

CR 2015/24 - Income tax: Calliden Group Limited Scheme of Arrangement and Special Dividend

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Class Ruling

Income tax: Calliden Group Limited Scheme of Arrangement and Special Dividend

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

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

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

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

What this Ruling is about

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

Relevant provisions

2. The Relevant Provisions dealt with in this Ruling are:

- Division 1A of former Part IIIA of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subsection 6(1) of the ITAA 1936
- subsection 44(1) of the ITAA 1936
- former section 160APHN of the ITAA 1936
- former section 160APHO 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 204-30 of the ITAA 1997
- section 207-20 of the ITAA 1997, and
- subsection 207-35(1) 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 ordinary shareholders of Calliden Group Limited (Calliden) who:

- are residents of Australia as that term is defined in subsection 6(1) of the ITAA 1936
- participated in the scheme as described in paragraphs 18 to 30 of this Ruling (the Scheme) under which Steadfast Group Ltd (Steadfast) acquired all of the issued shares in Calliden pursuant to a members' scheme of arrangement under Part 5.1 of the *Corporations Act 2001*
- held their shares in Calliden neither as revenue assets (as defined in section 977-50), nor as trading stock (as defined in subsection 995-1(1)) – that is, they broadly held their shares in Calliden on capital account, and
- are not subject to the taxation of financial arrangements rule in Division 230 in relation to gains and losses on their Calliden 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, an entity belonging to this class of entities is referred to as 'Calliden Shareholders'.

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 18 to 30 of this Ruling.

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

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

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:

- Class Ruling application dated 22 October 2014.
- Scheme Booklet lodged with the Australian Securities and Investments Commission (ASIC) on 31 October 2014 (Scheme Booklet).
- Other correspondence provided by the applicant between 22 October 2014 and 8 January 2015 inclusive.

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

Calliden

9. Calliden is an Australian resident company that was listed on the Australian Securities Exchange (ASX).

10. Calliden is the head company of the Calliden income tax consolidated group.

11. Calliden is an authorised non-operating holding company of an insurance company that has been operating in the Australian market since 2005.

12. As at 22 October 2014, Calliden had 226,683,914 ordinary shares on issue. Calliden did not have any other class of shares on issue.

13. The shareholders in Calliden comprise a mix of individuals, companies, superannuation funds and other institutional investors.

14. 99% of the shares in Calliden are held by Australian residents.

15. Calliden has paid fully franked dividends to its shareholders since the 2009 calendar year.

16. As at the date of the Scheme Booklet, Calliden's franking credits balance was approximately \$23.1 million.

Steadfast

17. Steadfast is an Australian resident company listed on the ASX.

The Scheme of Arrangement

18. On 27 August 2014, Calliden and Steadfast entered into the Scheme Implementation Deed under which Calliden agreed to propose the Scheme to Calliden shareholders.

19. The Scheme was approved by a majority of eligible Calliden shareholders at the Scheme Meeting held on 8 December 2014.

20. The Scheme was approved by the court at the second court hearing held on 11 December 2014. The Scheme became effective on 12 December 2014 when Calliden lodged the court orders and Scheme documents with the ASIC.

21. Under the Scheme, Calliden Shareholders received a total cash payment of \$0.465 (comprising the Special Dividend of \$0.05 paid by Calliden out of its existing cash reserves and the Scheme Consideration of \$0.415 paid by Steadfast) for each Calliden share transferred to Steadfast.

22. Calliden Shareholders who held Calliden shares:

- on the Special Dividend Record Date (17 December 2014), were paid the Special Dividend on the Special Dividend Payment Date (19 December 2014), and
- on the Scheme Record Date (19 December 2014), were paid the Scheme Consideration on the Implementation Date (23 December 2014).

23. On the Implementation Date, all of the Calliden shares were transferred to Steadfast.

The Special Dividend

24. The Special Dividend was declared by the Calliden board of directors on 23 October 2014.
25. The Special Dividend was paid by Calliden on the Special Dividend Payment Date (19 December 2014) to eligible shareholders who were registered as the holder of one or more Calliden shares on the Special Dividend Record Date (17 December 2014).
26. The Special Dividend is a frankable distribution for the purposes of subsection 202-40(1) and is capable of being franked in accordance with section 202-5.
27. The Special Dividend was paid by Calliden out of its existing cash reserves and was debited against its retained earnings.
28. The Special Dividend was not debited against Calliden's share capital account.
29. Although payment of the Special Dividend was conditional upon the Scheme becoming effective, the declaration and payment of the Special Dividend was at the discretion of the board of Calliden.
30. Steadfast did not have any influence or control over the decision to pay the Special Dividend nor did they provide any funds to Calliden to finance the payment of the Special Dividend.

Ruling

The Special Dividend

31. The Special Dividend of \$0.05 per Calliden share paid to Calliden Shareholders constitutes a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

32. A Calliden Shareholder that receives 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

33. A Calliden Shareholder that receives the fully franked Special Dividend directly and satisfies the residency requirements in section 207-75:
- must include the amount of the franking credit attached to the Special Dividend in their assessable income, and

- will be entitled to a tax offset equal to the amount of the franking credit,

under section 207-20, subject to being a 'qualified person' in relation to the Special Dividend.

34. A Calliden Shareholder (not being a corporate tax entity), who receives the fully franked Special Dividend as a trustee of a trust (not being a compliant superannuation entity or a FHSA trust) or as a partnership, is required to include an amount equal to the franking credit attached to the dividend as assessable income under subsection 207-35(1), subject to the trustee or the partnership being a 'qualified person'.

Qualified person

35. The payment of the Special Dividend by Calliden constitutes a 'related payment' for the purposes of former section 160APHN of the ITAA 1936.

36. Accordingly, to be a 'qualified person' in relation to the Special Dividend for the purposes of former Division 1A of Part IIIAA of the ITAA 1936 (former Division 1A), each Calliden Shareholder will need to hold their Calliden shares 'at risk' for a continuous period of at least 45 days in the secondary qualification period. A Calliden Shareholder must exclude any days on which they have materially diminished risks of loss or opportunities for gain in respect of their Calliden shares.

37. A Calliden Shareholder is considered to no longer hold their Calliden shares 'at risk' for the purposes of former Division 1A as from the Scheme Record Date of 19 December 2014.

38. Therefore, a Calliden Shareholder will be a qualified person in relation to the Special Dividend if, in the period from 3 November 2014 to 18 December 2014 inclusive, they continued to hold their Calliden shares and did not have materially diminished risks of loss or opportunities for gain in respect of their Calliden shares for a continuous period of at least 45 days (not counting the day on which the share was acquired or the day of disposal of the share).

Refundable tax offset

39. The franking credit tax offset that a Calliden Shareholder is entitled to under Division 207 in respect of the Special Dividend is subject to the refundable tax offset rules in Division 67, provided the Calliden Shareholder is not excluded by the operation of section 67-25.

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

40. CGT event A1 happens when a Calliden Shareholder disposes of a Calliden share to Steadfast pursuant to the Scheme (subsections 104-10(1) and 104-10(2)).

41. The time of the CGT event is when the change of ownership occurs (paragraph 104-10(3)(b)). CGT event A1 happens when the Calliden shares are transferred to Steadfast on the Implementation Date of 23 December 2014.

42. A Calliden Shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Calliden share exceed the cost base of that share. A Calliden Shareholder makes a capital loss if the capital proceeds from the disposal of a Calliden share are less than the reduced cost base of the Calliden share (subsection 104-10(4)).

Capital proceeds

43. The capital proceeds from CGT event A1 happening to a Calliden Shareholder is the money received or entitled to be received in respect of the event happening (subsection 116-20(1)).

44. Having regard to the circumstances of the Scheme, the capital proceeds from CGT event A1 happening in respect of each Calliden share will not include the Special Dividend.

45. The capital proceeds received by a Calliden Shareholder who disposes of Calliden shares pursuant to the Scheme will be \$0.415 per share.

Discount capital gain

46. A capital gain made by a Calliden Shareholder when they disposed of a Calliden share under the Scheme is a discount capital gain if they acquired the share at least 12 months before the date of disposal (i.e. 23 December 2014) and the other conditions in Division 115 are satisfied.

The anti-avoidance provisions

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

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48. 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 paid in relation to a Calliden share.

Commissioner of Taxation

1 April 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.*

Special Dividend

49. 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.

50. The payment of the Special Dividend is a distribution in money made by Calliden to its shareholders.

51. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 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...

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

Assessability of the Special Dividend

53. 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...

54. As the Special Dividend was paid out of profits derived by Calliden, Calliden 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

55. Subsection 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 any other amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a *tax offset for the income year in which the distribution is made. The tax offset is equal to the *franking credit on the distribution.

56. Therefore, subject to being a qualified person in relation to the Special Dividend for the purposes of former Division 1A, if the fully franked Special Dividend was received directly by a Calliden Shareholder and the Calliden Shareholder satisfies the residency requirement in section 207-75, the Calliden Shareholder:

- is required to include the amount of the franking credit on the Special Dividend in their assessable income, and
- is entitled to a tax offset equal to the amount of the franking credit.

57. If the fully franked Special Dividend was received by a Calliden 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.

58. Therefore, subject to satisfying the qualified person rule, a Calliden Shareholder that is a trustee of a trust or a partnership is required to include the amount of the franking credit on the Special Dividend in the assessable income of that trust or partnership under subsection 207-35(1).

Qualified person

59. 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 on a dividend.

60. Former section 160APHU of the ITAA 1936 provides that a partner in a partnership or a beneficiary of a trust cannot be a qualified person in relation to a dividend unless the partnership or the trustee of the trust is also a qualified person in relation to the dividend.

61. Former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' in relation to a franked distribution they have received and thus be entitled to a tax offset for the franking credit on the distribution. Former Division 1A has effect via the express terms of section 207-145.

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, or 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. Broadly, if the Calliden Shareholders are not under an obligation to make a related payment in relation to a dividend or distribution, they will have to satisfy the holding period requirement within the primary qualification period. If the Calliden Shareholders are under an obligation to make a related payment in relation to a dividend or distribution, they will have to satisfy the holding period requirement within the secondary qualification period.

Related payment

64. In order to determine the relevant qualification period, it is necessary to determine whether, under the Scheme, Calliden Shareholders are considered to have made, or be under an obligation to make, or be likely 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.

66. Former subsection 160APHN(2) of the ITAA 1936 states:

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.

67. 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.

68. 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 the dividend or distribution.

69. In the circumstances of this Scheme, it is considered that the payment of the Special Dividend of \$0.05 per share is an integral part of the Scheme. The payment of the Special Dividend was conditional upon the Scheme being approved by Calliden Shareholders and this ties the payment of the Special Dividend to the disposal of the Calliden shares.

70. The payment of the Special Dividend of \$0.05 to Calliden Shareholders will reduce the total entitlement of \$0.465 per share that the Calliden Shareholder received for the disposal of their Calliden shares under the Scheme to \$0.415 per share.

71. The reduction of the total entitlement under the Scheme by the amount of the Special Dividend has the effect of passing the benefit of the Special Dividend from a Calliden Shareholder to Steadfast. Therefore, a Calliden Shareholder is taken to have made, or to be under an obligation to make, a related payment in respect of the Special Dividend.

Holding period

72. As the Calliden Shareholders are taken, for the purposes of former Division 1A, to have made or be likely to make a related payment in respect of the Special Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

73. Former paragraph 160APHO(2)(a) of the ITAA 1936 provides that:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid satisfies this subsection in relation to a qualification period in relation to the shares or interest if, during the period:

- (a) where the taxpayer held the shares – the taxpayer held the shares for a continuous period (not counting the day on which the taxpayer acquired the shares or, if the taxpayer has disposed of the share, the day on which the disposal occurred) of not less than:
 - (i) if the shares are not preference shares – 45 days; or
 - (ii) if the shares are preference shares – 90 days; or...

74. As the Calliden shares are not preference shares, Calliden Shareholders are required to hold their shares for at least 45 days during the secondary qualification period.

75. The former section 160APHD of the ITAA 1936 defines the 'secondary qualification period' 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 became *ex dividend*...

76. 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.

77. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 17 December 2014. This was the last day on which acquisition by a person of a Calliden 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 18 December 2014.

78. As per the definition in former section 160APHD of the ITAA 1936, the secondary qualification period will begin 45 days before the *ex dividend* date of 18 December 2014 and end 45 days after that day. This means that the secondary qualification period would ordinarily run from 3 November 2014 to 1 February 2015 (45 days before and 45 days after 18 December 2014).

79. Pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which an entity had materially diminished risks of loss or opportunities for gain in respect of their Calliden shares, or interest in Calliden shares, are excluded from counting towards the 45 day holding period requirement. Subsection 160APHO(3) provides:

In calculating the number of days for which the taxpayer continuously held the shares or interest, any days on which the taxpayer has materially diminished risks of loss or opportunities for gain in respect of the shares or interest are to be excluded, but the exclusion of those days is not taken to break the continuity of the period for which the taxpayer held the shares or interest.

80. In this case, the Scheme Consideration was paid by Steadfast to Calliden Shareholders who were registered as the holder of one or more Calliden shares on the Scheme Record Date, being 19 December 2014. It is considered that once a Calliden shareholder is identified as a Calliden Shareholder on the Scheme Record Date, that Calliden Shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A as, at that time the Calliden Shareholder is committed to disposing of their Calliden shares and receiving the Scheme Consideration. This means that as from 19 December 2014, Calliden Shareholders no longer held their Calliden shares 'at risk'.

81. Accordingly, the secondary qualification period would run from 3 November 2014 to 18 December 2014 (inclusive). A Calliden Shareholder who received the Special Dividend would need to have held 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.

82. As such, a Calliden Shareholder who acquired a Calliden share on or before 3 November 2014 is a 'qualified person' for the purposes of former Division 1A if they continuously held their share at risk until the Scheme Record Date of 19 December 2014.

Refundable tax offset

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

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

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

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

CGT consequences

CGT event A1

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

87. A takeover effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract (paragraph 9 of the Taxation Determination TD 2002/4).

88. CGT event A1 happens when a Calliden Shareholder disposed of a Calliden share to Steadfast pursuant to the Scheme (subsections 104-10(1) and 104-10(2)). The disposal occurred on the Implementation Date of 23 December 2014 when the share was disposed of by a Calliden Shareholder (paragraph 104-10(3)(b)).

89. 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.

90. A Calliden Shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Calliden share are more than the cost base of the share. A Calliden Shareholder makes a capital loss if those capital proceeds are less than the reduced cost base of the Calliden share (subsection 104-10(4)).

Capital proceeds

91. The capital proceeds received by a Calliden Shareholder from the CGT event is the money they have received, or are entitled to receive, in respect of the event happening (subsection 116-20(1)).

92. Under the Scheme, a Calliden Shareholder received from Steadfast the Scheme Consideration of \$0.415 for each Calliden share and also received from Calliden the Special Dividend of \$0.05 per share paid out of Calliden's cash reserves.

93. 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.

94. The Special Dividend to Calliden Shareholders was declared by the Calliden board of directors on 23 October 2014. The payment of the Special Dividend was contingent on the Scheme becoming effective. The Scheme became effective on 12 December 2014.

95. The declaration of the Special Dividend was at the discretion of the Calliden Board and was subject to the approval of the Scheme by the requisite majority of Calliden shareholders.

96. The payment of the Special Dividend was funded entirely by Calliden with no actual or contingent funding support from Steadfast.

97. The payment of the Special Dividend allowed Calliden to utilise some of the franking credits available to Calliden.

98. In these circumstances, it is considered that the Special Dividend does not form part of the capital proceeds which a Calliden Shareholder receives in respect of CGT event A1 happening.

99. Accordingly, the capital proceeds for a participating Calliden Shareholder is equal to the Scheme Consideration of \$0.415 per share.

Discount capital gain

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

101. 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)).

102. This means that a capital gain made by a Calliden Shareholder when they dispose of their Calliden share is a discount capital gain if the shareholder acquired the Calliden share at least 12 months before the date of disposal under the Scheme, being the Implementation Date of 23 December 2014, and the other requirements in Division 115 are satisfied.

The anti-avoidance provisions

Section 177EA

103. 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.

104. If section 177EA 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).

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

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

107. In the present case, it is considered that the conditions of paragraphs 177EA(3)(a) to (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)), it would be concluded that, on the part of Calliden, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring a franking credit benefit under the scheme.

108. In arriving at a conclusion, one 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 diverse matters which, taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the franking credit benefit is more than an incidental purpose of the scheme.

109. The relevant circumstances are that the disposition of the ordinary shares in Calliden was made pursuant to a takeover by Steadfast by way of Scheme of Arrangement under the *Corporations Act 2001* voted upon by Calliden's shareholders entitled to vote.

110. The Calliden Scheme of Arrangement is a normal commercial transaction under which Calliden is being acquired.

111. Calliden's shareholders are a mix of residents and non-residents. The fully franked Special Dividend was paid to all the existing shareholders of Calliden in proportion to the number of shares that each shareholder held on the relevant Record Dates and irrespective of their ability to utilise the relevant franking credits. The Special Dividend allowed Calliden Shareholders to share in the accumulated profits of Calliden.

112. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by Calliden or the Calliden Shareholders for more than an incidental purpose of enabling Calliden Shareholders to obtain imputation benefits. The goal of providing imputation benefits to Calliden Shareholders remains incidental, in the sense of being subservient to, to the purpose of transferring their shares to Steadfast.

113. Having regard to the relevant circumstances of the scheme, it cannot be concluded that Calliden or the shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain a franking credit benefit.

114. As such, 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 dividends.

Section 204-30

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

- (a) an *imputation benefit is, or apart from this section would be, received by a *member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- (b) the member would *derive a *greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

116. Relevantly, if section 204-30 applies, the Commissioner has the discretionary powers under subsection 204-30(3) to make a written determination.

117. Subsection 204-30(3) provides:

The Commissioner may make one or more of these determinations:

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

A determination must be in writing.

118. 'Streaming' is not defined for the purposes of section 204-30. However, the Commissioner has understood it to refer to a company 'selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits' (paragraph 3.28 of the Explanatory Memorandum to the *New Business Tax System (Imputation) Bill 2002*).

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

120. Under the current arrangement, all Calliden Shareholders will receive an imputation benefit when the Special Dividend is paid. The imputation benefit for resident shareholders is in the form of a tax offset (paragraph 204-30(6)(a)), and for non-resident shareholders is in the form of not being liable to pay dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders may derive a greater benefit from franking credits than the non-resident shareholders.

121. However, the Special Dividend will be paid equally to all Calliden Shareholders and will be fully franked. Accordingly, it cannot be said that Calliden selectively directed the flow of franked distributions to those members who could most benefit from the imputation benefits.

122. As the conditions in subsection 204-30(1) 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.

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- Related Rulings/Determinations:**
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 - holding period
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Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 - disposal of a CGT asset

Income tax ~~ Capital gains tax ~~ Capital proceeds

Income tax ~~ Capital management ~~ Franking credits / tax offsets

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