


CR 2016/25 - Income tax: Colorpak Limited - Scheme of Arrangement and payment of Interim and Special Dividends

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Class Ruling

Income tax: Colorpak Limited – Scheme of Arrangement and payment of Interim and Special Dividends

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

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

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

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

What this Ruling is about

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

Relevant provision(s)

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subsection 44(1) of the ITAA 1936
- section 128B of the ITAA 1936
- section 128D 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 204-30 of the ITAA 1997
- section 207-20 of the ITAA 1997
- section 207-35 of the ITAA 1997
- section 207-45 of the ITAA 1997
- section 207-75 of the ITAA 1997, and
- section 207-145 of the ITAA 1997.

All subsequent legislative references in this Ruling are to provisions of the ITAA 1997 unless specified otherwise.

Class of entities

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

- (a) held their shares on capital account, that is, the shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
- (b) participated in the Scheme of Arrangement (SOA) under which Graphic Packaging International Australia Pty Limited (GPI Australia) acquired 100% of the shares in Colorpak
- (c) received the Interim and/or 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 Colorpak shares.

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

4. The class of entities described in the above paragraph are referred to in this Ruling as Colorpak Shareholders.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 30 of this Ruling.

7. 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

8. This Ruling applies from 1 July 2015 to 30 June 2016. The Ruling continues to apply after 30 June 2016 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 Class Ruling application dated 16 February 2016
- the Scheme Implementation Deed (SID) dated 11 January 2016
- the Scheme Booklet dated 1 March 2016, and
- further correspondence and information 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

Colorpak

10. Colorpak is an Australian resident company that is listed on the Australian Securities Exchange (ASX).

11. Colorpak's principal activities comprise the innovation, design and production of printed folding cartons, paper cups and lids, printed leaflets and other value added paperboard packaging products for specific end-use markets in Australia and New Zealand.

12. On 10 February 2016, Colorpak had 88,202,525 shares on issue. The issued shares are not expected to change prior to the Scheme Record Date of 22 April 2016.

13. On 30 June 2015, more than 95% of Colorpak shares were held by Australian resident entities.

GPI Australia

14. GPI Australia is a resident of Australia and is a wholly owned subsidiary of Graphic Packaging International, Inc (GPI). GPI is a non-resident of Australia and is a wholly owned subsidiary of Graphic Packaging Holding Company (Graphic Packaging).

15. Graphic Packaging is a non-resident of Australia and is a United States corporation listed on the New York Stock Exchange. It is a leading provider of packaging solutions for a wide variety of products to food, beverage and other consumer products companies.

The Scheme of Arrangement

16. On 12 January 2016, Colorpak announced that it had entered into a SID with GPI, under which GPI, through a wholly-owned subsidiary, will acquire all Colorpak shares by way of a SOA pursuant to Part 5.1 of the *Corporations Act 2001*. GPI Australia was subsequently nominated as the relevant wholly-owned entity.

17. The SOA is subject to certain conditions precedent set out in the SID including, but not limited to:

- Colorpak shareholder approval, and
- Court approval by the Supreme Court of Victoria.

18. The shareholder meeting was held on 7 April 2016.

19. Under the SOA, Colorpak Shareholders received a cash payment equal to \$0.68 per share less any dividends determined by Colorpak. This comprised of:

- a fully franked Interim Dividend of \$0.0125 per share
- a fully franked Special Dividend of \$0.0975 per share, and
- cash of \$0.57 per share (the Scheme Consideration).

20. Colorpak Shareholders who held their shares on the Scheme Record Date of 22 April 2016 disposed of their shares to GPI Australia on the Scheme Implementation Date of 29 April 2016.

Interim Dividend

21. On 4 February 2016, Colorpak announced a fully franked Interim Dividend of \$0.0125 per Colorpak share. The Ex-Dividend Date was 15 April 2016.

22. The Interim Dividend Record Date was 14 April 2016 and the Payment Date was 21 April 2016.

23. The Interim Dividend was paid out of retained earnings derived by Colorpak and was funded from existing cash reserves, working capital and/or existing banking facilities. The Interim Dividend was not debited against Colorpak's share capital account. GPI did not provide any funds to Colorpak to finance the Interim Dividend.

24. The Interim Dividend was not contingent on the SOA proceeding. However, the payment of the Interim Dividend reduced the amount paid to Colorpak's Shareholders as Scheme Consideration by GPI under the SOA.

25. GPI had no control over the determination or payment of the Interim Dividend. The Interim Dividend reflects the interim dividend for the year ending 30 June 2016 that Colorpak would ordinarily have been expected to determine and pay to its shareholders in the absence of the SOA.

Special Dividend

26. The Colorpak Board also declared a fully franked Special Dividend of \$0.0975.

27. The determination of the Special Dividend was wholly at Colorpak's discretion. Although the Scheme consideration was reduced to the extent of the Special Dividend paid, GPI had no control over the determination or payment of the Special Dividend.

28. The implementation of the SOA was not conditional upon the determination or payment of the Special Dividend.

29. Colorpak shareholders who were registered as holding shares on the Special Dividend Record Date of 14 April 2016 received a fully franked Special Dividend of \$0.0975 per share on the Special Dividend Payment Date of 21 April 2016.

30. The Special Dividend was paid out of retained earnings derived by Colorpak and was funded by Colorpak from existing cash reserves, working capital and/or existing banking facilities. GPI did not provide any funds to Colorpak to finance the Special Dividend. The Special Dividend was not debited against Colorpak's share capital account.

Ruling

Interim Dividend

31. The Interim Dividend of \$0.0125 per share paid to Colorpak Shareholders is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Special Dividend

32. The Special Dividend of \$0.0975 per share paid to Colorpak Shareholders is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability and withholding tax of the Interim and Special Dividends

33. A resident Colorpak Shareholder who received the Interim and/or Special Dividend is required to include the dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

34. A non-resident Colorpak Shareholder who received the Interim and/or Special Dividend (other than 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 is not liable for Australian withholding tax in respect of the dividend (paragraph 128B(3)(ga) of the ITAA 1936).

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

Gross up and tax offset

36. A resident Colorpak Shareholder, and a non-resident Colorpak Shareholder that is carrying on business in Australia at or through a permanent establishment in Australia, who received the Interim and/or Special Dividend:

- (a) is required to include the amount of the franking credit in their assessable income, and
- (b) is entitled to a tax offset equal to the amount of the franking credit

under section 207-20 and subsection 207-75(2), subject to being a qualified person in relation to the Interim and/or Special Dividend.

37. A Colorpak Shareholder who received the Interim and/or Special Dividend as the trustee of a trust (not being a complying superannuation entity or a FHSA trust) or as a partnership, is required to include the amount of the franking credit attached to the dividend as part of the shareholder's assessable income under subsection 207-35(1), subject to the trustee or partnership being a qualified person.

38. The relevant members of a partnership or trust to whom a distribution flows indirectly through the partnership or trust, are entitled to a tax offset under section 207-45, equal to their share of the franking credit attached to the distribution included in the assessable income of the partnership or trust under section 207-35(1).

Qualified Persons Rule

Interim Dividend

39. The payment of the Interim Dividend as part of the SOA is not a related payment for the purposes of former section 160APHN of the ITAA 1936.

40. Accordingly, a Colorpak Shareholder will need to hold their Colorpak shares at risk for a continuous period of at least 45 days in the primary qualification period in order to be a qualified person.

Special Dividend

41. The payment of the Special Dividend as part of the SOA is a related payment for the purposes of former section 160APHN of the ITAA 1936.

42. Accordingly, a Colorpak Shareholder will need to hold their Colorpak 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.

43. A Colorpak Shareholder will no longer be considered to hold their shares 'at risk' for the purpose of Division 1A of the former Part IIIAA of the ITAA 1936 as of 22 April 2016, which is the Scheme Record Date.

44. Therefore, a Colorpak Shareholder will be considered to be a qualified person in respect of the secondary qualification period for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 in relation to the Special Dividend if:

- they acquired the Colorpak share or interest in the share on or before 7 March 2016, and
- from 7 March 2016 to 21 April 2016 inclusive, they continued to hold the Colorpak shares and did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of the Colorpak 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

45. The franking credit tax offset that Colorpak Shareholders are entitled to under Division 207 is subject to the refundable tax offset rules in Division 67. Certain trustees and corporate tax entities are excluded from the refundable tax offset rules pursuant to section 67-25.

Capital Gains Tax (CGT)

CGT event A1

46. CGT event A1 happened when a Colorpak Shareholder disposed of their Colorpak shares to GPI Australia under the SOA on the Scheme Implementation Date of 29 April 2016 (section 104-10).

Capital gain or capital loss

47. A Colorpak Shareholder will make a capital gain if the capital proceeds from the disposal of their Colorpak shares exceed the cost base of the shares (subsection 104-10(4)). The capital gain will be the amount of the excess.

48. A Colorpak Shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the Colorpak shares (subsection 104-10(4)). The capital loss will be the amount of the difference.

Capital proceeds

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

50. The capital proceeds received by a Colorpak Shareholder who disposed of their Colorpak shares pursuant to the SOA is \$0.57 per share.

Discount capital gain

51. A Colorpak Shareholder who made a capital gain when they disposed of their Colorpak shares under the SOA is eligible to treat the gain as a discount capital gain if they acquired their Colorpak shares at least 12 months before 29 April 2016 being the Scheme Implementation Date, and the other conditions in Division 115 are satisfied.

Anti-avoidance provisions

52. Section 177EA of the ITAA 1936 will not apply in respect of the Interim and Special Dividends.

53. Section 204-30 will not apply in respect of the Interim and Special Dividends.

54. Section 207-145 will not apply to the whole, or any part, of the Interim and Special Dividends received by Colorpak Shareholders, provided shareholders are qualified persons.

Commissioner of Taxation

4 May 2016

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.*

The Interim and Special Dividends

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

56. The payment of the Interim and Special Dividends is a distribution of money by Colorpak to its shareholders.

57. However, paragraph 6(1)(d) of the ITAA 1936 excludes from the definition of 'dividend' any:

... moneys paid or credited by a company to a shareholder...where the amount of the moneys paid or credited...is debited against an amount standing to the credit of the share capital account of the company...

58. The Interim and Special Dividends were not debited against Colorpak's share account. Therefore, the exclusion in paragraph 6(1)(d) of the ITAA 1936 will not apply and the Interim and Special Dividends are dividends for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Interim and Special Dividends

Residents

59. 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.

60. As the Interim and Special Dividends are paid out of profits derived by Colorpak, Colorpak Shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Interim and Special Dividends in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Non-residents (not carrying on business at or through a permanent establishment)

61. 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.

62. 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 and the ITAA 1997 that expressly deals with dividends excludes some or all of the dividend from assessable income.

63. Subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes the franked part of a dividend received by a non-resident from liability to withholding tax which would otherwise arise pursuant to subsection 128B(1) of the ITAA 1936. As the Interim and Special Dividends were fully franked, the dividends will not be subject to Australian withholding tax when derived by non-resident Colorpak Shareholders.

64. Section 128D of the ITAA 1936 operates to treat the Interim and Special Dividends as non-assessable non-exempt income.

65. Accordingly, non-resident Colorpak Shareholders who received the Interim and Special Dividends (other than shareholders who received the Interim and Special Dividends in carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the Interim and Special Dividends in assessable income pursuant to subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and are not liable to Australian withholding tax in relation to the Interim and Special Dividends (paragraph 128B(3)(ga) of the ITAA 1936).

Non-residents (carrying on business at or through a permanent establishment)

66. A non-resident's liability to withholding tax on dividend income received in subsection 128B(1) of the ITAA 1936 is subject to subsection 128B(3E). Subsection 128B(3E) states that section 128B 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 trustee.

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

... 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.

68. Accordingly, non-resident Colorpak Shareholders carrying on a business in Australia at or through a permanent establishment who received the Interim and Special Dividends are required to include the dividends in their assessable income, to the extent to which the dividend is attributable to the permanent establishment, pursuant to subparagraph 44(1)(c)(i) of the ITAA 1936 and will not be liable for Australian withholding tax in relation to the dividend.

Gross up and tax offset

69. 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 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.

70. Therefore, subject to satisfying the qualified persons rule, where the Interim and Special Dividends are received directly by Colorpak Shareholders and Colorpak Shareholders satisfy the residency requirement in section 207-75, then Colorpak Shareholders:

- are required to include the amount of the franking credit attached to the Interim and Special Dividends in their assessable income, and
- are entitled to a tax offset equal to the amount of the franking credit.

71. If the Interim and Special Dividends are received by a Colorpak 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 of an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a *corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust – the trust is not a *complying superannuation entity or *FHSA trust when the distribution is made;

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

72. Where a Colorpak Shareholder that is a partnership or a trustee of a trust is a qualified person, the Colorpak Shareholder is required to include the amount of the franking credit attached to the Interim and Special Dividends in the assessable income of that trust or partnership under section 207-35(1).

Qualified persons, related payment and holding period rule

Qualified person

73. Paragraph 207-145(1)(a) provides that where a franked distribution is made to an entity, only a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 is:

- required to include the amount of the franking credit in their assessable income, and
- entitled to a tax offset in respect of the franking credit attached to the dividend.

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

75. The main test of what constitutes a 'qualified person' for the purposes of Division 1A of the former Part IIIAA of the ITAA 1936 which is known as the holding period rule, is set out in former subsection 160APHO(1) of the ITAA 1936 which states:

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.

76. Former subsection 160APHO(2) of the ITAA 1936 requires the taxpayer to hold the shares for at least 45 days if the shares are not preference shares, or at least 90 days if the shares are preference shares. 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

77. In order to determine the relevant qualification period, it is necessary to determine whether a Colorpak Shareholder has made, or is under an obligation to make, or is likely to make, a related payment in respect of any of the Interim or Special Dividends received.

78. Former subsection 160APHN(2) of the ITAA 1936 provides that a:

...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.

79. 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.

80. 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.

81. The Commissioner considers that the Special Dividend of \$0.0975 per share is an integral part of the SOA. The Special Dividend is a permitted distribution provided for in the SID. The declaration and payment of the Special Dividend is conditional on the Colorpak Shareholders approving the SOA. Therefore, Colorpak Shareholders will be doing something, will be under an obligation to do something, or will be likely to do something which will have the effect of passing the benefit of the Special Dividend that caused the Colorpak shares ('property') to be transferred to GPI Australia ('another person') for the purposes of former subsection 160APHN(3) of the ITAA 1936.

82. Therefore, a Colorpak Shareholder will be taken to have made or to be likely to make a related payment in respect of the Special Dividend.

Holding period requirement

83. The holding period rule requires shareholders to hold their ordinary shares at risk for a continuous period of not less than 45 days during the relevant qualification period.

84. The primary qualification period (as defined in former section 160APHD of the ITAA 1936) begins from the day after the date of acquisition of the share and ends on the 45th day after the day on which the share becomes ex-dividend. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the share are not counted.

85. 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 became ex dividend....

86. 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.

Interim Dividend

87. Having regard to the relevant circumstances, a Colorpak Shareholder, or an associate does nothing that has the effect of passing the benefit of the dividend to another person in respect of the Colorpak Interim Dividend.

88. The Interim Dividend represents Colorpak's 2016 interim dividend for the year ending 30 June 2016, and reflects what Colorpak would have ordinarily determined and paid to its shareholders in the absence of the SOA.

89. Colorpak Shareholders are not taken, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to be under an obligation to make a related payment in respect of the Interim Dividend as a result of the SOA. Therefore, the relevant holding period for the Interim Dividend is the primary qualification period pursuant to former paragraph 160APHO(1) of the ITAA 1936.

90. Consideration should be given to any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Colorpak Shares. Former subsection 160APHO(3) of the ITAA 1936 stipulates that any days on which a taxpayer has materially diminished risks of loss or opportunities for gain are to be excluded in determining whether the shares are held 'at risk'.

91. As of 22 April 2016, the Scheme Record Date, the Colorpak Shareholders had ceased to hold their shares at-risk as they were committed to dispose of their shares in exchange for the Scheme Consideration.

92. Accordingly, in the context of the SOA (and assuming Colorpak Shareholders have not already satisfied the primary qualification period in respect of an earlier dividend), the primary qualification period begins on the day after the acquisition date of the shares and ends on 21 April 2016, being the day before the Scheme Record Date.

93. As such, a Colorpak Shareholder who acquired Colorpak shares on or before 7 March 2016 will be capable of being a qualified person provided they held their shares at risk until the Scheme Record Date of 22 April 2016.

Special Dividend

94. The Special Dividend constitutes an integral part of the SOA. In particular, the payment of the Special Dividend was conditional upon Colorpak obtaining approval from the requisite majority of Colorpak Shareholders at the Scheme Meeting held on 7 April 2016.

95. Therefore, having regard to the relevant circumstances, it is considered that Colorpak Shareholders have made something, are under an obligation to do something, or be likely to do something that has 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.

96. As Colorpak Shareholders are taken for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to be under an obligation to make, or 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.

97. The secondary qualification period runs from 45 days before the ex-dividend date of 15 April 2016 and ends 45 days after that day. Accordingly, the secondary qualification period beings on 1 March 2016 (45 days before the ex-dividend date of the Special Dividend) and ends on 30 May 2016 (45 days after the ex-dividend date of the Special Dividend).

98. 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 Colorpak shares are to be excluded.

99. As of 22 April 2016, the Scheme Record Date, the Colorpak Shareholders had ceased to hold their shares at-risk as they were committed to dispose of their shares in exchange for the Scheme Consideration.

100. Accordingly, the secondary qualification period runs from 1 March 2016 until 21 April 2016 (inclusive). A Colorpak Shareholder who received the Special Dividend needs 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 Division 1A of former Part IIIAA of the ITAA 1936. Further, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, the date of acquisition or disposal are not included in the relevant 45 day period.

101. As such, a Colorpak Shareholder who acquired Colorpak Shares on or before 7 March 2016 will be capable of being qualified person provided they held their Colorpak shares at risk until the Scheme Record Date of 22 April 2016.

Refundable tax offset

102. Colorpak Shareholders who are entitled to a tax offset under subsection 207-20(2) in respect of the franking credit received (or entities entitled to a tax offset under section 207-45 equal to their share of the franking credit) will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

103. 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 (paragraph 67-25(1B)(b))
- 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)).

104. A Colorpak Shareholder (or entities entitled to a tax offset under section 207-45) will be entitled to the refundable tax offset unless specifically excluded pursuant to section 67-25.

Exempting entity

105. Colorpak was not an 'exempting entity' when the Interim and Special Dividends were paid, nor was it a 'former exempting entity' at that time as less than 95% of accountable membership interest or accountable partial interest (broadly direct and indirect ownership interests) held in Colorpak was held by foreign residents (Division 208).

106. As at 31 December 2015, the total foreign resident shareholding was approximately 1.64%. The percentage of resident shareholders at the time of the payment of the Interim and Special Dividends is consistent with the shareholding profile at 31 December 2015.

107. Section 208-195 will therefore not apply to deny the gross-up of the assessable income of a Colorpak Shareholder by the amount of the franking credit attached to the Interim and Special Dividends received by shareholders, nor to deny the tax offset to which the Colorpak Shareholder is otherwise entitled pursuant to Division 207 at the time when the Interim and Special Dividends were paid.

Capital gains tax

CGT event A1

108. CGT event A1 happens when an entity disposes of a CGT asset. This occurs when there is a change in the ownership of a CGT asset from one entity to another. The time of CGT event A1 is when the disposing entity enters into a contract for the disposal, or if there is no contract, when the change of ownership occurs (subsections 104-10(1) and (3)).

109. The disposal of shares pursuant to the SOA is not under a contract.

110. CGT event A1 happened when Colorpak Shareholders disposed of their Colorpak shares to GPI Australia pursuant to the SOA (subsections 104-10(1) and 104-10(2)). The disposal happened on 29 April 2016, the Scheme Implementation Date (paragraph 104-10(3)(b)).

111. The time when CGT event A1 happens determines the year of income in which a Colorpak Shareholder makes a capital gain or capital loss, and may affect whether the shareholder is entitled to the CGT discount for any capital gain.

112. A Colorpak Shareholder will make a capital gain when CGT event A1 happens if the capital proceeds from the disposal of their Colorpak shares are more than their cost base. A Colorpak Shareholder will make a capital loss if those capital proceeds are less than their reduced cost base (subsection 104-10(4)).

Capital proceeds

113. The capital proceeds received by a Colorpak Shareholder upon CGT event A1 happening to their Colorpak shares under the SOA is the money the shareholder received, or was entitled to receive, '...in respect of the event happening' (subsection 116-20(1)).

114. The term '...in respect of the event happening' in subsection 116-20(1) requires that the relationship between the CGT event and the receipt of the money, or the entitlement to receive the money, must be more than coincidental or caused simply by temporal proximity. An amount is not included in the capital proceeds from a CGT event merely because it is received in association with the event.

115. The Commissioner considers that the Interim and Special Dividends were not received in respect of the disposal of Colorpak shares under the SOA. The Interim and Special Dividends are paid out of retained earnings at the discretion of the Colorpak Board with GPI having no influence or control over the declaration or payment of the dividends.

116. Although payment of the Special Dividend was conditional upon Colorpak Shareholders approving the SOA, the Special Dividend was not paid as a term of the SOA. GPI did not have the ability to participate, influence or veto the manner or form of payment of the Special Dividend. Furthermore, GPI did not provide any funds to Colorpak to finance the payment of the Special Dividend.

117. Therefore, the Interim and Special Dividends do not form part of the capital proceeds which Colorpak Shareholders received in respect of CGT event A1 happening.

118. Accordingly, a Colorpak Shareholder received capital proceeds of \$0.57 per share pursuant to the SOA.

Discount capital gain

119. Division 115 provides a CGT discount that reduces the amount of CGT otherwise payable by a taxpayer by the relevant discount percentage in accordance with Subdivision 115-B. Only discount capital gains are eligible for the CGT discount.

120. To be eligible to treat a capital gain as a discount capital gain, the capital gain must:

- (a) be made by an individual, a complying superannuation entity, a trust or a life insurance company (in certain circumstances) (section 115-10)
- (b) result from a CGT event happening after 11:45am legal time in the Australian Capital Territory on 21 September 1999 (section 115-15)
- (c) have been worked out using a cost base that was not subject to indexation (subsection 115-20(1)), and
- (d) result from a CGT event happening to a CGT asset that was acquired by the entity at least 12 months before the CGT event (subsection 115-25(1)).

121. Where a Colorpak Shareholder made a capital gain when they disposed of their Colorpak shares, the capital gain may be treated as a discount capital gain if the Colorpak shares were acquired at least 12 months before 29 April 2016 being when the shares were disposed of under the SOA, subject to the other requirements listed in paragraph 120 of the Explanation being satisfied.

Anti-avoidance provisions

Section 177EA

122. Section 177EA of the ITAA 1936 is a general anti-avoidance rule that is intended to prevent abuse of the imputation system through schemes which circumvent the basic rules for the franking of dividends.

123. Where section 177EA of the ITAA 1936 applies, the Commissioner has a discretion pursuant to subsection 177EA(5) to make a determination to either:

- debit the company's franking account pursuant to paragraph 177EA(5)(a) or,
- deny the imputation benefit on the distribution that flowed directly or indirectly to each shareholder pursuant to paragraph 177EA(5)(b).

124. In broad terms, there needs to be a scheme in which, having regard to the relevant circumstances of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme, did so for a purpose (whether or not the dominate purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit. Under this arrangement, a Colorpak Shareholder is the 'relevant taxpayer' and the scheme comprises the circumstances surrounding the SOA.

125. In the present case, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied as:

- (a) the disposal of shares in Colorpak (a corporate tax entity) pursuant to the SOA is a scheme for the disposition of membership interests
- (b) the Interim and Special Dividends are frankable distributions paid to Colorpak shareholders in respect of their Colorpak shares
- (c) the Interim and Special Dividends are franked distributions, and
- (d) Colorpak shareholders could reasonably be expected to receive imputation benefits as a result of the Interim and Special Dividends.

126. Accordingly, the issue is whether, having 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, it would be concluded that, on the part of Colorpak, its shareholders or any other relevant party who entered into or carried out the scheme or any part of the scheme, there was a purpose (other than an incidental purpose) of enabling Colorpak Shareholders to obtain an imputation benefit.

127. The relevant circumstances of the scheme indicate that there is no requisite purpose of conferring an imputation benefit under the scheme. It includes the fact that the disposition of the shares in Colorpak occurred pursuant to the SOA under the *Corporations Act 2001* voted upon by Colorpak Shareholders.

128. The Interim and Special Dividends were fully franked, which is a continuation of Colorpak dividend policy to pay fully franked dividends. The Interim and Special Dividends were paid to all participating Colorpak Shareholders on a pro-rata basis in proportion to the number of shares that each participating Colorpak Shareholder held on the relevant Scheme Record Date, irrespective of their ability to utilise the relevant franking credits. The amount of the Interim Dividend is consistent with dividends previously paid out by Colorpak. The amount of the Interim and Special Dividends allows participating Colorpak Shareholders to share in the accumulated profits of Colorpak.

129. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into for the purpose, other than a merely incidental purpose of enabling the relevant taxpayer to obtain an imputation benefit. Having regard to the relevant circumstances of the scheme, the Commissioner has formed the view that the requisite purpose is not present. 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 Interim and Special Dividends.

Section 204-30

130. Section 204-30 applies where a corporate tax entity 'streams' the payment of distributions to its members in such a way that an imputation benefit is or would be received by a member of the entity that derives a greater benefit from franking credits, while other members receive lesser or no imputation benefits regardless of whether or not they receive other benefits (paragraphs 204-30(1)(a), (b) and (c)).

131. Relevantly, if section 204-30 applies, the Commissioner has a discretion under subsection 204-30(3) to make a written determination:

...

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

132. 'Streaming' is not defined for the purposes of section 204-30. However, the Commissioner considers that it refers 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).

133. 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.

134. The Interim and Special Dividends were paid equally to all Colorpak Shareholders and were fully franked. Therefore, it cannot be concluded that Colorpak 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 Interim and Special Dividends, while other members receive less or no imputation benefits.

135. As the conditions in subsection 204-30(1) are not met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits to be received in relation to the Interim and Special Dividends.

Section 207-145

136. Pursuant to subsection 207-145(1), gross-up and tax offset treatment under sections 207-20, 207-35 and 207-45 does not apply if an entity makes a franked distribution to another entity in one or more of the following circumstances:

- (a) the entity is not a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 (paragraph 207-145(1)(a))
- (b) the Commissioner has made a determination under paragraph 177EA(5)(b) of that Act that no imputation benefit (within the meaning of that section) is to arise in respect of the distribution for the entity (paragraph 207-145(1)(b))
- (c) the Commissioner has made a determination under paragraph 204-30(3)(c) of this Act that no *imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(c))
- (d) the distribution is made as part of a *dividend stripping operation (paragraph 207-145(1)(d)).

137. The explanation of whether a Colorpak Shareholder is a qualified person for the purpose of the Division 1A of former Part IIIAA of the ITAA 1936 is provided in paragraphs 73 to 101 of this Ruling.

138. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits in relation to the Interim and Special Dividends.

139. A distribution will be taken to be made as part of a dividend stripping operation, pursuant to section 207-155, if the making of the distribution arose out of, or was made in the course of, 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.

140. Having regard to the circumstances of the scheme, under which the Colorpak Shareholders disposed of their Colorpak shares to GPI Australia, the Commissioner considers that the payment of the Interim and Special Dividends to Colorpak Shareholders was not made as part of a dividend stripping operation.

141. Accordingly, section 207-145 will not apply to the Interim and Special Dividends received by the Colorpak Shareholders.

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Previous draft:

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NO: 1-7RUT4SD

ISSN: 2205-5517

ATOlaw topic: Income tax ~~ Assessable income ~~ Dividend, interest and royalties ~~ Dividend income
Income tax ~~ Capital gains tax ~~ Capital proceeds
Income tax ~~ Capital gains tax ~~ CGT event A1 – disposal of a CGT asset
Tax offsets, credits and benefits ~~ Other offsets and credits ~~ Dividend streaming and demerger benefits
Income tax ~~ Capital management ~~ Franking credit / tax offsets
Tax offsets ~~ credits and benefits ~~ Other offsets and credits ~~ Franking tax offset

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