsection 104-10(4) of the ITAA 1997).

### ***Capital proceeds***

49. The capital proceeds received by a participating Healthscope shareholder is the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

50. The capital proceeds for a participating Healthscope shareholder will be \$6.05 cash per Healthscope share.

**Foreign resident shareholders**

51. A foreign resident Healthscope shareholder who is paid the Scheme Consideration disregards any capital gain made when CGT event A1 happens if their Healthscope share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

**Anti-avoidance provisions**

52. 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 benefit received in relation to the Final Dividend and Special Dividend paid in relation to a Healthscope share.

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

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**Commissioner of Taxation**20 October 2010

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## Appendix 1 – Explanation

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❶ ***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.***

### **The Final Dividend and the Special Dividend**

54. The term 'dividend' is defined in subsection 6(1) as a distribution made by a company to shareholders, whether in money or other property.

55. The payment of the Final Dividend and the Special Dividend are each a distribution of money by Healthscope to its shareholders.

56. Paragraph (d) of the definition of 'dividend' in subsection 6(1) excludes from the definition of 'dividend' any:

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...

57. The payment of the Final Dividend and the Special Dividend are from existing cash reserves and/or existing loan facilities. The payment amounts will be debited against Healthscope's retained earnings account not the share capital account. Therefore, the exclusion in paragraph (d) will not apply. The Final Dividend and the Special Dividend will each constitute a 'dividend' for the purposes of subsection 6(1).

### **Assessability of Dividends**

58. Subparagraph 44(1)(a)(i) includes in the assessable income of an Australian resident shareholder in a company:

dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

59. As the Final Dividend and the Special Dividend are paid to Healthscope shareholders out of profits derived by Healthscope, Healthscope shareholders who are residents of Australia as defined in subsection 6(1) are required to include the Final Dividend and the Special Dividend in their assessable income under paragraph 44(1)(a)(i).

60. Subparagraph 44(1)(b)(i) includes in the assessable income of a non-resident shareholder in a company:

dividends (other than non-share dividends) paid to the shareholder by the company to the extent to which they are paid out of profits derived by it from sources in Australia.

61. Subsection 128B(1) imposes Australian withholding tax on income that:

- (a) is derived, on or after 1 January 1968, by a non-resident; and
- (b) consists of a dividend paid by a company that is a resident.

62. However, subparagraph 128B(3)(ga)(i) excludes from subsection 128B(1) income derived by a non-resident that consists of the franked part of a dividend. As the Final Dividend and the Special Dividend are fully franked, they will not be subject to Australian withholding tax when derived by non-resident Healthscope shareholders.

63. In addition section 128D states that:

Income other than income to which section 128B applies by virtue of subsection (2A), (2C) or 9(C) of that section upon which withholding tax is payable, or upon which withholding tax would, but for paragraph 128(3)(ga) or (jb), section 128F, section 128FA or section 128GB, be payable, is not assessable income and is not exempt income of a person.

64. As the payment of the Final Dividend and the Special Dividend are income that is subject to withholding tax but for paragraph 128B(3)(ga), they will not be assessable income, and will not be exempt income of non-resident Healthscope shareholders pursuant to section 128D.

65. Accordingly, Healthscope shareholders who receive the fully franked Final Dividend and Special Dividend and are non-residents (other than those carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) (section 128D) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga)).

### **Gross up and tax offset**

66. Section 207-20 of the ITAA 1997 provides:

- (1) If an entity makes a \*franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the \*franking credit on the distribution. This is in addition to any other amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.

- (2) The receiving entity is entitled to a \*tax offset for the income year in which the distribution is made. The tax offset is equal to the \*franking credit on the distribution.

67. Therefore, subject to satisfying the qualified person rule, where the fully franked Final Dividend and the fully franked Special Dividend are received directly by a Healthscope shareholder, the Healthscope shareholder will:

- include the amount of the franking credit attached to the Final Dividend and Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit.

68. Where the fully franked Final Dividend and Special Dividend are received by a Healthscope shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) of the ITAA 1997 applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

If:

- (a) a \*franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a \*corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust – the trust is not a \*complying superannuation entity or \*FHSA trust when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the \*franking credit on the distribution.

69. Therefore, subject to satisfying the qualified person rule, a Healthscope shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Final Dividend and the Special Dividend in their assessable income under subsection 207-35(1) of the ITAA 1997.

## Qualified persons

70. Former Division 1A contains the measures known as the holding period rule and the related payment rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

71. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) as follows:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a *qualified person* in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification in relation to the dividend.

72. Former subsection 160APHO(2), referred to in paragraph 71, sets out the holding period requirement. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

### **Related payment rule**

73. In order to determine which is the relevant qualification period, it is necessary to determine whether, under the present arrangement, the Healthscope shareholders are considered to be under an obligation to make a related payment.

74. Former section 160APHN provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A. Former subsection 160APHN(2) provides:

The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

75. Former paragraph 160APHN(3)(d) states:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other person:

...

- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or

...

76. Former subsection 160APHN(4) states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to;  
the amount of dividend or distribution.

## ***Final Dividend***

77. Having regard to the relevant circumstances of the Scheme, it cannot be said that the Scheme documents indicate that a Healthscope shareholder, or an associate, does anything that has the effect of passing the benefit of the dividend to another person in respect of the Final Dividend. The Final Dividend is paid regardless of whether or not the Scheme proceeds.

78. As the Healthscope shareholders are not taken, for the purposes of the former Division 1A, to have made a related payment in respect of the Final Dividend as a result of the Scheme, the relevant holding period for the Final Dividend is the primary qualification period pursuant to former paragraph 160APHO(1)(a).

79. The primary qualification period is defined in former section 160APHD as follows:

In relation to a taxpayer in relation to shares or an interest in shares, means the period beginning on the day after the day on which the taxpayer acquired the shares or interest and ending:

- (a) if the shares are not preference shares – on the 45<sup>th</sup> day after the day on which the shares or interest became *ex dividend*; or

....

80. The concept of 'ex-dividend' is defined in former subsection 160APHE(1) as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

81. Healthscope will determine eligibility for the Final Dividend on the Final Dividend Record Date of 7.00pm on 1 October 2010. This is the last day on which acquisition by a person of a Healthscope share will entitle the person to receive the Final Dividend. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 2 October 2010.

82. The primary qualification period runs from the day after acquisition until 45 days after the ex-dividend date of 2 October 2010. In practical terms, this means that the secondary qualification period runs until 16 November 2010. Pursuant to former subsection 160APHO(3), any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Healthscope shares are to be excluded. This would mean that the primary qualification period would run until 16 November 2010 or if earlier, until the date that Healthscope shareholders are no longer at risk for the purposes of former Division 1A.

83. Entitlement to participate in the Healthscope Scheme will be determined on the Scheme Record Date on the basis of being a Healthscope shareholder who is registered in the share register as the holder of the relevant ordinary share at 7.00pm on 5 October 2010. It is considered that once a Healthscope shareholder is identified as a participating Healthscope shareholder, that the Healthscope shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A as at that time the Healthscope shareholder is committed to disposing of their Healthscope share and receiving the Scheme Consideration.

84. The primary qualification period would run for 45 days until 4 October 2010 (inclusive). Healthscope shareholders who receive the Final Dividend would need to hold their shares at risk from 20 August 2010 for a continuous period of not less than 45 days in order to be a 'qualified person' for the purposes of former Division 1A.

### ***Special Dividend***

85. Having regard to the relevant circumstances of the Scheme, it is considered that part of the arrangement is the payment of the Special Dividend of \$0.09 cash per Healthscope share contingent on Healthscope obtaining approval from the requisite majority of Healthscope shareholders at the Scheme Meeting for the Scheme to be entered into. The Special Dividend is conditional upon the scheme of arrangement being approved, tying the payment of the Special Dividend to the disposal of the Healthscope shares.

86. In these circumstances, in determining whether a Healthscope shareholder is taken to have made, or be likely to make a related payment in respect of the Special Dividend, it is considered that a Healthscope shareholder will be taken to have made or be likely to make a related payment in respect of the Special Dividend.

87. As the Healthscope shareholders are taken, for the purposes of former Division 1A, to have made or be likely to make a related payment in respect of the Special Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b).

88. The secondary qualification period is defined in former section 160APHD as follows:

In relation to a taxpayer in relation to shares or an interest in shares, means:

- (a) if the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45<sup>th</sup> day after, the day on which the shares or interest becomes ex dividend...

89. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

90. Healthscope will determine eligibility for the Special Dividend on the Special Dividend Record Date of 7.00pm on 1 October 2010. This is the last day on which acquisition by a person of a Healthscope share will entitle the person to receive the Special Dividend as per former section 160APHE. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 2 October 2010.

91. The secondary qualification period runs from 45 days before the ex-dividend date of 2 October 2010 and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 18 August 2010 to 16 November 2010. However, pursuant to former subsection 160APHO(3), any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Healthscope shares are to be excluded. This would mean that the secondary qualification period would run from 18 August 2010 until the date that Healthscope shareholders are no longer at risk for the purposes of former Division 1A.

92. Entitlement to participate in the Healthscope Scheme will be determined on the Scheme Record Date on the basis of being a Healthscope shareholder who is registered in the share register as the holder of the relevant ordinary share at 7.00pm on 5 October 2010. It is considered that once a Healthscope shareholder is identified as a participating Healthscope shareholder, that the Healthscope shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A as at that time the Healthscope shareholder is committed to disposing of their Healthscope share and receiving the Scheme Consideration.

93. The secondary qualification period would run from 18 August 2010 until 4 October 2010 (inclusive). Healthscope shareholders who receive the Special Dividend would need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A.

### **Capital gains tax**

#### ***CGT event A1***

94. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10 of the ITAA 1997). This 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)).

95. The Addendum to Taxation Determination TD 2002/4 indicates that a takeover or merger effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract.

96. CGT event A1 will happen when a participating Healthscope shareholder disposes of each of their Healthscope shares to APH pursuant to the Scheme. The disposal will occur on the Implementation Date of 12 October 2010 (subsections 104-10(1) and (2) of the ITAA 1997) when the shares are disposed of by the Healthscope shareholder.

97. A participating Healthscope shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Healthscope share exceed its cost base. A participating Healthscope shareholder will make a capital loss if those capital proceeds are less than the Healthscope shares reduced cost base (subsection 104-10(4) of the ITAA 1997).

#### ***Capital proceeds***

98. The capital proceeds received by a participating Healthscope shareholder are the money received or entitled to be received in respect of the event happening (subsection 116-20(1) of the ITAA 1997).

99. The term 'in respect of the event happening' in subsection 116-20(1) of the ITAA 1997 requires that the relationship between the event and the receipt of the money, or entitlement to receive the money, must be more than coincidental. An amount is not 'capital proceeds' of an event merely because it is received in association with the event.

100. In this case the payment of the Final Dividend will occur separately to the Healthscope Scheme. The Final Dividend was declared on 19 August 2010 and will be paid between the date of the Agreement and the Implementation Date of the Scheme. The Final Dividend of \$0.12 cash per Healthscope share will be paid to the Healthscope shareholders who hold Healthscope shares at the Record Date of 1 October 2010. The Scheme Consideration of \$6.26 cash per Healthscope share is reduced by the amount of the Final Dividend.

101. The circumstances of the payment of the Final Dividend show that the payment of the Final Dividend is not in respect of the disposal of the Healthscope shares. The Final Dividend does not form part of the capital proceeds which a participating Healthscope shareholder will receive in respect of CGT event A1 happening.

102. The Special Dividend of \$0.09 cash per Healthscope share was declared on 22 September 2010. The payment of the Special Dividend was contingent on the Scheme proceeding.

103. The declaration of the Special Dividend was at the discretion of the Healthscope Board and would not be payable unless the requisite majority of Healthscope shareholders approved the Scheme to transfer their Healthscope shares to APH. The manner and form of the Special Dividend is contained in the definition of 'permitted additional dividend' in the Agreement definitions. The payment of the Special Dividend allows Healthscope to utilise the remaining franking credits that Healthscope will have after the Final Dividend is paid.

104. In these circumstances, it is considered that the Special Dividend does not form part of the capital proceeds which a participating Healthscope shareholder will receive in respect of CGT event A1 happening.

105. The capital proceeds for a participating Healthscope shareholder will be \$6.05 cash per Healthscope share.

## **Foreign resident shareholders**

106. A foreign resident disregards a capital gain or capital loss made from a CGT event that happens in relation to a CGT asset that is not 'taxable Australian property' (section 855-10 of the ITAA 1997). The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997 and covers five categories of assets.

107. Broadly, these categories are:

- taxable Australian real property which is held directly;
- indirect Australian real property interests which are not covered by item 5 of the table in section 855-15 of the ITAA 1997;
- CGT assets used in carrying on a business through a permanent establishment in Australia, and which are covered by item 1, 2 or 5 of the table in section 855-15;

- options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table in section 855-15; and
- CGT assets covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

108. A foreign resident Healthscope shareholder who is paid the Scheme Consideration disregards any capital gain made when CGT event A1 happens if their Healthscope share is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

### **Anti-avoidance provisions**

#### ***Section 204-30***

109. 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 section 204-30 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)).

110. If section 204-30 of the ITAA 1997 applies the Commissioner has discretion under subsection 204-30(3) to make a determination in writing:

- (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)); and/or
- (b) that no imputation benefit is to arise in respect of any streamed distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

111. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from imputation benefits than other members. The words 'derives a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

112. Under the current proposal for the payment of the fully franked Final Dividend and fully franked Special Dividend, all Healthscope shareholders will receive an imputation benefit. Australian resident shareholders will receive the benefit of a tax offset (paragraph 204-30(6)(a) of the ITAA 1997) or receive a franking credit to their franking account as a result of the distribution.

113. The non-resident shareholders will receive an imputation benefit in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e) of the ITAA 1997). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders. However, as the proposed distributions are to be fully franked and paid to all the shareholders, it cannot be argued that Healthscope has directed the flow of distributions in such a manner so as to ensure that imputation benefits are derived by shareholders who derive greater benefit from franking credits, while other shareholders receive lesser or no imputation benefits.

114. Having regard to all of the relevant circumstances it is considered that section 204-30 of the ITAA 1997 does not apply.

## **Section 177EA**

115. 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 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.

116. 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; 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; 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, a person (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 a purpose (whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

117. If section 177EA applies, the Commissioner may make a determination under subsection 177EA(5) that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a)) or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b)).

118. Healthscope is a corporate tax entity. The disposal of the ordinary shares in Healthscope pursuant to the Scheme is a scheme for the disposition of membership interests. Both the fully franked Final Dividend and Special Dividend are frankable distributions that will be paid to Healthscope shareholders as a part of this Scheme who could, therefore, reasonably be expected to receive imputation benefits.

119. In the present case, it is considered that 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 (as provided for in subsection 177EA(17)), it would be concluded that, on the part of Healthscope, its shareholders or any other relevant party, there is a purpose of more than merely an incidental purpose of conferring a franking credit benefit under the scheme.

120. 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.

121. The relevant circumstances are that the disposition of the ordinary shares in Healthscope is made pursuant to a takeover by APH by way of Scheme of Arrangement under the *Corporations Act 2001* voted upon by Healthscope's existing shareholders.

122. The Final Dividend will be fully franked, which is a continuation of Healthscope's dividend policy to pay fully franked dividends. The amount of the Final Dividend is consistent with dividends previously paid out by Healthscope and allows Healthscope shareholders to share in the accumulated profits of Healthscope for the income year ended 30 June 2010.

123. The Special Dividend will also be fully franked and will be paid to the existing shareholders of Healthscope in proportion to their shareholding. The Special Dividend allows Healthscope shareholders to share in the accumulated profits of Healthscope.

124. In considering the manner, form and substance of the Scheme, it is considered that the Scheme is not being entered into by Healthscope or the Healthscope shareholders for the purpose of enabling participating shareholders to obtain an imputation benefit. Having regard to the relevant circumstances of the Scheme, the Commissioner has come to the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefit received in relation to the dividends.

## **Appendix 2 – Detailed contents list**

125. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; TD 2002/4A

*Subject references:*

- arrangement
- CGT capital proceeds
- CGT event A1 – disposal of a CGT asset
- dividend
- distributions
- franking credits
- imputation benefits
- ordinary shares
- qualified person
- related payment rule
- takeovers

*Legislative references:*

- ITAA 1936
- ITAA 1936 6(1)
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- ITAA 1936 160APHO(1)(b)
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- ITAA 1936 160APHO(3)
- ITAA 1936 177EA
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- ITAA 1936 177EA(3)(a)
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- ITAA 1936 177EA(5)
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- ITAA 1997 204-30(1)(c)
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- ITAA 1997 204-30(3)(a)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 204-30(6)(a)
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- ITAA 1997 204-30(8)
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