

CR 2018/6 - Income tax: Tatts Group Limited Scheme of Arrangement and payment of Special Dividend

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Class Ruling

Income tax: Tatts Group Limited Scheme of Arrangement and payment of Special Dividend

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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.

Summary – what this ruling is about

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

Relevant provisions

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subparagraph 44(1)(a)(i) of the ITAA 1936
- Division 1A of former Part IIIAA of the ITAA 1936
- section 177E of the ITAA 1936
- paragraph 177EA(5)(b) of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997
- section 110-25 of the ITAA 1997

- section 110-55 of the ITAA 1997
- section 112-30 of the ITAA 1997
- subsection 115-30(1) of the ITAA 1997
- section 116-20 of the ITAA 1997
- Subdivision 124-M of the ITAA 1997
- paragraph 204-30(3)(c) of the ITAA 1997
- section 207-20 of the ITAA 1997
- section 207-35 of the ITAA 1997
- section 207-145 of the ITAA 1997.

All 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 consists of holders of ordinary shares in Tatts Group Limited (Tatts) who:

- were 'residents of Australia' as defined in subsection 6(1) of the ITAA 1936
- did not hold their shares in Tatts as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) – that is, the shareholders held their shares in Tatts broadly on capital account
- received the Tatts Special Dividend and participated in the scheme as described in paragraphs 10 to 31 of this Ruling (the Scheme)
- acquired their shares in Tatts on or after 20 September 1985, and
- were not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their Tatts shares.

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

4. In this Ruling, an entity belonging to this class of entities is referred to as a Scheme Shareholder.

5. This Ruling does not consider the taxation consequences in relation to Tatts Performance Rights.

Qualifications

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

7. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 31 of this Ruling.

8. 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

9. This Ruling applies from 1 July 2017 to 30 June 2018. The Ruling continues to apply after 30 June 2018 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

10. 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:

- request for Class Ruling dated 13 September 2017
- Merger Implementation Deed dated 18 October 2016 (Merger Implementation Deed)
- Tatts Group Limited Scheme Booklet lodged with the Australian Securities and Investments Commission (ASIC) on 8 September 2017 (Scheme Booklet)
- Tatts Group Limited Supplementary Scheme Booklet dated 28 November 2017, and
- further 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

Tatts

11. Tatts is a widely held public company limited by shares and has been listed on the Australian Securities Exchange (ASX) since 2005.

12. Tatts is a 'resident of Australia' as defined in subsection 6(1) of the ITAA 1936.

13. Tatts is the head company of the Tatts tax consolidated group.

14. As at 8 September 2017 (the date of the Scheme Booklet), Tatts had 1,468,519,481 ordinary shares on issue. It also had the following:

- 1,946,642 Tatts Bonds on issue, and
- 818,103 Tatts Performance Rights on issue.

15. As at 1 September 2017, approximately 99.68% of Tatts ordinary shares were held by resident entities and approximately 0.32% of Tatts ordinary shares were held by non-resident entities.

Tabcorp Holdings Limited (Tabcorp)

16. Tabcorp is a widely held public company limited by shares and listed on the ASX.

17. Tabcorp is a 'resident of Australia' as defined in subsection 6(1) of the ITAA 1936.

Scheme of Arrangement

18. On 18 October 2016 Tatts and Tabcorp entered into the Merger Implementation Deed under which Tabcorp proposed to acquire all of the issued shares in Tatts by way of a court ordered scheme of arrangement pursuant to Part 5.1 of the *Corporations Act 2001* (Corporations Act).

19. The Scheme was approved by the requisite majority of Tatts shareholders at the Scheme Meeting held on 12 December 2017.

20. The Scheme was approved by the court at the hearing held on 13 December 2017. The Scheme became effective on 13 December 2017 when Tatts lodged the court order with ASIC.

21. On the Scheme Record Date of 19 December 2017, a Scheme Shareholder who held a Tatts share was entitled to participate in the Scheme.

22. The Tatts Performance Rights were cancelled on the Scheme Record Date of 19 December 2017.

23. On the Scheme Implementation Date of 22 December 2017, Tabcorp paid to the Scheme Shareholders for each of their Tatts shares transferred to Tabcorp the following (Scheme Consideration):

- the scrip consideration of 0.80 new Tabcorp shares, and
- the cash consideration of \$0.425 (less the Special Dividend).

Special Dividend

24. On 13 December 2017 Tatts declared a Special Dividend of \$0.16 per Tatts share. The Special Dividend Record Date was 15 December 2017 and the ex-dividend date was 16 December 2017. The Special Dividend was paid on 19 December 2017.

25. The payment of the Special Dividend was conditional upon the Scheme becoming effective and was payable at the discretion of the Tatts Board.

26. The Special Dividend was fully franked and funded from Tatts' existing debt facilities and debited against Tatts' retained profits account. Tabcorp did not finance or facilitate financing for the payment of the Special Dividend.

27. The share capital account of Tatts is untainted for the purposes of Division 197.

28. The Special Dividend complied with the requirements of the Corporations Act, including section 254T of the Corporations Act.

Other matters

29. There are no common or significant stakeholders in Tatts or in the combined Tatts/Tabcorp entity for the purposes of section 124-783 of the ITAA 1997.

30. The Special Dividend is a frankable distribution pursuant to section 202-40.

31. The exception to obtaining roll-over relief in subsection 124-795(4) did not apply.

Ruling

Special Dividend

32. The Special Dividend paid to the Scheme Shareholder is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

33. Scheme Shareholders who received the Special Dividend are required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross up and tax offset

34. A Scheme Shareholder, under section 207-20, subject to being a 'qualified person', who received the Special Dividend directly and satisfies the residency requirements in section 207-75:

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

35. A Scheme Shareholder (not being a corporate tax entity), who received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, is required to include an amount equal to the franking credit attached to the dividend in its assessable income under subsection 207-35(1), subject to the trustee or the partnership being a 'qualified person'.

Qualified persons

36. The payment of the Special Dividend constitutes a related payment for the purpose of former section 160APHN of the ITAA 1936.

37. Accordingly, to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 in relation to the Special Dividend, each Scheme Shareholder must have held their Tatts shares 'at risk' for a continuous period of at least 45 days in the secondary qualification period (former section 160APHO of the ITAA 1936).

38. A Scheme Shareholder is considered to no longer hold their Tatts shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 as from the Scheme Record Date of 19 December 2017. Therefore, a Scheme Shareholder will be a qualified person in relation to the Special Dividend if, in the period from 1 November 2017 to 18 December 2017 (inclusive), they continued to hold their Tatts shares and did not have materially reduced risks of loss or opportunities for gain in respect of their Tatts shares for a continuous period of 45 days (not counting the day on which the share was acquired or the day of the disposal of the share).

Refundable tax offset

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

Capital Gains Tax (CGT) consequences

40. CGT event A1 happens when a Scheme Shareholder disposes of each of their Tatts shares to Tabcorp pursuant to the Scheme on the Scheme Implementation Date (section 104-10).

41. Under subsection 104-10(3), the time of CGT event A1 if there is no contract is when the change of ownership occurs (paragraph 104-10(3)(b)).

42. A Scheme Shareholder will make a capital gain if the capital proceeds from the disposal exceed the cost base of that share. A Scheme Shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the share (subsection 104-10(4)).

Capital proceeds

43. The capital proceeds from CGT event A1 will be the cash consideration and the market value (worked out at the time of CGT event A1) of any new Tabcorp shares received by the Scheme Shareholders for each of their Tatts shares (subsection 116-20(1)).

44. The capital proceeds from CGT event A1 happening in respect of each Tatts share will not include the Special Dividend.

Availability of scrip for scrip roll-over if a capital gain is made

45. Subject to the qualification in paragraph 46, a Scheme Shareholder who made a capital gain from the disposal of their Tatts shares and received part of their proceeds in the form of new Tabcorp shares may choose scrip for scrip roll-over for that part of the capital gain that is referable to the receipt of new Tabcorp shares.

46. However, scrip for scrip roll-over cannot be chosen if any capital gain the Scheme Shareholder might make for the replacement of new Tabcorp shares would be disregarded on a subsequent CGT event, except because of a roll-over (subsection 124-795(2)).

47. If scrip for scrip roll-over is chosen, that part of the capital gain that is referable to the receipt of new Tabcorp shares is disregarded (subsections 124-785(1) and 124-790(1)).

Scrip for scrip roll-over chosen

48. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of a replacement new Tabcorp share is worked out by reasonably attributing to it the part(s) of the cost base of the Tatts shares for which it was exchanged and for which the roll-over was obtained (subsections 124-785(2) and 124-785(4)). Any part(s) of the cost base of the Tatts shares exchanged by the Scheme Shareholder that relates to the receipt of cash consideration is attributable to an ineligible part and is not included in the cost base of the new Tabcorp shares (subsection 124-785(3)).

49. If a Scheme Shareholder chooses scrip for scrip rollover, the acquisition date of the new Tabcorp shares for the purposes of making a discount capital gain is the date when they acquired the Tatts shares that were exchanged for new Tabcorp shares (item 2 of the table in subsection 115-30(1)).

Scrip for scrip roll-over not chosen

50. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each new Tabcorp share is equal to the market value of the Tatts shares given in exchange for the acquisition of new Tabcorp shares on the Scheme Implementation Date (subsections 110-25(2), 110-55(2) and 112-30(1)). The market value is worked out at the time of the acquisition (subsection 110-25(2)). The market value of the Tatts shares given by the Scheme Shareholder for the receipt of the cash consideration is not included (subsection 112-30(1)).

The anti-avoidance provisions

51. The Scheme is not a scheme, or a scheme having substantially the effect of a scheme, by way of, or in the nature of dividend stripping within the meaning of section 177E of the ITAA 1936.

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

53. 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.

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

54. 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.

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

56. 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 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.

57. The payment of the Special Dividend is sourced from Tatts' existing debt facilities and debited against its retained profits account. Tatts will not debit the Special Dividend against its untainted share capital account. Therefore, the exclusion in paragraph (d) will not apply and the Special Dividend constitutes a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

58. 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.

59. As the Special Dividend is paid to the Scheme Shareholders is debited against Tatts' retained profits account, Scheme Shareholders who are residents of Australia 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

60. 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.

61. Therefore, subject to satisfying the qualified person rule, where the fully franked Special Dividend is received directly by a Scheme Shareholder, the Scheme Shareholder will:

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

62. Where the fully franked Special Dividend is received by a Scheme Shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

if:

- (a) a *franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a *corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust – the trust is not a *complying superannuation entity 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.

63. Therefore, subject to satisfying the 'qualified person' rule, a Scheme Shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1).

Qualified persons

64. 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.

65. Former section 160APHU of the ITAA 1936 provides that a partner in a partnership or the 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.

66. Former Division 1A of Part IIIAA of the ITAA 1936 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.

67. 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.

68. Broadly, if the Scheme Shareholders were 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 Scheme Shareholders were 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

69. In order to determine what the relevant qualification period is, it is necessary to determine whether, under the present arrangement, a Scheme Shareholder has made, or is under an obligation to make, or is likely to make, a related payment in respect of the Special Dividend they receive.

70. Former section 160APHN of the ITAA 1936 gives examples of, but does not limit, what constitutes the making of a related payment, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

71. 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.

72. 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 to the taxpayer or associate; 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.

73. 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.

74. In the circumstances of the Scheme, it is considered that the payment of the Special Dividend is an integral part of the Scheme. Under the terms of the Merger Implementation Deed, the cash consideration is reduced by the amount of the Special Dividend paid by Tatts to the Scheme Shareholders. Therefore, former paragraphs 160APHN(3)(f) and 160APHN(4)(c) of the ITAA 1936 are satisfied.

75. The reduction of the cash consideration has the effect of passing the benefit of the Special Dividend from a Scheme Shareholder to Tabcorp. A Scheme Shareholder, or a partner in a partnership or a beneficiary of a trust that has an interest in Tatts shares, is taken to have made, or to be under an obligation to make, a related payment in respect of the Special Dividend.

Holding period requirement

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

77. 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.

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

79. 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*...

80. 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.

81. The eligibility to receive the Special Dividend was determined on the Special Dividend Record Date of 15 December 2017. This was the last day on which acquisition by a person of a Tatts 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 is 16 December 2017.

82. 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 16 December of 2017 and end 45 days after that day. This means that the secondary qualification period would ordinarily run from 1 November 2017 to 30 January 2018 (45 days before and 45 days after 16 December 2017).

83. 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 Tatts shares, or interest in Tatts 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.

84. This would mean that for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, the secondary qualification period would run from 1 November 2017 until 22 December 2017, the date that the Scheme Shareholders disposed of their shares.

85. Entitlement to participate in the Scheme will be determined on the Scheme Record Date (on the basis of being a Tatts shareholder who is registered in the share register as the holder of the relevant ordinary share at 6.00pm (AEST) on 19 December 2017). It is considered that once a Tatts shareholder is identified as a Scheme Shareholder on the Scheme Record Date, that Scheme Shareholder would no longer be considered to hold their shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 as, at that time the Scheme Shareholder is committed to disposing of their Tatts shares and receiving the Scheme Consideration. This means that as from 19 December of 2017, Scheme Shareholders no longer held their Tatts shares 'at risk'.

86. Accordingly, while the secondary qualification period would relevantly run from 1 November 2017 to 22 December 2017, the period 19 December 2017 to 22 December 2017 would be excluded in determining the period during which the shares were held at risk, as it represents a period of materially diminished risk. As such, a Scheme 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 the period 1 November 2017 to 18 December 2017 in order to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, the dates of acquisition and disposal are not included in the relevant 45 day period.

Refundable tax offset

87. Scheme 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.

88. 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)).

89. Accordingly, a holder of Tatts 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 and corporate limited partnerships) will be excluded from the operation of the refundable tax offset rules.

CGT consequences

CGT Event A1

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

91. The acquisition of shares in Tatts under 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 *Income tax: capital gains: what is the first element of the cost base and reduced cost base of a share in a company you acquire in exchange for a share in another company in a takeover or merger?*).

92. CGT event A1 happened when a Scheme Shareholder disposed of a Tatts share to Tabcorp pursuant to the Scheme (subsections 104-10(1) and 104-10(2)). The disposal occurred on the Scheme Implementation Date of 22 December 2017 (paragraph 104-10(3)(b)).

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

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

Capital proceeds

95. The capital proceeds received by a Scheme Shareholder from a CGT event is the money and the market value of any property received or entitled to be received (worked out at the time of the event happening) in respect of the event happening (subsection 116-20(1)).

96. The capital proceeds that the Scheme Shareholders received for the disposal of a Tatts share is the market value of 0.80 new Tabcorp shares and the amount of cash consideration received.

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

98. In this case, the Special Dividend was not paid in respect of the disposal of Tatts shares under the Scheme. The determination to pay the Special Dividend was at the discretion of the Tatts Board. Tabcorp had no control over Tatts' decision to pay it, or its quantum (subject to the \$0.25 ceiling in clause 6.3 of the Merger Implementation Deed).

99. The payment of the Special Dividend will be funded entirely by Tatts' existing debt facilities with no actual or contingent funding support from Tabcorp.

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

Scrip for scrip roll-over

101. Scrip for scrip roll-over under Subdivision 124-M enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

102. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the scheme that is the subject of this Ruling are:

- shares are exchanged for shares in another company (replacement of shares)
- the exchange is in consequence of a single arrangement, and
- conditions for the roll-over are satisfied.

Replacement of shares

103. In this case, each Tatts shareholder received 0.8 Tabcorp shares for each Tatts share it transferred under the Scheme of Arrangement.

Single arrangement

104. Paragraph 124-780(1)(b) requires that shares in an entity be exchanged in consequence of a single arrangement that satisfies subsections 124-780(2) or 124-780(2A). Subsection 124-780(2A) does not apply to the scheme described in the Ruling.

105. The exchange of Tatts shares for shares in Tabcorp under the Scheme of Arrangement is considered a single arrangement for the purposes of Subdivision 124-M and satisfies the conditions in subsection 124-780(2) as:

- the arrangement results in another company, the acquiring entity, that is, Tabcorp becoming the owner of 100% of the shares in Tatts
- all Tatts Shareholders could participate, and
- participation in the Scheme of Arrangement was available on substantially the same terms for all holders of Tatts shares.

Conditions for roll-over are satisfied

106. Paragraph 124-780(1)(c) requires that the conditions for roll-over in subsection 124-780(3) are satisfied. These conditions must be met for each Tatts share for which scrip for scrip roll-over is chosen.

107. In this case, the conditions in subsection 124-780(3) are satisfied:

- Tatts shareholders acquired their shares on or after 20 September 1985
- apart from the roll-over, a Tatts shareholder would make a capital gain from a CGT event happening to their Tatts shares
- each replacement share is an ordinary share in Tabcorp, and
- the Tatts shareholder chooses to obtain roll-over relief under Subdivision 124-M.

Scrip for scrip roll-over chosen

108. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of a replacement new Tabcorp share is worked out by reasonably attributing to it the part(s) of the cost base of the Tatts shares for which it was exchanged and for which the roll-over was obtained (subsections 124-785(2) and 124-785(4)). Any part(s) of the cost base of the Tatts shares exchanged by the Scheme Shareholder that relates to the receipt of cash consideration is not included (subsection 124-785(3)).

109. For Scheme Shareholders that choose scrip for scrip roll-over, the acquisition date of the new Tabcorp shares for the purposes of making a discount capital gain is the date when they acquired the Tatts shares that were exchanged for new Tabcorp shares (item 2 of the table in subsection 115-30(1)).

Scrip for scrip roll-over not chosen

110. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each new Tabcorp share is worked out by reasonably attributing to it the market value of the Tatts shares given in exchange for the acquisition of new Tabcorp shares on the Scheme Implementation Date (subsections 110-25(2), 110-55(2) and 112-30(1)). The market value is worked out at the time of the acquisition (subsection 110-25(2)). The market value of the Tatts shares given by the Scheme Shareholder for the receipt of the cash consideration is not included (subsection 112-30(1)).

The anti-avoidance provisions

Section 177E

111. Section 177E of the ITAA 1936 is an anti-avoidance provision that is designed to prevent tax benefits being obtained as part of a dividend stripping scheme or a scheme with substantially the same effect as a dividend stripping scheme.

112. The term 'dividend stripping' has no precise legal meaning. In its traditional form, a dividend stripping operation occurs when shares in a company with substantial retained profits are acquired by shareholders who pay the existing shareholders a capital sum reflecting the value of the retained profits. The new shareholders then liberate those profits through the payment of a dividend post acquisition. Generally, the new shareholders who derive dividend income from the company would not be liable to tax upon those dividends.

113. Therefore, a scheme by way of, or in the nature of, dividend stripping, or one that has substantially the effect of a scheme by way of, or in the nature of, dividend stripping, would be one that has the effect of delivering a shareholder's entitlement to a dividend in a tax advantaged manner.

114. Tatts' existing debt facilities are to be used to fund the Special Dividend to existing shareholders prior to the implementation of the Scheme and the Special Dividend is not provided in a tax advantaged manner. Consequently, section 177E of the ITAA 1936 will not apply.

Section 177EA

115. 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.

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

117. 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.

118. Tatts is a corporate tax entity. The sale of the ordinary shares in Tatts pursuant to the 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 Scheme Shareholders (the relevant taxpayers) as a part of this Scheme and who could, therefore, reasonably be expected to receive imputation benefits.

119. 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 Tatts, its shareholders or any other relevant party, there was a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the scheme.

120. 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, the delivery of the imputation benefit is more than an incidental purpose of the scheme.

121. The relevant circumstances are that the disposition of the ordinary shares in Tatts was made pursuant to a takeover by Tabcorp by way of a Scheme of Arrangement under the Corporations Act voted upon by Tatts' shareholders entitled to vote.

122. The Tatts Scheme of Arrangement is a normal commercial transaction under which Tatts is being acquired.

123. Shareholders in Tatts are predominantly residents of Australia with different tax profiles. The fully franked Special Dividend was paid to all existing shareholders of Tatts in proportion to the number of shares that each shareholder held on the Special Dividend Record Date and irrespective of their ability to utilise the relevant franking credits.

124. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by Tatts or the Scheme Shareholders for more than an incidental purpose of enabling the Scheme Shareholders to obtain imputation benefits. The provision of imputation benefits to the Scheme Shareholders remains incidental, in the sense of being subservient to, the purpose of enabling the shareholders to dispose of their shares in Tatts to Tabcorp in exchange for new Tabcorp shares and the cash consideration.

125. Having regard to the relevant circumstances of the scheme, it cannot be concluded that Tatts or the Scheme Shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain an imputation benefit.

126. As such, the Commissioner has come to the view that the requisite purpose was not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit to be received in relation to the Special Dividend.

Section 204-30

127. 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)).

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

129. 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 a distribution that is made to a favoured member and specified in the determination.

A determination must be in writing.

130. '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).

131. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than another member 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.

132. Under the Scheme of Arrangement, all shareholders received an imputation benefit when the Special Dividend was paid. The imputation benefit for resident shareholders was in the form of a tax offset (paragraph 204-30(6)(a)), and for non-resident shareholders was 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 non-resident shareholders.

133. However, the Special Dividend was paid equally to all Scheme Shareholders and was fully franked regardless of their tax profiles. Accordingly, it cannot be said that Tatts selectively directed the flow of franked dividends to those members who could most benefit from the franking credits.

134. 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 benefit received in relation to the Special Dividend.

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