


# ***CR 2011/87 - Income tax: Cellestis Limited Scheme of Arrangement and Special Dividend***

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## Class Ruling

# Income tax: Cellestis Limited Scheme of Arrangement and Special Dividend

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### **ⓘ 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provisions

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 160APHN of the ITAA 1936;
- Division 1A of former Part IIIA of the ITAA 1936;
- section 177EA of the ITAA 1936;
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997;

- Division 115 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- subsection 207-35(1) of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

### **Class of entities**

3. The class of entities to which this Ruling applies are the shareholders of Cellestis Limited (Cellestis) who:

- (a) held their Cellestis shares on capital account;
- (b) participated in the scheme under which QIAGEN Australia Holdings Pty Ltd (QIAGEN Australia) acquired 100% of the shares in Cellestis; and
- (c) received the Scheme Consideration of \$3.74 per share for the transfer of each Cellestis share to QIAGEN Australia; and
- (d) received the Special Dividend of \$0.06 per share [fully-franked]; and
- (e) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their Cellestis shares.

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

In this Ruling, a person belonging to this class of entities is referred to as a 'Cellestis shareholder'.

**Note:** This Ruling does not consider the taxation treatment of Cellestis options holders.

### **Qualifications**

4. The Commissioner makes this Ruling based on the precise Scheme 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 28 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 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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:

- application for a Class Ruling dated 20 April 2011;
- the Scheme Implementation Deed dated 3 April 2011 and its amending deed of 11 July 2011;
- the Scheme Booklet that was issued by Cellestis to its shareholders on 17 June 2011;
- the Supplementary Scheme Booklet- Revised Proposal that was released to Cellestis shareholders on 15 July 2011;

- Australian Securities Exchange (ASX) announcements by Cellestis dated 4 April 2011, 11 July 2011, 3 August 2011, 4 August 2011 and 10 August 2011; and
- correspondence from the applicant providing further particulars.

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

## **Cellestis**

10. Cellestis was an Australian resident company that was listed for quotation on the ASX.

11. Cellestis developed and marketed QuantiFERON technology products for medical diagnosis and scientific research. The QuantiFERON technology is a patented whole blood method for detecting cell mediated immune responses of T cell lymphocytes using whole blood samples.

12. As at 20 April 2011, Cellestis had 96,151,778 ordinary shares on issue. Of these shares, the company's share register disclosed that 1,191,567 shares (or 1.24%) were held by shareholders whose registered address was shown as being outside Australia.

13. Cellestis did not have any other class of shares on issue.

14. Cellestis had also granted options to a number of executives. These options were cancelled upon the scheme being approved with each option holder being paid an amount determined to be the value of the options by an independent expert.

## **QIAGEN N.V. (QIAGEN)**

15. QIAGEN is a Netherlands holdings company whose shares are listed in both the USA and Germany. It is the leading global supplier of sample and assay technologies.

## **QIAGEN Australia**

16. QIAGEN Australia is a proprietary company registered in Australia and a wholly owned subsidiary of QIAGEN.

17. Prior to the Scheme becoming effective, QIAGEN and QIAGEN Australia did not own any shares in Cellestis (either directly or through wholly owned subsidiaries).

**The Scheme of Arrangement**

18. On 4 April 2011, Cellestis announced that it had entered into a Scheme Implementation Deed (SID) with QIAGEN and QIAGEN Australia under which it was proposed that QIAGEN Australia would acquire all of the issued shares in Cellestis by means of a Scheme of Arrangement under Part 5.1 of the *Corporations Act 2001* (the Scheme).

19. The terms of the SID were amended on 11 July 2011.

20. Under the terms of the amended SID, participating Cellestis shareholders received Total Cash Payments of \$3.80 (comprising Scheme Consideration of \$3.74 and a fully-franked Special Dividend of \$0.06) for each Cellestis share transferred to QIAGEN Australia.

21. The Scheme, as amended, was approved by Cellestis shareholders at an Extraordinary General Meeting on 3 August 2011.

22. The Record Date for the Scheme of Arrangement was 22 August 2011 and the Scheme implementation date was 29 August 2011.

**The Special Dividend**

23. The Cellestis Board (in its sole and absolute discretion) declared and paid a fully franked dividend of \$0.06 per Cellestis share (Special Dividend).

24. While the declaration and payment of the Special Dividend was contingent upon the Scheme being approved by Cellestis shareholders, the Special Dividend was sourced from Cellestis' retained earnings and was funded from existing cash reserves and/or existing banking facilities. Neither QIAGEN nor QIAGEN Australia provided any financial assistance to Cellestis to enable the payment of the Special Dividend.

25. Neither QIAGEN nor QIAGEN Australia had any influence or control over the declaration or payment of the Special Dividend by Cellestis.

26. The Special Dividend was capable of being fully-franked in terms of section 202-5.

27. The Record Date for determining entitlements to the Special Dividend was 18 August 2011.

28. Under the terms of the SID, as amended, the Scheme Consideration to be provided by, or on behalf of, QIAGEN Australia to a Cellestis shareholder for the transfer of each Cellestis share to QIAGEN Australia was to be reduced by the amount of any special dividend paid by Cellestis for which the record date was on or before the Scheme implementation date.

## Ruling

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### The Special Dividend

29. The Special Dividend of \$0.06 per share paid to a Cellestis shareholder will constitute a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

### Assessability of the Special Dividend

30. Cellestis shareholders who receive the fully franked Special Dividend and are residents of Australia, as defined in subsection 6(1) of the ITAA 1936, are required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

### Gross up and tax offset

31. Cellestis shareholders who received the fully franked Special Dividend directly:

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

under section 207-20, subject to being a qualified person.

32. Where the fully franked Special Dividend is received by a Cellestis shareholder (not being an entity taxed as a corporate tax entity) who is a trustee of a trust (not being a complying superannuation fund) or a partnership, the trustee of the trust or the partnership must include an amount equal to the franking credit attached to the Special Dividend as assessable income under subsection 207-35(1).

### Qualified persons

33. The payment of the Special Dividend by Cellestis constitutes a related payment for the purposes of former section 160APHN of the ITAA 1936.

34. Accordingly, each Cellestis shareholder will need to hold their Cellestis 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 of the Special Dividend.

35. Those Cellestis shareholders who have held their shares at risk for a continuous period of not less than 45 days during the time period 5 July 2011 to 3 October 2011 will be qualified persons in respect to the Special Dividend.

**Refundable tax offset**

36. The franking credit allocated to the Special Dividend will be subject to the refundable tax offset rules in Division 67, provided the Cellestis shareholder is not excluded by the operation of section 67-25.

**Non-resident shareholders**

37. In the case of non-resident Cellestis shareholders who are carrying on business in Australia at or through a permanent establishment, those shareholders are required to include the Special Dividend in their assessable income to the extent it is attributable to that permanent establishment.

38. For other non-resident Cellestis shareholders, the Special Dividend:

- will not be subject to Australian withholding tax; and
- will not be assessable income and will not be exempt income pursuant to section 128D of the ITAA 1936, being income that would be subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936.

**Capital Gains Tax (CGT) consequences*****CGT event A1***

39. CGT event A1 happened when a Cellestis shareholder disposed of a Cellestis share to QIAGEN Australia pursuant to the Scheme (subsections 104-10(1) and (2)).

40. The time of the CGT event was when the change of ownership occurred (paragraph 104-10(3)(b)). This was when the Cellestis share was transferred to QIAGEN Australia on the Scheme implementation date of 29 August 2011.

41. A Cellestis shareholder made a capital gain from CGT event A1 happening if the capital proceeds in respect of the disposal of a Cellestis share exceeded its cost base. A Cellestis shareholder made a capital loss if the capital proceeds in respect of the disposal of a Cellestis share were less than its reduced cost base (subsection 104-10(4)).

***Capital proceeds***

42. The capital proceeds received by each Cellestis shareholder is the money received or entitled to be received in respect of the event happening (subsection 116-20(1)).

43. The capital proceeds will not include the Special Dividend as it is considered, having regard to all the circumstances of the arrangement, that this dividend was not paid in respect of the CGT event happening (subsection 116-20(1)).

### ***Discount capital gain***

44. If a Cellestis shareholder made a capital gain from the disposal of their Cellestis share, the Cellestis shareholder may be eligible to treat the capital gain as a discount capital gain provided all relevant requirements of Division 115 are satisfied.

### ***Foreign resident shareholders***

45. A foreign resident Cellestis shareholder who participated in the Scheme disregards any capital gain made when CGT event A1 happened if their share was not 'taxable Australian property' (section 855-10).

### ***The anti-avoidance provisions***

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

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

## **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 Special Dividend**

#### ***Dividend as defined in subsection 6(1) of the ITAA 1936***

48. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders. The Special Dividend is a distribution in money made by Cellectis to its ordinary shareholders.

49. Paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 however 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...

50. The Special Dividend was sourced from Cellectis' retained earnings. Cellectis did not debit the Special Dividend to its share capital account. Therefore, the exclusion in paragraph (d) does not apply and the Special Dividend will constitute a dividend for the purposes of subsection 6(1) of the ITAA 1936.

#### ***Assessability of the Special Dividend***

51. Subparagraph 44(1)(a)(i) of the ITAA 1936 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.

52. As the Special Dividend was paid to Cellectis shareholders out of profits derived by Cellectis, Cellectis shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Special Dividend as assessable income.

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

53. Section 207-20 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 another 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.

54. Therefore, subject to satisfying the qualified person rule, where the Special Dividend is received directly by a Cellestis shareholder, the Cellestis shareholder:

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

55. Where the Special Dividend is received by a Cellestis 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) 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.

56. Therefore, subject to satisfying the qualified person rule, the Cellestis trustee or partnership shareholder will be required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1).

## Qualified persons

57. Pursuant to paragraph 207-145(1)(a), an entity must be a 'qualified person' in relation to a dividend in order to be entitled to a tax offset in respect of the franking credit allocated to the dividend.

58. Division 1A of former Part IIIAA of the ITAA 1936 (the former Division 1A) contains the measures known as the holding period rule and the related payment rule. In broad terms, the 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.

59. The test of what constitutes a 'qualified person' is provided in former section 160APHO of the ITAA 1936 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 a 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 period in relation to the dividend.

60. Former subsection 160APHO(2) of the ITAA 1936, referred to in the preceding paragraph, 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***

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

62. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A. Former subsection 160APHN(2) of the ITAA 1936 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.

63. Former subsection 160APHN(3) of the ITAA 1936 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 persons:

- (a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or
- (b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or the other persons; or
- (c) causing services to be provided to, or in accordance with the directions of, the other person or other persons; or
- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or
- (e) allowing any property or money to be used by the other person or other persons or by someone nominated by the other person or other persons; or
- (f) causing an amount or amounts to be set off against, or to be otherwise applied in reduction of, a debt or debts owed by the other person or other persons; or
- (g) agreeing to treat an amount or amounts owed to the other person or other persons by the taxpayer or associate as having been increased.

64. Former subsection 160APHN(4) of the ITAA 1936 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.

65. In the current circumstances, it is considered that the payment of the Special Dividend of \$0.06 per share is an integral part of the Scheme. The payment of the Special Dividend was conditional upon Cellestis obtaining approval from the requisite majority of Cellestis shareholders at the Scheme meeting. As such, the payment of the Special Dividend was conditional upon the Scheme being approved by Cellestis shareholders. This means the payment of the Special Dividend relates to the disposal of the Cellestis shares by Cellestis' shareholders to QIAGEN Australia. Further, the payment of the Special Dividend to Cellestis shareholders reduced the amount of the payment that Cellestis shareholders would have received from QIAGEN Australia.

66. In these circumstances, the payment of the Special Dividend would constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936. Therefore a Cellestis shareholder is taken to have made or be likely to make a related payment in respect of the Special Dividend.

#### ***Holding period requirement***

67. As the Cellestis 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 thus the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

68. The secondary qualification period is defined in former section 160APHD of the ITAA 1936 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 45<sup>th</sup> day before, and ending on the 45<sup>th</sup> day after, the day on which the shares or interest becomes ex dividend

69. The ex-dividend date of the Special Dividend for tax purposes is 19 August 2011 pursuant to former section 160APHE of the ITAA 1936.

70. The secondary qualification period thus runs from 45 days before the ex-dividend date of 19 August 2011 as determined in paragraph 68 and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 5 July 2011 to 3 October 2011. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Cellestis shares are to be excluded. This would mean that the secondary qualification period would run from 5 July 2011 until the date that Cellestis shareholders are no longer at risk for the purposes of former Division 1A.

71. In this context, entitlement to participate in the Scheme was determined on the Scheme Record Date on the basis of being a Cellestis shareholder who is registered in the register as the holder of the relevant Scheme Share on 22 August 2011. It is considered that once a Cellestis shareholder was identified as a Cellestis shareholder on the Scheme Record Date, that Cellestis shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A as at that time the Cellestis shareholder was committed to disposing of their Cellestis share and receiving the Scheme Consideration.

72. Accordingly, Cellestis 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 the secondary qualification period in order to be a qualified person for the purposes of former Division 1A of the ITAA 1936. Further, pursuant to paragraph 160APHO(2)(a) of the ITAA 1936, the dates of acquisition and disposal are not included in the relevant 45 day period.

### **Refundable tax offset**

73. Shareholders who are entitled to a tax offset under subsection 207-20(2), in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

74. Pursuant to section 67-25, there are a range of taxpayers who are specifically excluded from the operation of the refundable tax offset rules. This range of excluded entities includes:

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

75. Accordingly, a holder of Cellestis shares will be subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities under section 67-25. Generally, corporate tax entities (including companies, corporate limited partnerships, corporate unit trusts, and public trading trusts) will be excluded from the operation of the refundable tax offset rules.

**Non-resident shareholders**

76. Subparagraph 44(1)(b)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder 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.

77. Subsection 128B(1) of the ITAA 1936 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.

78. However, subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes from subsection 128B(1) of the ITAA 1936 income derived by a non-resident that consists of the franked part of a dividend. As the Special Dividend is fully franked, it will not be subject to Australian withholding tax when derived by non-resident Cellestis shareholders.

79. In addition section 128D of the ITAA 1936 states that:

Income other than income to which section 128B applies by virtue of subsection (2A), (2C) or (9C) of that section upon which withholding tax is payable, or upon which withholding tax would, but for paragraph 128B(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.

80. As the Special Dividend is income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936 it will not be assessable income and will not be exempt income of non-resident Cellestis shareholders pursuant to section 128D of the ITAA 1936.

81. Accordingly, Cellestis 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) will not be required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

**CGT consequences*****CGT event A1***

82. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10). 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 (paragraph 104-10(3)(b)).

83. CGT event A1 happened when a Cellectis shareholder disposed of their Cellectis shares to QIAGEN Australia pursuant to the Scheme (subsections 104-10(1) and (2)). The disposal occurred on the Scheme implementation date of 29 August 2011 when the shares were disposed of by the Cellectis shareholders (paragraph 104-10(3)(b)).

84. The time when CGT event A1 happens determines the income year in which any capital gain or capital loss is made and whether the CGT discount applies to any capital gain.

85. A Cellectis shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Cellectis share exceeded its cost base. A Cellectis shareholder made a capital loss if those capital proceeds were less than the Cellectis share's reduced cost base (subsection 104-10(4)).

### ***Capital proceeds***

86. The capital proceeds received by a Cellectis shareholder is the money received or entitled to be received in respect of the event happening (subsection 116-20(1)). The capital proceeds does not include the Special Dividend.

87. A Cellectis shareholder was entitled to receive Total Cash Payments of \$3.80 (comprising Scheme Consideration of \$3.74 and a fully-franked Special Dividend of \$0.06) for each Cellectis share disposed of under the Scheme.

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

### ***The Special Dividend***

89. The Special Dividend of \$0.06 per Cellectis share was declared on 4 August 2011. The declaration of the Special Dividend was at the discretion of the Cellectis Board. Neither QIAGEN nor QIAGEN Australia had any influence or control over the declaration or payment of the Special Dividend.

90. Although payment of the Special Dividend was conditional upon Cellectis shareholders approving the Scheme, the Special Dividend was not paid as a term of the Scheme. Neither QIAGEN nor QIAGEN Australia influenced the decision to pay the Special Dividend nor did they provide any funds to Cellectis to finance the payment of the Special Dividend. It is therefore not received in respect of the disposal of Cellectis shares under the Scheme.

91. Accordingly, the Special Dividend does not form part of the capital proceeds which a Cellectis shareholder received in respect of CGT event A1 happening.

92. The capital proceeds received by a Cellestis shareholder for each Cellestis share disposed of under the Scheme is \$3.74.

### ***Discount capital gain***

93. If a Cellestis shareholder made a capital gain from the disposal of their Cellestis share, the Cellestis shareholder may be eligible to treat the capital gain as a discount capital gain provided that all relevant requirements of Division 115 are met.

94. One of those requirements is that the capital gain must result from a CGT event happening to a CGT asset that was acquired by the entity making the capital gain at least 12 months before the CGT event (subsection 115-25(1)).

95. This means that a capital gain made by a Cellestis shareholder when they dispose of their Cellestis share is a discount capital gain if the shareholder acquired the Cellestis share at least 12 months before the date of disposal under the Scheme, being the Scheme implementation date of 29 August 2011, and the other requirements in Division 115 are satisfied.

### ***Foreign resident shareholders***

96. Under subsection 855-10(1), an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

97. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2 or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

98. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens under the Scheme, can not disregard under subsection 855-10(1) a capital gain or capital loss from CGT event A1 happening if:

- their share in Cellestis was an indirect Australian real property interest (item 2 of the table in section 855-15); or
- their share in Cellestis had been used at any time by the foreign resident, or the trustee of a foreign trust for CGT purposes, in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15); or
- their share in Cellestis was covered by subsection 104-165(3) (item 5 of the table in section 855-15).

## The anti-avoidance provisions

### **Section 204-30**

99. Section 204-30 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)).

100. Relevantly, if section 204-30 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)).

101. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

102. Under the current Scheme for the payment of Special Dividend all Cellestis shareholders received an imputation benefit as a result of the Special Dividend; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a)) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders derived a greater benefit from franking credits than the non-resident shareholders.

103. However, the Special Dividend was paid to all Cellestis shareholders at the Dividend Record Date and was fully franked with Australian franking credits. Accordingly, it cannot be argued that Cellestis directed the flow of distributions in such a manner as to stream the imputation benefits such that one class of members derived a greater benefit from the franking credits attached to the dividends, while the other members received lesser or no imputation benefits.

104. As the conditions in subsection 204-30(1) for the provision to apply are not met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

### **Section 177EA**

105. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes seeking to obtain a tax advantage in relation to imputation benefits. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA of the ITAA 1936 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 membership interests, as the case may be;
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit;

- (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.

106. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a) of the ITAA 1936) or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

107. In the present case, Cellestis is a corporate tax entity. The disposal of the ordinary shares in Cellestis pursuant to the Scheme is a scheme for the disposition of membership interests. The Special Dividend is a frankable distribution that was paid to Cellestis shareholders as a part of this Scheme who could, therefore, reasonably be expected to receive imputation benefits.

108. The conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of Cellestis or its shareholders, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the Scheme.

109. 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) of the ITAA 1936. 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.

110. The relevant circumstances of the Scheme indicate that there is no requisite purpose of conferring an imputation benefit under the Scheme. The Special Dividend was fully franked, which is a continuation of Cellestis's dividend policy to pay fully franked dividends. Cellestis has only ordinary shares on issue and the Special Dividend was paid to all Cellestis shareholders on a pro-rata basis in proportion to the number of shares that each Cellestis shareholder held on the record date for the Special Dividend. The amount of the Special Dividend allows Cellestis shareholders to share in the accumulated profits of Cellestis.

111. In considering the manner, form and substance of the Scheme, it is considered that the Scheme was not entered into for the purpose of enabling members 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) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the dividends.

**Appendix 2 – Detailed contents list**

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

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*Subject references:*

- arrangement
- CGT capital proceeds
- CGT event A1
- dividend
- dividend streaming arrangements
- frankable dividends
- franking credits
- holding period
- imputation system
- qualified person
- related payment

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ATOlaw topic: Income Tax ~~ Assessable income ~~ dividend, interest and royalty income

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