


CR 2015/17 - Income tax: Vita Group Limited Dividend Reinvestment Plan

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 This document has changed over time. This is a consolidated version of the ruling which was published on *25 February 2015*



Class Ruling

Income tax: Vita Group Limited Dividend Reinvestment Plan

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

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

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

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

What this Ruling is about

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

Relevant provision(s)

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

- former section 160APHM of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subsection 177EA(5) of the ITAA 1936
- Division 202 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- subsection 204-30(1) of the ITAA 1997
- subsection 204-30(3) of the ITAA 1997, and
- section 205-5 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders of Vita Group Limited (Vita Group) at the time of the Scheme of Arrangement who:

- (a) hold their shares in Vita Group (Vita Group shares) on capital account
- (b) participate in the scheme and are eligible to receive the Special Dividend announced on 24 October 2014
- (c) acquired their Vita Group shares on, or after, 20 September 1985
- (d) are not 'temporary residents' of Australia within the meaning of section 995-1 at that time
- (e) in respect of foreign resident shareholders – have not used their Vita Group shares at any time in carrying on a business through a permanent establishment in Australia
- (f) are not 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of these expressions in Subdivision 124-M, and
- (g) are not subject to the Taxation of Financial Arrangements (TOFA) rules in Division 230 in relation to gains or losses on their Vita Group shares.

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

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 35 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.

Date of effect

7. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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

8. 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 10 November 2014
- Vita Group ASX Announcement made on 24 October 2014
- the underwriting agreement executed between Vita Group and Canaccord Genuity (Australia) Limited (Canaccord) on 17 October 2014
- 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

Vita Group Limited

9. Vita Group is an Australian tax resident. It is the head company of a tax consolidated group and is listed on the Australian Securities Exchange.

10. Vita Group has one class of ordinary shares. The ordinary shares are equity interests under Division 974.

The Scheme of Arrangement

11. On 24 October 2014, Vita Group announced a program of returning capital to shareholders by the declaration of special dividends.

12. On 24 October 2014, Vita Group announced the first special dividend of \$0.03 to be paid on Vita Group's ordinary shares.

13. The special dividend was paid to all shareholders on the share register at the close of business on 10 November 2014 (record date). The dividend was payable to all shareholders in proportion to their shareholding held on the record date.

14. The ex-dividend date for the special dividend was 11 November 2014 and the payment date was 5 December 2014.

15. The special dividend met the requirements of section 254T of the *Corporations Act 2001* as a dividend.

16. Shareholders were given the option of receiving the special dividend in cash or electing to receive the special dividend in Vita Group shares pursuant to the Vita Group Dividend Reinvestment Plan (DRP). A discount of 2.5 per cent applied to the shares issued under the DRP. To participate in the DRP, shareholders had to make an election by 12 November 2014.

17. The special dividend was underwritten to 100 per cent. In effect if a shareholder elected to receive the dividend in cash, the unallocated DRP shares were available for purchase by the underwriter.

18. The underwriting was undertaken by Canaccord Genuity (Australia) Limited (Canaccord). Pursuant to the underwriting agreement dated 17 October 2014 Canaccord agreed to take up any unallocated shares.

19. The combined impact of the special dividend, the DRP and the underwriting was that Vita Group had approximately the same value of cash available following the payment of the special dividend as it did prior to payment of the special dividend.

20. The share price for DRP shares was determined using a volume-weighted averaging period (VWAP). The averaging period for determining the share price under the DRP was 10 trading days from 13 November 2014 to 26 November 2014. The VWAP share price was \$1.1140.

21. The announcement date for the price for DRP shares was 27 November 2014.

22. The total special dividend declared was three cents per share.

23. Vita Group issued 112,889 new shares to existing shareholders under the DRP.

24. Vita Group issued 3,824,199 new shares to the underwriter for \$1.0862 per share (including the discount of 2.5 per cent), an amount equal to the amount of the special dividend paid out in cash to those shareholders that did not elect to receive their special dividend as DRP shares.

25. The new shares were issued to Canaccord on 5 December 2014.

26. Vita Group did not seek shareholder approval in relation to the issue of the new shares under the DRP, as the issue was within Vita Group's available 15 per cent capacity as defined in ASX listing rule 7.1.

27. Vita Group incurred underwriting fees and other professional costs as part of the capital raising via the DRP, including a Capital Raising Fee.

28. The Capital Raising Fee paid to Canaccord was equal to 2.5 per cent of the underwritten amount (being the number of DRP not taken up by Vita shareholders multiplied by \$0.03 per share).

Other Matters

29. Vita Group states it intends to use the funds from the underwriting agreement to support its growth plans in its retail and business operations.

30. The special dividend was paid out of the retained profits of Vita Group as at 30 June 2014 and not out of any distributions from subsidiaries of Vita Group.

31. Vita Group had a franking account balance of \$41,678,050 immediately prior to the payment of the special dividend. The debit to the franking amount arising from the special dividend was \$1,832,771.

32. The share capital account of Vita Group is not tainted.

33. The journal entries for the special dividend are as follows:

	Dr	Cr
On date of declaration:		
Retained earnings	4,276,465	
Dividend payable		4,276,465
On date of payment:		
Cash		112,620
Dividend payable participants	112,620	
Dividend payable	4,163,845	
Share capital		4,163,845
Cash	4,163,845	
Share capital		4,163,845

34. As of 30 September 2014, Australian resident shareholders of Vita Group held 99.14 per cent of all shares and non-resident shareholders held the remaining 0.86 per cent of shares.

35. Vita Group paid a fully franked cash dividend to shareholders of 1.91 cents per share during the 6 months ended 30 June 2014. Vita Group paid a fully franked cash dividend to shareholders of 2.73 cents per share on 3 October 2014.

Ruling

Franking of special dividend

36. As the special dividend satisfies section 202-5, it can be fully franked in accordance with Division 202.

Qualified persons

37. A Vita Group shareholder will be a qualified person in relation to the Special Dividend if, from the day after the day they acquired the share to 26 December 2014 inclusive, the Vita Group shareholder holds their Vita Group shares continuously for not less than 45 days and does 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 Vita Group shares.

Anti-streaming provisions of Division 204

38. The Commissioner does not consider that the Scheme set out in paragraphs 8 to 35 of this Ruling will result in Vita Group directing the flow of distributions in such a manner as to stream the imputation benefits such that one class of members derive greater benefit from the franking credits attached to the Special Dividend, while the other members receive lesser or no imputation benefits. As the conditions in subsection 204-30(1) do not apply, 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.

The anti-avoidance provisions

39. In considering the manner, form and substance of the Scheme set out in paragraphs 8 to 35 of this Ruling, 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 to be received in relation to the Special Dividends.

Commissioner of Taxation

25 February 2015

Appendix 1 – Explanation

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.*

Franking of special dividend

40. In accordance with section 202-5, an entity will be taken to have franked a distribution if the following conditions are satisfied:

- (a) The entity is a franking entity that satisfies the residency requirement when the distribution is made
- (b) The distribution is a frankable distribution, and
- (c) The entity allocates a franking credit to the distribution.

The entity is a franking entity that satisfies the residency requirement when the distribution is made

41. Section 202-15 provides that an entity will be a franking entity at a particular time if:

- (a) it is a corporate tax entity at that time;
- (b) it is not a life insurance company that is a mutual insurance company at that time; and
- (c) in a case where the entity is a company that is a trustee of a trust – it is not acting in its capacity as trustee of the trust at that time.

42. As a public company, Vita Group is a corporate tax entity as defined in section 960-115 and as such is a franking entity in accordance with paragraph 202-15(a). Vita Group is not a life insurance company or acting in the capacity as a trustee of a trust at the time of the distribution (being the payment of the special dividend). Accordingly, Vita Group is a franking entity.

43. The residency requirement when making a distribution is set out in section 202-20. Paragraph 202-20(a) provides that a company will satisfy the residency requirement if it is an Australian resident at the time of making the distribution. As an Australian resident, Vita Group will also satisfy the residency requirements of section 202-20.

The distribution is a frankable distribution

44. Subsection 202-40(1) states that a distribution is a frankable distribution to the extent that it is not unfrankable under section 202-45.

45. In this respect, pursuant to item 1 of the table set out in subsection 960-120(1), a distribution by a company includes a dividend.

46. Vita Group's special dividend will be unfrankable if any of the circumstances listed in section 202-45 apply. Vita Group's proposed distribution does not meet any of the descriptions of an unfrankable distribution under section 202-45.

The entity allocates a franking credit to the distribution

47. Vita Group will pay the special dividend out of its retained profits. Vita Group has a balance in its franking account sufficient to fully frank the special dividend distribution.

48. Accordingly, as the special dividend satisfies section 202-5, it will be fully franked in accordance with Division 202.

Qualified persons

49. Former Division 1A of Part IIIA of the ITAA 1936 contains the measures known as the 'holding period rule' and the 'related payment rule'. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

50. 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 the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification in relation to the dividend

51. Former subsection 160APHO(2) of the ITAA 1936, 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

52. In order to determine the relevant qualification period, it is necessary to determine whether, under the present arrangement, the Vita Group shareholders are considered to be under an obligation to make a related payment in respect of the Special Dividend.

53. 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 of Part IIIA of the ITAA 1936. 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.

54. 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.

55. 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 of the sums 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.

56. In the current circumstances, it is considered that an integral part of the Scheme of Arrangement is the payment of the Special Dividend of \$0.03 per share. The payment of the Special Dividend is not conditional on the shareholders doing something, being under an obligation to do something, or likely to do something that will have the effect of passing the benefit of the Special Dividend to another person for the purposes of former subsection 160APHN(3) of the ITAA 1936. As such, it can be concluded that a Vita Group shareholder will not be taken to have made a related payment in respect of the Special Dividend.

Shareholders not under an obligation – primary qualification period

57. As the Vita Group shareholders will not be taken, for the purposes of former Division 1A of Part IIIA of the ITAA 1936, to have made a related payment in respect of the Special Dividend, the relevant holding period is the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

58. The primary 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 the period beginning on the day after the day on which the taxpayer acquired the shares or interest and ending:

- (a) if the shares are not preference shares – on the 45th day after the day on which the shares or interest become *ex dividend*;

59. The ex-dividend date of the Special Dividend for tax purposes is 11 November 2014 pursuant to former section 160APHE of the ITAA 1935.

60. The primary qualification period (defined in former subsection 160APHD of the ITAA 1936) runs from the day after the date of acquisition of a Vita Group share until 45 days after the ex-dividend date of 11 November 2014. In practical terms, this means that the primary qualification period runs from the day after the date of acquisition to 26 December 2014.

61. A Vita Group shareholder will be a qualified person in relation to the Special Dividend if, from the day after the day they acquired the share to 26 December 2014 inclusive, the Vita Group shareholder holds their Vita Group shares continuously for not less than 45 days (former subparagraph 160APHO(2)(a)(i) of the ITAA 1936) and does 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 Vita Group shares.

Anti-streaming provisions of Division 204

62. Subdivision 204-D contains the general anti-streaming provisions. Section 204-26 provides that Subdivision 204-D prevents the streaming of imputation benefits to members of a corporate tax entity in preference to others by imposing a franking debit or denying an imputation benefit where there is streaming.

63. 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)), and
- (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)).

64. Relevantly, 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 a distribution that is made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

65. 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.

66. Pursuant to the payment of the Special Dividend, all Vita Group shareholders will receive an imputation benefit as a result of the Special Dividend. Subject to being 'qualified persons', Australian resident shareholders will receive an imputation benefit in the form of a tax offset (paragraph 204-30(6)(a)). Non-resident shareholders will receive an imputation benefit in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders (subsection 204-30(8)).

67. However, the Special Dividend will be paid to all Vita Group shareholders identified on the ex-dividend date on a pro-rata basis and will be fully franked with Australian franking credits. As of 30 September 2014, Australian resident shareholders of Vita Group held 99.14 per cent of all shares and non-resident shareholders held the remaining 0.86 per cent of shares.

68. The Commissioner does not consider that Vita Group will direct the flow of distributions in such a manner as to stream the imputation benefits such that one class of members derive greater benefit from the franking credits attached to the Special Dividend, while the other members receive lesser or no imputation benefits.

69. As the conditions in subsection 204-30(1) for the provision to apply will not be 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.

The anti-avoidance provisions

70. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares.

71. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and

- (d) except for this section, a person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

72. 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).

73. 'Corporate tax entity' is defined in section 960-115 and includes an entity that is a company.

74. A 'membership interest' in an entity is defined in section 960-135. If you are a member of an entity who has an interest in an entity, or a right in relation to an entity, you have a membership interest in that entity.

75. A 'scheme for a disposition' of a membership interest, or an interest in a membership interest includes entering into any contract, arrangement, transaction or dealing that changes or otherwise affects the legal or equitable ownership of the membership interests or interest in membership interests (subsection 177EA(14) of the ITAA 1936).

76. Vita Group is a corporate tax entity for the purposes of section 177EA of the ITAA 1936 and shares in Vita Group are membership interests in Vita Group. The fully franked Special Dividend is a frankable distribution that will be paid to Vita Group shareholders (the relevant taxpayers) as a part of this scheme and who could, therefore, reasonably be expected to receive imputation benefits.

77. Consequently, 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, given the scheme set out in paragraphs 8 to 35 of this Ruling, Vita Group, its shareholders or any other relevant party, had a purpose of more than merely an incidental purpose, of conferring an imputation benefit under the scheme.

78. In arriving at this 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. Subsection 177EA(17) of the ITAA 1936 provides a non-exclusive list of 'relevant circumstances' to which one must have regard. The list includes a variety of matters (including the eight matters in subparagraphs 177D(2)(a) to (h) of the ITAA 1936) which individually and collectively will point towards or away from the requisite purpose; however not all of the circumstances listed will be relevant to every case.

(a) the extent and duration of the risks of loss, and the opportunities for profit or gain

79. There are no facts that indicate that this factor of itself is relevant to suggest a dominant purpose of obtaining a tax benefit.

(b) derive a greater benefit from franking credits than other entities who hold membership interests

80. The special dividend is being paid to all shareholders on a pro-rata basis. While non-resident shareholders will not be eligible for a fully-franked special dividend, non-resident shareholders hold only 0.86 per cent of the ordinary shares in Vita Group. Accordingly, this factor of itself does not suggest a dominant purpose of obtaining a tax benefit.

(c) retained or used franking credits to pay a franked distribution to another entity referred to in paragraph 177EA(17)(b) of the ITAA 1936

81. This factor does not suggest a dominant purpose of obtaining a tax benefit because the special dividend is being paid to all shareholders on a pro-rata basis and all shareholders may elect to either receive the special dividend in cash or have it reinvested under the dividend reinvestment plan.

(d) apart from the scheme, a franked distribution would have flowed indirectly to another entity referred to in paragraph (b)

82. This factor does not suggest a dominant purpose of obtaining a tax benefit because the special dividend is being paid to all shareholders on a pro-rata basis and all shareholders may elect to either receive the special dividend in cash or have it reinvested under the dividend reinvestment plan.

(e) the issue of a non-share equity interest to which section 215-10 applies

83. There are no facts that indicate that this factor of itself is relevant to suggest a dominant purpose of obtaining a tax benefit.

(f) whether any consideration in connection with the scheme was calculated by reference to the imputation benefits to be received by the relevant taxpayer

84. There are no facts that indicate that this factor of itself is relevant to suggest a dominant purpose of obtaining a tax benefit.

(g) whether a deduction is allowable or a capital loss is incurred under the scheme

85. There are no facts that indicate that this factor of itself is relevant to suggest a dominant purpose of obtaining a tax benefit.

(ga) whether a distribution under the scheme is sourced, directly or indirectly, from unrealised or untaxed profits

86. The special dividend will be paid out of retained profits of Vita Group as at 30 June 2014 and not out of any distributions from subsidiaries of Vita Group. There are no facts which suggest that this factor of itself is relevant to suggest a dominant purpose of obtaining a tax benefit.

(h) whether a distribution under the scheme is equivalent to the receipt by the relevant taxpayer of interest

87. There are no facts to indicate that this factor of itself is relevant to suggest a dominant purpose of obtaining a tax benefit.

(i) the period for which the relevant taxpayer held membership interests in the corporate tax entity

88. Subject to Vita Group shareholders satisfying the requirements to be a qualified person there are no facts that indicate that this factor is relevant of itself to suggest a dominant purpose of obtaining a tax benefit.

(j) any of the matters referred to in subsection 177D(2) of the ITAA 1936

Paragraph 177D(2)(a) of the ITAA 1936 – the manner in which the scheme was entered into or carried out

89. This factor enables contrivance and artificiality to be identified by comparing the manner in which the scheme will be entered into or carried out with the manner in which reasonable counterfactuals would have been implemented. Identification of any step or aspect of the scheme that is apparently explicable for no purpose but a tax purpose will go to the manner in which the scheme was entered into or carried out.

90. As stated by the majority of the High Court in *Spotless*,¹ the terms ‘manner’ and ‘entered into’ are not to be given any restricted meaning. ‘Manner’ includes consideration of the way in which, and method or procedure by which, a scheme was established.

¹ *Federal Commissioner of Taxation v. Spotless Services Ltd* (1995) 62 FCR 244; (1995) 133 ALR 165; 95 ATC 4775; (1995) 32 ATR 309.

91. Here, the manner in which the scheme will be entered into or carried out is evident from the facts provided. The arrangement has a non-tax rationale and is an arrangement which is commercially explicable when compared with the counterfactual. As the proposed arrangement will be entered into and carried out in a manner which is consistent with facilitating effective dividend distribution and management of the franking account balance, the manner of the implementation of the arrangement does not indicate the existence of any artificiality or contrivance. There do not appear to be steps present that could not be expected to be present in a more straightforward or ordinary method of achieving the outcome of the arrangement.

92. There is nothing elaborate or contrived which would indicate that the scheme is tax driven, rather, the scheme achieves the objectives of the Vita Group in terms of dividend distribution to ordinary shareholders on a pro-rata basis. The manner in which the scheme will be entered into or carried out does not suggest that the scheme is explicable only by reference to Australian taxation considerations. Accordingly, of itself this factor does not suggest a dominant purpose of obtaining a tax benefit.

Paragraph 177D(2)(b) of the ITAA 1936 – the form and substance of the scheme

93. In *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; (2004) 217 CLR 216; (2004) 206 ALR 207; 2004 ATC 4599; (2004) 55 ATR 712 at [94], Callinan J said that in looking at the form and substance of the scheme under subparagraph 177D(b)(ii)² of the ITAA 1936 one is to look at:

whether the substance of the transaction (tax implications apart) could more conveniently, or commercially, or frugally have been achieved by a different transaction or form of transaction.

94. Where the form of a scheme differs from its substance, the Commissioner may regard this as inconsistent with commercial practice.

95. A discrepancy between the business and practical effect of a scheme on the one hand, and its legal form on the other, may indicate the scheme has been implemented in a particular form as the means to obtain a tax benefit if the substance of the scheme may be achieved or available by some other more straightforward or commercial transaction or dealing.

² Former subparagraph 177D(b)(ii) of the ITAA 1936 was repealed by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* on 29 June 2013 and replaced by paragraph 177D(2)(b) of the ITAA 1936.

96. The form of the arrangement is the payment of a special dividend to all ordinary shareholders on a pro-rata basis. Participation in a dividend reinvestment plan will be offered to all shareholders. The substance of the arrangement reflects the form of the scheme. The form and substance of the scheme is explicable by its financial and commercial objectives, being the stated objective of Vita Group to reduce its franking credit account balance and raise capital via the DRP and underwriting to support Vita Group's growth plans in its retail and business operations.

97. Therefore, the rights and obligations created by the scheme are consistent with the legal form. On the facts, it is considered that the arrangement cannot reasonably be said to involve a roundabout way of implementing steps that have no effect on the substance of what is achieved but instead lead directly to the obtaining of a tax benefit. The arrangement, and the way it is implemented, do not make the arrangement more complicated than a straightforward or ordinary commercial arrangement that achieves the same overall effect, disregarding any tax benefit. It is not evident that there are material steps in the arrangement consistent with no other explanation than the purpose of obtaining a tax benefit, such as would recharacterise the purposes of an entity that will enter into or carrying out the scheme.

98. As there is no disparity between the form and substance of the scheme, of itself this factor does not suggest the scheme has a dominant purpose of obtaining a tax benefit.

Paragraph 177D(2)(c) of the ITAA 1936 – the time at which the scheme was entered into and the length of the period during which the scheme was carried out

99. This factor considers the time the proposed arrangement will be entered into or carried out, and the length of the period during which it will be carried out, and allows consideration of the extent to which the timing and duration of the arrangement go towards delivering the relevant taxpayer a tax benefit or are related to commercial requirements.

100. On the facts, the announcement date of the special dividend will be 24 October 2014 with an ex-dividend date of 11 November 2014 for payment on 5 December 2014. The arrangement is not proposed to be entered into shortly before year end, in advance of a change in the tax law, or other tax sensitive date, such as might tend to suggest a purpose other than a commercial purpose. Instead, the time at which the arrangement will be entered into will be proximate to a commercial occasion and the ability of Vita Group to undertake the arrangement. The time at which the scheme will be entered into can reasonably be said to be associated with a strategic business need that points to a non-tax purpose. There is nothing that suggests that the time at which the scheme will be entered into or the length of time during which the scheme will be carried out is driven by tax considerations.

101. On balance, the timing of the scheme does not indicate a dominant purpose of Vita Group obtaining a tax benefit.

102. The length of the period will reflect the period of time required to complete the steps involved in announcing the special dividend and reinvestment plan and paying the special dividend. Nothing in the length of the period of the arrangement tends to indicate that the scheme will be entered into for the dominant purpose of obtaining a tax benefit.

103. Accordingly, the timing of the arrangement and its length do not suggest the scheme will be entered into or carried out for the dominant purpose of Vita Group obtaining a tax benefit in connection with the scheme.

Paragraph 177D(2)(d) of the ITAA 1936 – the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme

104. This refers to outcomes that would arise from the scheme if Part IVA of the ITAA 1936 did not apply. It considers the relative benefit of tax benefits in relation to any other tax consequences that would arise if the scheme were not entered into.

105. It is reasonable to hypothesise that the result achieved in relation to the operation of the Income Tax Assessment Acts, but for the operation of Part IVA of the ITAA 1936, is that no substantial capital gain or capital loss will be made by Vita Group on its payment of the special dividend and dividend reinvestment plan. This factor does not suggest a dominant tax avoidance purpose.

Paragraph 177D(2)(e) of the ITAA 1936 – any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme

106. This factor requires consideration of whether Vita Group is financially advantaged from the scheme. This does not include changes in the financial position resulting from commercial circumstances rather than the scheme itself. An argument that Vita Group achieves a commercial benefit that outweighs a tax benefit in connection with the arrangement is not of itself conclusive. There are no facts to indicate that this factor is relevant to suggest a dominant tax avoidance purpose.

Paragraph 177D(2)(f) of the ITAA 1936 – any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme

107. There are no facts to indicate that this factor of itself is relevant to suggest a dominant tax avoidance purpose.

Paragraph 177D(2)(g) of the ITAA 1936 – any other consequence for the relevant taxpayer, or for any person referred to in paragraph (f), of the scheme having been entered into or carried out

108. This relates to consequences other than a change in financial position of the parties involved in the scheme. Broadly, it has regard to the commercial benefits of the scheme, and considers the result of these relative to the tax benefits from the scheme.

109. On the facts there are no consequences apart from those outlined above which evidence that the dominant purpose of the arrangement will be for Vita Group to obtain a tax benefit in connection with the scheme in the manner contemplated in section 177EA. Accordingly, of itself this factor does not suggest the scheme will be entered into for the dominant purpose of obtaining a tax benefit.

Paragraph 177D(2)(h) of the ITAA 1936 – the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in paragraph (f)

110. This factor inquires into the nature of the connection between Vita Group and any other person whose financial position is reasonably expected to change as a result of the scheme or for whom there are any other consequences from the scheme.

111. It looks to the practical, legal, economic and any other outcomes achieved by the scheme for connected parties, and ensures that any other consequences from the scheme are taken into account, for instance other non-tax advantages arising to the parties to the scheme of a commercial nature.

112. From Vita Group's perspective, the intention is to pay a special dividend to take advantage of the Group's franking credit balance for the benefit of shareholders. Vita Group is also offering a dividend reinvestment plan to provide flexibility to re-invest dividends in shares.

113. On the facts, the arrangement is not a blatant or artificial arrangement to generate a capital loss. Of itself, this factor does not suggest a dominant tax avoidance purpose.

Conclusion

114. The Special Dividend will be fully franked and will be paid to the existing shareholders of Vita Group in proportion to their shareholding, and irrespective of their ability to utilise the relevant franking credits. Subject to meeting the requirements of being a qualified person, all shareholders may elect to receive their Special Dividend in the form of a cash payment or elect to participate in a Dividend Reinvestment Plan and have their Special Dividend reinvested. The Special Dividend will allow Vita Group shareholders to share in the accumulated profits of Vita Group.

115. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by Vita Group or the Vita Group shareholders for more than an incidental purpose of enabling participating shareholders to obtain imputation benefits. The provision of imputation benefits to Vita Group shareholders remains incidental, in the sense of being subservient, to the purpose of distributing retained profits to Vita Group shareholders as special dividends.

116. 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 to be received in relation to the Special Dividends.

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References

Previous draft:

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Related Rulings/Determinations:

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- part IVA
- qualified person
- related payment rule
- special dividend
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- ITAA 1997 Div 202
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