

CR 2012/88 - Income tax: Little World Beverages Limited Scheme of Arrangement and Special Dividend



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Class Ruling

Income tax: Little World Beverages 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 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;
 - subsection 128B(3E) of the ITAA 1936;
 - section 128D of the ITAA 1936;
 - former section 160APHM 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 118-20 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- subsection 207-35(1) of the ITAA 1997;
- section 207-75 of the ITAA 1997;
- section 207-145 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 Little World Beverages Limited (LWB) other than Anglo-Gaelic Investments Pty Ltd (AGI) who:

- (a) held their LWB shares on capital account;
- (b) participated in the LWB Scheme of Arrangement (the Scheme) under which AGI acquired all of the shares in LWB that it did not already own;
- (c) received the Special Dividend and the Scheme Consideration; and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their LWB 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 an 'LWB shareholder'.

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 10 to 27 of this Ruling.

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

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- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2012 to 30 June 2013. The Ruling continues to apply after 30 June 2013 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

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 received on 6 July 2012;
- the Scheme Implementation Agreement (SIA), together with its schedule dated 17 June 2012;
- the LWB Scheme Booklet dated 13 August 2012; and
- other information and documents provided by the applicant.

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

Relevant Entities

LWB

10. LWB is an Australian resident company that was listed on the Australian Securities Exchange.

11. LWB's principal activities are brewing and distributing beer and cider in Australia and internationally from operations located in Western Australia and Victoria.

12. As at 13 August 2012, LWB had 68,241,176 fully paid ordinary shares and 146,479 Achievement Rights on issue.

13. In accordance with the rules of the Achievement Rights Plan, upon the Scheme becoming effective, the Achievement Rights vested and the holders of the Achievement Rights were issued with shares in LWB such that they were eligible to participate in the Scheme.

14. The shareholders of LWB were a mix of individuals, companies, superannuation funds and other institutional investors, some of which were non-residents.

Kirin Holdings Company, Limited (Kirin) and AGI

15. Kirin is a Japanese resident company listed on the Tokyo Stock Exchange.

16. The Kirin group is a leading manufacturer and supplier of food and beverage products in the Asia-Oceania region.

17. AGI is an indirectly wholly owned subsidiary of Kirin, incorporated in Australia and registered in Victoria.

18. AGI is a member of the tax consolidated group of which Lion Pty Limited is head company.

19. As at 13 August 2012, AGI held 23,650,123 shares in LWB. This was approximately 34.66% of LWB's ordinary shares on issue at that time.

The Scheme of Arrangement

20. On 18 June 2012, LWB announced that it had entered into a SIA with AGI, under which, subject to the satisfaction of a number of conditions precedent, it was proposed that AGI would acquire all of the ordinary shares in LWB, not already owned by AGI, by way of a scheme of arrangement under section 411 of the *Corporations Act 2001*.

21. The Scheme was approved by a majority of eligible LWB shareholders at the court ordered Scheme Meeting held on 17 September 2012.

22. Under the Scheme, LWB shareholders received a Total Payment of \$5.30 (comprising Scheme Consideration of \$5.10 and a fully franked Special Dividend of \$0.20) for each LWB share transferred to AGI.

23. The Record Date for the Scheme was 28 September 2012 and the Scheme Implementation Date was 8 October 2012.

The Special Dividend

24. On 17 September 2012, the LWB Board of Directors determined to pay the fully franked Special Dividend of \$0.20 per LWB share.

25. LWB shareholders, including AGI, who were registered as holding LWB shares on the Special Dividend Record Date of 26 September 2012, received the fully franked Special Dividend of \$0.20 per LWB share on the Special Dividend Payment Date of 8 October 2012.

26. The Special Dividend was sourced entirely from LWB's retained earnings account and LWB did not debit the Special Dividend to its share capital account.

27. Under clause 4.7 of the SIA, AGI agreed to fund the payment of the Special Dividend by providing LWB with an unsecured, interest-free loan equal to the aggregate amount of the Special Dividend. This loan is not repayable to AGI until at least one year following the date the funds were provided to LWB.

Ruling

The Special Dividend

28. The Special Dividend of \$0.20 per LWB share paid to an LWB shareholder constitutes a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

29. An LWB shareholder who received the fully franked Special Dividend and is a resident of Australia, as defined in subsection 6(1) of the ITAA 1936, is required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross up and tax offset

30. An LWB shareholder who received the fully franked Special Dividend directly and who satisfies the residency requirements in section 207-75:

- is required to 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.

31. Where the fully franked Special Dividend was received by an LWB 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 is required to include an amount equal to the franking credit attached to the Special Dividend as assessable income under subsection 207-35(1), subject to the trustee or the partnership being a qualified person.

Qualified persons

32. The payment of the Special Dividend as part of the Scheme constitutes a related payment for the purposes of former section 160APHN of the ITAA 1936.

33. Accordingly, each LWB shareholder will need to hold their LWB 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.

34. Each LWB shareholder will no longer be considered to hold their LWB shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 as from the Scheme Record Date of 28 September 2012.

35. Therefore, an LWB shareholder will be a qualified person in relation to the Special Dividend if, from 13 August 2012 until 27 September 2012 inclusive, the LWB shareholder continued to hold their LWB shares and did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of their LWB shares for a continuous period of at least 45 days.

Refundable tax offset

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

Non-resident shareholders

37. An LWB shareholder who received the fully franked Special Dividend and is a non-resident shareholder (other than those carrying on business in Australia at or through a permanent establishment in Australia) is not 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).

38. An LWB shareholder who received the fully franked Special Dividend and is a non-resident carrying on business in Australia at or through a permanent establishment in Australia, where the Special Dividend is attributable to the permanent establishment, is required to include the Special Dividend as assessable income under subparagraph 44(1)(c)(i) of the ITAA 1936 and is not liable for Australian withholding tax in respect of the dividend (subsection 128B(3E) of the ITAA 1936).

Capital gains tax (CGT) consequences

CGT event A1

39. CGT event A1 happened when an LWB shareholder disposed of each of their LWB shares to AGI pursuant to the Scheme (subsections 104-10(1) and 104-10(2)).

40. The time of the CGT event was when the change of ownership occurred (paragraph 104-10(3)(b)). This was when the LWB share was transferred to AGI on the Scheme Implementation Date of 8 October 2012.

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

Capital proceeds

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

43. The capital proceeds received by an LWB shareholder who disposed of their LWB share under the Scheme is \$5.30. This amount includes the Special Dividend of \$0.20.

Anti-overlap provisions

44. Any capital gain made by an LWB shareholder from CGT event A1 happening can be reduced (but not below zero) by the amount of the Special Dividend that is included in the LWB shareholder's assessable income under subsection 44(1) of the ITAA 1936 (section 118-20 of the ITAA 1997). The amount of any capital loss made by an LWB shareholder will not be adjusted under section 118-20 of the ITAA 1997 by the amount of the Special Dividend that is included in the LWB shareholder's assessable income.

Discount capital gain

45. Any capital gain made by an LWB shareholder when they disposed of their LWB share under the Scheme can treat the capital gain as a discount capital gain provided they acquired the share at least 12 months before the date of disposal and the other conditions in Division 115 are satisfied.

Foreign resident shareholders

46. A foreign resident LWB 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

47. 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 paid in relation to an LWB share.

48. Section 207-145 will not apply to the whole, or any part, of the Special Dividend received by LWB shareholders.

49. 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 paid in relation to an LWB share.

Commissioner of Taxation

10 October 2012

Appendix 1 – Explanation

- *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

50. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders, whether in money or other property.

51. The Special Dividend is a distribution in money made by LWB to its ordinary shareholders.

52. 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...

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

Assessability of the Special Dividend

54. 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.

55. As the Special Dividend was paid to LWB shareholders out of profits derived by LWB, LWB shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Special Dividend in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross up and tax offset

56. 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.

57. Therefore, subject to satisfying the qualified person rule, where the fully franked Special Dividend is received directly by an LWB shareholder and the LWB shareholder satisfies the residency requirement in section 207-25, the LWB shareholder:

- is required to 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.

58. Where the fully franked Special Dividend is received by an LWB 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 a 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.

59. Therefore, subject to satisfying the qualified person rule, an LWB shareholder that is a trust or a partnership is 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

60. 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.

61. Division 1A of former Part IIIAA of the ITAA 1936 (former Division 1A) contains the measures known as the holding period rule and the related payments 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.

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

63. Former subsection 160APHO(2) of the ITAA 1936, referred to in paragraph 62 of this Ruling, 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

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

65. 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.

66. 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.

67. 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.

68. In the current circumstances, it is considered that the payment of the Special Dividend of \$0.20 per share is an integral part of the Scheme. The payment of the Special Dividend was conditional upon LWB obtaining approval from the requisite majority of non-AGI LWB shareholders, tying the payment of the Special Dividend to the disposal of the LWB shares. In addition, the payment of the Special Dividend is part of the Total Payment of \$5.30 per share that was paid to an LWB shareholder for the disposal of their LWB share to AGI.

69. In these circumstances, it is considered 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 an LWB shareholder is taken to have made or be likely to make a related payment in respect of the Special Dividend.

Holding period rule

70. As the LWB 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.

71. 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 45th day before, and ending on the 45th day after, the day on which the shares or interest becomes ex dividend...

72. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 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.

73. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 26 September 2012. This was the last day on which acquisition by a person of an LWB share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly the ex-dividend date for the purposes of former subsection 160APHE(1) of the ITAA 1936 was 27 September 2012.

74. The secondary qualification period thus runs from 45 days before the ex-dividend date of 27 September 2012 and ends 45 days after that date. In practical terms, this means that the secondary qualification period runs from 13 August 2012 to 11 November 2012. 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 LWB shares are to be excluded. This would mean that the secondary qualification period would run from 13 August 2012 until the date that LWB shareholders are no longer at risk for the purposes of former Division 1A.

75. In this context, entitlement to participate in the Scheme was determined on the Scheme Record Date of 28 September 2012. It is considered that once an LWB shareholder was identified as an LWB shareholder on the Scheme Record Date, that LWB shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A as at that time the LWB shareholder was committed to disposing of their LWB share and receiving the Scheme Consideration.

76. Accordingly, for an LWB shareholder who disposed of their LWB shares under the Scheme, the secondary qualification period would run from 13 August 2012 to 27 September 2012 (inclusive). An LWB shareholder who received 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. Further, pursuant to former 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

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

78. Pursuant to section 67-25, certain taxpayers are specifically excluded from the operation of the refundable tax offset rules. The identified entities include:

- 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)).

79. Accordingly, a holder of LWB shares is subject to the refundable tax offset rules unless they are specifically excluded pursuant to 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

80. Subparagraph 44(1)(b)(i) of the ITAA 1936 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.

81. However, subsection 44(1) of the ITAA 1936 does not apply to a dividend to the extent to which another provision of the ITAA 1936 that expressly deals with dividends excludes some or all of the dividend from assessable income.

82. 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.

83. 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 was fully franked, it will not be subject to Australian withholding tax when derived by non-resident LWB shareholders.

84. 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.

85. As the payment of 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 LWB shareholders pursuant to section 128D of the ITAA 1936.

86. Accordingly, an LWB shareholder who received the fully franked Special Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) is not 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).

87. Subsection 128B(1) of the ITAA 1936 is subject to subsection 128B(3E) of the ITAA 1936. Subsection 128B(3E) of the ITAA 1936 states that section 128B of the ITAA 1936 does not apply to dividend income that:

- (a) is paid to a person who is a non-resident carrying on business in Australia at or through a permanent establishment of the person in Australia; and
- (b) is attributable to the permanent establishment; and
- (c) is not paid to the person in the person's capacity as a trustee.

88. Subparagraph 44(1)(c)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder of a resident company who is carrying on business in Australia at or through a permanent establishment of the shareholder in Australia:

dividends (other than non-share dividends) that are paid to the shareholder by the company and are attributable to the permanent establishment, to the extent to which they are paid out of profits derived by the company from sources outside Australia.

89. Accordingly, non-resident LWB shareholders carrying on business in Australia at or through a permanent establishment who received the fully franked Special Dividend (to the extent to which the dividend is attributable to the permanent establishment) are required to include the Special Dividend in assessable income under subparagraph 44(1)(c)(i) of the ITAA 1936; and will not be liable for Australian withholding tax in respect of the Special Dividend.

CGT Consequences

CGT event A1

90. 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 (subsection 104-10(3)).

91. A takeover or merger effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract (paragraph 9 of Taxation Determination TD 2002/4¹).

92. CGT event A1 happened when an LWB shareholder disposed of their LWB shares to AGI pursuant to the Scheme (subsections 104-10(1) and 104-10(2)). The disposal occurred on the Scheme Implementation Date of 8 October 2012 when the shares were disposed of by the LWB shareholders (paragraph 104-10(3)(b)).

93. 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.

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

Capital proceeds

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

96. An LWB shareholder who disposed of an LWB share under the Scheme received a Total Payment of \$5.30. This was made up of the Special Dividend of \$0.20 and the Scheme Consideration of \$5.10 (being \$5.30 reduced by the amount of the Special Dividend).

97. 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 the entitlement to receive the money, to be more than coincidental. An amount is not 'capital proceeds' received or entitled to be received in respect of a CGT event merely because it is received in association with the CGT event.

¹ Taxation Determination TD 2002/4: Income tax: capital gains: what is the first element of the cost base and reduced cost base of a share in a company you acquire in exchange for a share in another company in a takeover or a merger?

98. A dividend declared by a company that is subject to a takeover can form part of the vendor shareholders' capital proceeds from the disposal of the shares. Taxation Ruling TR 2010/4² states in paragraph 9 that:

A dividend declared or paid by the target company to the vendor shareholder will be money or property that the vendor shareholder has received, or is entitled to receive, under the contract or the scheme of arrangement, in respect of the transfer of the shares, if the vendor shareholder has bargained for the receipt of the dividend (whether or not in addition to other consideration) in return for giving up the shares. That is to say, if the dividend forms the whole or part of that sum of money or property in return for which the vendor shareholder is willing, and under the contract has promised or under the scheme of arrangement is bound, to transfer the shares in the target company, it will be capital proceeds in respect of the CGT event A1 happening.

99. In this case, the payment of the Special Dividend did not occur independently of the Scheme. This is primarily reflected in the following scheme attributes:

- the Scheme Consideration of \$5.30 per LWB share was reduced by the amount of the Special Dividend;
- the Special Dividend was only payable if the Scheme became effective; and
- AGI loaned to LWB the amount of the Special Dividend, by way of an interest-free loan, solely to enable LWB to pay the Special Dividend.

100. These scheme attributes support a conclusion that the Special Dividend was received in respect of the disposal of LWB shares under the Scheme. Accordingly, the Special Dividend forms part of the capital proceeds which an LWB shareholder received in respect of CGT event A1 happening.

101. Therefore, the capital proceeds received by an LWB shareholder for each LWB share disposed of under the Scheme is \$5.30.

Anti-overlap provisions

102. A capital gain made from a CGT event is reduced if the capital gain includes an amount that is included in assessable income under another provision of the ITAA 1936 or the ITAA 1997 (section 118-20 of the ITAA 1997). This has the effect of reducing (but not below zero) the capital gain by the amount that is assessable under the other provision. A capital loss made from a CGT event will not be increased by the operation of section 118-20.

² Taxation Ruling TR 2010/4: Income tax: capital gains: when a dividend will be included in the capital proceeds from a disposal of shares that happens under a contract or a scheme of arrangement.

103. Where a dividend forms part of the capital proceeds from the disposal of shares and is assessable income under subsection 44(1) of the ITAA 1936, section 118-20 of the ITAA 1997 will reduce any capital gain by the amount of the dividend.

104. The Special Dividend is included in the assessable income of the LWB shareholders under subsection 44(1) of the ITAA 1936. Therefore, section 118-20 of the ITAA 1997 will operate to reduce (but not below zero) any capital gain made by an LWB shareholder from CGT event A1 happening by the amount of the Special Dividend that is included in the LWB shareholder's assessable income under subsection 44(1) of the ITAA 1936.

105. However, under paragraph 118-20(1B)(b), the capital gain made by an LWB shareholder is not reduced by the amount of the franking credit that is included in their assessable income.

106. The amount of a capital loss made by an LWB shareholder is not adjusted by the amount of the Special Dividend under section 118-20.

Discount capital gain

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

108. 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)).

109. This means that a capital gain made by an LWB shareholder when they disposed of their LWB share can be treated as a discount capital gain if the shareholder acquired the LWB share at least 12 months before the date of disposal under the Scheme, being the Scheme Implementation Date of 8 October 2012, and the other requirements in Division 115 are satisfied.

Foreign resident shareholders

110. 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'.

111. 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).

112. 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 LWB was an indirect Australian real property interest (item 2 of the table in section 855-15); or
- their share in LWB 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 LWB was covered by subsection 104-165(3) (item 5 of the table in section 855-15).

The anti-avoidance provisions

Section 204-30

113. 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:

- 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));
- the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- 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)).

114. If section 204-30 applies, the Commissioner may 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)); 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)).

115. 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.

116. Pursuant to the payment of the Special Dividend, all LWB shareholders received an imputation benefit as a result of the Special Dividend. Subject to being 'qualified persons', Australian resident LWB shareholders received an imputation benefit in the form of a tax offset (paragraph 204-30(6)(a)). Non-resident LWB shareholders received an imputation benefit in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). Resident LWB shareholders derived a greater benefit from franking credits than the non-resident shareholders.

117. However, the Special Dividend was paid to all LWB shareholders identified at the Special Dividend Record Date and was fully franked. Accordingly, it cannot be concluded that LWB intended to direct the flow of distributions in such a manner as to stream the imputation benefits to members that derive a greater benefit from the franking credits attached to the Special Dividend, while other members received lesser or no imputation benefits.

118. As the conditions in subsection 204-30(1) are not met in respect of the Special Dividend, 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 respect of the Special Dividend.

Section 207-145

119. Paragraph 207-145(1)(d) applies where a franked distribution is made as part of a dividend stripping operation. Section 207-155 defines a dividend stripping operation as being a scheme that:

- (a) was by way of, or in the nature of, dividend stripping; or
- (b) had substantially the effect of a scheme by way of, or in the nature of, dividend stripping.

120. Having regard to the purpose of the scheme under which the LWB shareholders disposed of their LWB shares to AGI, the Scheme is not a scheme by way of, or in the nature of, dividend stripping, or a scheme having substantially the effect of a scheme by way of, or in the nature of, dividend stripping to which subsection 207-145(1) is applicable.

Section 177EA

121. 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. 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.

122. 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.

123. 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).

124. LWB is a corporate tax entity. The disposal of the ordinary shares in LWB pursuant to the Scheme is a scheme for the disposition of membership interests. The fully franked Special Dividend is a frankable distribution that was paid to LWB shareholders (the relevant taxpayers) as a part of this Scheme and who could, therefore, reasonably be expected to receive imputation benefits.

125. In the present case, 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 (as provided for in subsection 177EA(17) of the ITAA 1936), it would be concluded that, on the part of LWB, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the Scheme.

126. 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.

127. The relevant circumstances of the Scheme include the fact that the disposition of the ordinary shares in LWB was made pursuant to a transfer of shares to AGI by way of a Scheme of Arrangement under the *Corporations Act 2001* voted upon by LWB's existing shareholders.

128. The Special Dividend was fully franked and was paid to the existing shareholders of LWB in proportion to their shareholding, and irrespective of their ability to utilise the relevant franking credits. The Special Dividend allowed LWB shareholders to share in the accumulated profits of LWB.

129. In considering the manner, form and substance of the Scheme, it is considered that the Scheme was not entered into by LWB or the LWB shareholders for more than an incidental purpose of enabling participating shareholders to obtain imputation benefits. The goal of providing imputation benefits to LWB shareholders remained incidental, in the sense of being subservient to, the purpose of transferring their shares to AGI.

130. 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 Special Dividend.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2002/4; TR 2006/10;
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Subject references:

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

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ATOlaw topic: Income Tax ~~ Assessable income ~~ dividend, interest
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Income Tax ~~ Capital Gains Tax ~~ capital proceeds
Income Tax ~~ Capital Gains Tax ~~ CGT event A1 –
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