


CR 2019/64 - Ruralco Holdings Limited - Scheme of Arrangement and payment of Special Dividend

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Class Ruling

Ruralco Holdings Limited – Scheme of Arrangement and payment of Special Dividend

📌 Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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What this Ruling is about

1. This Ruling sets out the tax consequences of the special dividend (Special Dividend) paid and the scheme of arrangement (Scheme of Arrangement) under which Agrium Australia Pty Ltd (Nutrien Sub) acquired 100% of the shares in Ruralco Holdings Limited (Ruralco) on 30 September 2019.
2. Full details of this Scheme of Arrangement and payment of Special Dividend are set out in paragraphs 29 to 51 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you:
 - are a resident of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) or a non-resident (other than a non-resident who carries on a business at or through a permanent establishment in Australia)

- held your Ruralco shares on capital account, that is, you did not hold your shares in Ruralco as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
 - disposed of your Ruralco shares to Nutrien Sub under the Scheme of Arrangement pursuant to Part 5.1 of the *Corporations Act 2001 (Cth)* (Corporations Act) between Ruralco and Nutrien Limited (Scheme of Arrangement)
 - received the fully franked Special Dividend and Scheme Consideration (as described in paragraph 48 of this Ruling)
 - are not subject to the investment manager regime in Subdivision 842-I in relation to your shares, and
 - are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains or losses on your Ruralco shares
- (**Note:** Division 230 will not apply to individuals, unless they have made an election for it to apply).

When this Ruling applies

5. This Ruling applies from 1 July 2019 to 30 June 2020.

Ruling

Special Dividend

6. The Special Dividend is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.
7. The Special Dividend is a frankable distribution under section 202-40.

Assessability of the Special Dividend

Residents

8. If you are a resident, you include the Special Dividend in your assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).

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

9. If you are a non-resident (and do not carry on a business in Australia at or through a permanent establishment in Australia) you are 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 are not liable to Australian withholding tax in respect of the dividend (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

Gross-up and tax offset

10. If you received the Special Dividend directly and satisfy the residency requirements in section 207-75, you:
 - include the amount of the franking credit attached to the Special Dividend in your assessable income, and

- are entitled to a tax offset equal to the amount of the franking credit attached to the Special Dividend,

in the income year the Special Dividend was paid (section 207-20), subject to you being a 'qualified person' in relation to the Special Dividend.

11. If you are not a corporate tax entity and received the Special Dividend as either a trustee of a trust (not being a complying superannuation entity) or as a partnership, you are required to include an amount equal to the franking credit attached to the Special Dividend in your assessable income under subsection 207-35(1), subject to you being a 'qualified person' in relation to the Special Dividend.

12. 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 subsection 207-35(1).

Qualified persons

13. The payment of the Special Dividend constitutes a 'related payment' for the purposes of former section 160APHN of the ITAA 1936 (paragraph 207-145(1)(a)).

14. You will be a qualified person in relation to the Special Dividend, if from 4 August 2019 to 22 September 2019 (inclusive), you continued to hold your Ruralco 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 your Ruralco shares for a continuous period of at least 45 days.

Refundable tax offset

15. Your entitlement to the franking credit tax offset under Division 207 in relation to the Special Dividend is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25.

Exempting entity

16. Ruralco was not an 'exempting entity' when the Special Dividend was paid, nor was it a 'former exempting entity' at the time as less than 95% of accountable membership interests or accountable partial interests (broadly direct and indirect ownership interests) held in Ruralco were held by non-residents (Division 208).

17. Therefore, section 208-195 will not apply to deny the gross up of your assessable income by the amount of the franking credit attached to the special dividend received by you, nor to deny the tax offset to which you are otherwise entitled under Division 207 at the time when the special dividend was paid.

Imputation benefits anti-avoidance provisions

Section 177EA

18. 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.

Section 204-30

19. 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.

CGT consequences

CGT event A1

20. CGT event A1 happened on 30 September 2019 (scheme implementation date) when you disposed of each of your Ruralco shares to Nutrien Sub in accordance with the Scheme of Arrangement (section 104-10).

Capital proceeds

21. The Total Cash Consideration of \$4.40 for each Ruralco share is the capital proceeds from CGT event A1 happening (subsection 116-20(1)).

22. The Special Dividend of \$0.84 (that is part of the Total Cash Consideration) is included in the capital proceeds as the Special Dividend was paid in respect of the CGT event happening.

Capital gain or capital loss

23. You will make a capital gain if the capital proceeds from the disposal of a Ruralco share exceed its cost base (subsection 104-10(4)). The capital gain is the amount of the excess.

24. You will make a capital loss if the capital proceeds are less than the reduced cost base of the Ruralco share (subsection 104-10(4)). The capital loss is the amount of the difference.

CGT anti-overlap provision

25. A capital gain made by you from CGT event A1 that happened to your Ruralco shares is reduced (but not below zero) by the amount of the Special Dividend that is included in your assessable income under section 44 of the ITAA 1936 (section 118-20).

26. A capital gain is not reduced by the amount of the franking credit (attached to the Special Dividend) that is included in your assessable income under section 207-20 (paragraph 118-20(1B)(b)).

Discount capital gain

27. If you made a capital gain from the disposal of a Ruralco share and after the application of the CGT anti-overlap provision that gain is greater than zero, you will be eligible to treat that reduced capital gain as a 'discount capital gain' provided you satisfy the requirements of Division 115.

Non-resident shareholders

28. If you are a non-resident you may disregard any capital gain or capital loss made when CGT event A1 happened as the Ruralco share were not 'taxable Australian property' (section 855-10).

Scheme

29. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

30. Other information referenced is as follows:

- Scheme Implementation Deed (SID) dated 27 February 2019, and
- Scheme Booklet dated 5 June 2019.

Relevant entities***Ruralco Holdings Limited***

31. Ruralco is an Australian tax resident that was listed on the Australian Securities Exchange.

32. Ruralco's principal activity is the provision of a range of agricultural supplies to Australian farmers through its owned stores and combined rural traders, is Australia's largest independent rural retailing group, and provides agronomic advice and agency services to help maximise the returns of production. Ruralco is also a leading distributor of water products, provider of on farm water infrastructure services, and is a broker of water entitlements to the Australian agricultural sector.

33. On 13 September 2019 (effective date), Ruralco had 106,540,034 ordinary shares on issue.

34. Ruralco is the head company of a tax consolidated group (RHL TCG) including its wholly owned Australian resident subsidiaries. Ruralco also has a majority stake in several joint venture companies which do not form part of the RHL TCG.

35. As at 22 February 2019, no non-residents, either alone or together with any associates, beneficially held more than 10% of the shares in Ruralco.

36. No non-resident shareholder, either alone or together with their associates, beneficially held more than 10% of the shares in Ruralco throughout a 12 month period beginning no earlier than 24 months before the scheme implementation date.

Nutrien Limited

37. Nutrien is a Canadian company formed on 1 January 2018. Nutrien's common shares are listed on the Toronto Stock Exchange and New York Stock Exchange.

38. Nutrien is the world's largest provider of crop nutrients, inputs and services and sells over 26 million tonnes annually of potash, nitrogen and phosphate products for agricultural, industrial and feed customers worldwide.

Nutrien Sub

39. Nutrien Sub was established for the purpose of acquiring all of the shares in Ruralco.

40. Prior to the scheme implementation date, neither Nutrien Sub nor Nutrien held any Ruralco shares directly or indirectly.

Scheme of Arrangement

41. On 27 February 2019, Ruralco announced that it had entered into the SID with Nutrien under which Nutrien Sub would acquire all of the issued shares in Ruralco by way of a court ordered Scheme of Arrangement under Part 5.1 of the Corporations Act.

42. Under the terms of the Scheme of Arrangement, the Scheme Consideration payable by Nutrien Sub was \$4.40 per Ruralco share held at 7.00pm on 23 September 2019 (scheme record date) less the amount of any Special Dividend paid by Ruralco which did not exceed \$0.90.

43. The requisite majority of Ruralco shareholders approved the Scheme of Arrangement at a meeting held on 6 September 2019.

44. The Scheme of Arrangement was approved by order of the Federal Court of Australia on 12 September 2019.

45. The Scheme of Arrangement became effective on 13 September 2019 when Ruralco lodged the court order with Australian Securities and Investments Commission. Ruralco shares were suspended from trading at the close of trading on 13 September 2019.

46. On the scheme record date, a Ruralco shareholder was entitled to participate in the Scheme of Arrangement.

47. On 30 September 2019 (scheme implementation date), Ruralco's shareholders disposed of each share they held in Ruralco to Nutrien Sub.

48. On the scheme implementation date, Ruralco's shareholders received a total cash payment of \$4.40 per Ruralco share (Total Cash Consideration) comprising of:

- Scheme Consideration under the scheme of \$3.56 for each Ruralco Share held on the scheme record date, and
- a fully franked Special Dividend of \$0.84 per share.

Special Dividend

49. On 6 September 2019, the Board of Directors of Ruralco (Ruralco Board) declared a fully franked special dividend of \$0.84 per Ruralco share held at 17 September 2019 (Special Dividend record date). The Special Dividend was paid on 30 September 2019.

50. The payment of the Special Dividend was subject to the Scheme of Arrangement becoming effective and was payable at the discretion of the Ruralco Board. Neither Nutrien (nor any wholly-owned subsidiary of Nutrien, such as Nutrien Sub) influenced the decision of the Ruralco Board to declare the Special Dividend.

51. The Special Dividend was paid from Ruralco's current year profits and retained earnings comprising of dividends received from its subsidiary companies. The Special Dividend was debited against Ruralco's Retained Earnings account. Ruralco financed the payment of the Special Dividend in the interim with a loan issued by Nutrien. The Special Dividend complied with the requirements of the Corporations Act, including section 254T of that Act.

Commissioner of Taxation

9 October 2019

Appendix – Explanation

ⓘ *This Explanation 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.*

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Special Dividend

52. 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. However, paragraph (d) of the definition of 'dividend' excludes a distribution debited against an amount standing to the credit of the share capital account of the company.

53. The payment of the Special Dividend is a distribution of money which Ruralco made to its shareholders. Ruralco did not debit the Special Dividend against its share capital account.

54. Therefore, the exclusion in paragraph (d) does not apply and the Special Dividend constitutes a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

55. A distribution is a frankable distribution to the extent it is not unfrankable (section 202-40). Section 202-45 sets out the circumstances under which an amount or distribution is taken to be unfrankable.

56. None of the circumstances in section 202-45 apply to the Special Dividend. Therefore, the Special Dividend is a frankable distribution under section 202-40 and in turn is capable of being franked in accordance with section 202-5.

Assessability of the Special Dividend**Residents**

57. 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;

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

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

59. 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;

60. However, subsection 44(1) of the ITAA 1936 does not apply to a dividend to the extent to which it is included in, or excluded from, assessable income by another provision that expressly deals with dividends in the ITAA 1936 or the *Income Tax Assessment Act 1997*.

61. Subsection 128B(1) of the ITAA 1936 imposes Australian withholding tax on income which:

- a. is derived, on or after 1 January 1968, by a non-resident; and
- b. consists of a dividend paid by a company that is a resident.

62. Subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes from subsection 128B(1) income derived by a non-resident that consists of the franked part of a dividend. As the Special Dividend was fully franked, it will not be subject to Australian withholding tax when derived by a non-resident shareholder.

63. Section 128D of the ITAA 1936 operates to treat the Special Dividend as non-assessable non-exempt income.

64. Accordingly, non-resident shareholders who received the fully franked Special Dividend (other than those shareholders who received the Special Dividend in carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as 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 dividend (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

Gross-up and tax offset

65. 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.

66. Where a shareholder receives a franked distribution directly, satisfies the residency requirement in section 207-75 and is a 'qualified person' in relation to the franked distribution, the assessable income of the shareholder includes the amount of the franking credit (subsection 207-20(1)). The shareholder will also be entitled to a tax offset equal to the franking credit on the distribution (subsection 207-20(2)).

67. A shareholder that is not a qualified person in relation to the Special Dividend:

- does not include the franking credit attached to the dividend in their assessable income (paragraph 207-145(1)(e), and
- is not entitled to a tax offset equal to the amount of the franking credit attached to the dividend (paragraph 207-145(1)(f).

68. Subject to satisfying the 'qualified person' rule, the assessable income of a shareholder (not being an entity taxed as a corporate tax entity) that is a partnership or a trustee of a trust (not being a complying superannuation fund), includes the amount of the franking credit attached to the Special Dividend (subsection 207-35(1)).

Qualified person, related payment and holding period rule

Qualified person

69. 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 (subsection 207-145(1)).

70. 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.

71. Paragraph 207-145(1)(a) which refers to 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.

72. The test of what constitutes a 'qualified person' is set out in former subsection 160APHO(1) of the ITAA 1936 as follows:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a **qualified person** in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of a taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification period in relation to the dividend.

73. Broadly, if shareholders were not under an obligation to make a related payment in relation to the Special Dividend, they are required to satisfy the holding period requirement within the primary qualification period. If the shareholders were under an obligation to

make a related payment in relation to the Special Dividend, they are required to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

74. In order to determine the relevant qualification period, it is necessary to determine whether, under the Scheme of Arrangement, a shareholder has made, was under an obligation to make, or is likely to make, a 'related payment' in respect of the Special Dividend they receive (former subsection 160APHN(2) of the ITAA 1936).

75. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 are set out in former section 160APHN of the ITAA 1936. Broadly, a related payment is where a shareholder has done, or is obliged to do, anything having the effect of passing the benefit of the dividend to one or more other persons.

76. Former subsection 160APHN(3) of the ITAA 1936 lists examples of what may have the effect of passing the benefit of a dividend to one or more other persons, for example, 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 (former paragraph 160APHN(3)(f) of the ITAA 1936).

77. Former subsection 160APHN(4) of the ITAA 1936 lists the circumstances of making a related payment referred to in former paragraph 160APHN(3)(f) of the ITAA 1936 being broadly that the amount of the benefit passed on reflects the amount of the dividend.

78. Under the terms of the SID, the Scheme Consideration was reduced by the amount of the Special Dividend paid by Ruralco to its shareholders and was contingent upon the Scheme of Arrangement being implemented. On this basis, it is considered that the payment of the Special Dividend is an integral part of the scheme. Therefore, the requirements of former paragraphs 160APHN(3)(f) and 160APHN(4)(c) of the ITAA 1936 are satisfied.

79. The reduction of the Scheme Consideration has the effect of passing the benefit of the Special Dividend from Ruralco's shareholders to Nutrien Sub. Therefore, a shareholder, or a partner in a partnership or a beneficiary of a trust that has an interest in Ruralco shares, is taken to have made, or to have been under an obligation to make, a related payment in respect of the Special Dividend.

Holding period requirement

80. 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 (former paragraph 160APHO(2)(a) of the ITAA 1936).

81. As Ruralco's shareholders are taken, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to have made 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.

82. 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:

... 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* ...

83. 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.

84. The eligibility for the Special Dividend was determined on the Special Dividend record date of 17 September 2019, being the last day on which acquisition by a person of a Ruralco share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date of a Ruralco share for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 16 September 2019.

85. The secondary qualification period runs from 45 days before and ends on 45 days after the ex-dividend date of 18 September 2019. In practical terms, this means that the secondary qualification period runs from 4 August 2019 to 2 November 2019. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Ruralco share is to be excluded. This means that the secondary qualification period runs from 4 August 2019 until the date that the shareholders are no longer holding their shares at risk for the purposes of former Division 1A of Part III of the ITAA 1936.

86. Entitlement to participate in the Scheme of Arrangement was determined on the scheme record date (23 September 2019). Shareholders who disposed of their shares under the SID are no longer considered to have held their Ruralco shares at risk for the purposes of former Division 1A of Part IIIA of the ITAA 1936 as of 23 September 2019.

87. Accordingly, for a shareholder who disposed of their shares under the SID, the secondary qualification period will run for a period of 4 August 2019 to 22 September 2019 (being the day prior to the scheme record date). A shareholder who received the Special Dividend will need to have held its shares at risk for a continuous period of not less than 45 days during this period in order to be a qualified person for the purposes of former Division 1A of Part IIIA of the ITAA 1936. Further, pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, neither the date of acquisition nor the date of disposal is included in the relevant 45-day period.

88. As such, a shareholder who acquired Ruralco shares on or before 4 August 2019, will be capable of being a qualified person provided they held their Ruralco shares at risk until the scheme record date of 23 September 2019.

89. The small shareholder exception in former section 160APHT of the ITAA 1936 does not apply as the Special Dividend constitutes a related payment as discussed in paragraphs 74 to 79 of this Ruling. Therefore, a shareholder who is an individual and who has franking credit offsets not exceeding \$5,000 for the year of income ended 30 June 2019 must also satisfy the holding period requirement in relation to the Special Dividend (former subsection 160APHT(2) of the ITAA 1936).

90. Each shareholder will need to determine whether they satisfy this holding period requirement having regard to their personal circumstances. This will require them to take into account any positions they may have entered into that have diminished their risk of

loss or opportunity for gain in respect of their shares, which is outside the scope of this Ruling.

Refundable tax offset

91. A shareholder who is entitled to a tax offset pursuant to 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) is also subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

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

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A))
- a trustee of a trust who is liable to be assessed under section 98 or 99A of the ITAA 1936 (subsection 67-25(1B)), and
- 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)).

93. Division 63 sets out the rules on how, and in what order, tax offsets are applied against income tax liability. Where a tax offset that is subject to the refundable tax offset rules in Division 67 exceeds the income tax liability, the shareholder can get a refund of the remaining amount (table item 40 of section 63-10).

Exempting entity

94. Division 207 does not apply to a distribution by an exempting entity unless it is expressly stated to apply under Subdivision 208-G (section 208-195).

95. A corporate tax entity is an exempting entity at a particular time if, at that time, the entity is effectively owned by prescribed persons (section 208-20). In broad terms, an entity is effectively owned by prescribed persons if not less than 95% of accountable membership interests or accountable partial interests (broadly direct and indirect ownership interests) are held by or on behalf of prescribed persons (subsection 208-25(1)).

96. The definition of a 'prescribed person' in relation to another corporate tax entity includes companies, trustees, partnerships or individuals that are a foreign resident or if they were to receive a distribution by the corporate tax entity, the distribution would be exempt income or non-assessable non-exempt income of the company, trust estate, partnership or individual (sections 208-40 and 208-45).

97. Ruralco was not an exempting entity at the time the Special Dividend was paid to shareholders, nor was it a former exempting entity at that time, as less than 95% of the accountable membership interests or accountable partial interests held in Ruralco were held by foreign residents (Division 208).

98. Therefore, section 208-195 does not apply to deny the gross up of the assessable income of a shareholder by the amount of the franking credit attached to the Special Dividend received by that shareholder, nor to deny the tax offset to which the shareholder is otherwise entitled pursuant to Division 207 at the time when the Special Dividend was paid.

Imputation benefits anti-avoidance provisions**Section 177EA**

99. 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 a share or an interest in a share.

100. 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
- alternatively, that no imputation benefits arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

101. 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.

102. Ruralco is a corporate tax entity. The transfer of the shares in Ruralco under 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 Ruralco's shareholders (the relevant taxpayers) as part of this scheme and who could, therefore, reasonably be expected to receive imputation benefits.

103. In this case, it is considered that the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided in subsection 177EA(17) of the ITAA 1936), it would be concluded that, on the part of Ruralco, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the scheme.

104. To arrive at a conclusion, regard must be had 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 in this subsection encompass a range of diverse matters which, taken individually or in

conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the imputation benefit is more than an incidental purpose of the scheme.

105. The relevant circumstances are that the disposition of the Ruralco shares was made as part of a takeover by Nutrien by way of a Scheme of Arrangement under the Corporations Act which was voted on by Ruralco shareholders who were entitled to vote.

106. Ruralco's Scheme of Arrangement is a normal commercial transaction regarding the acquisition of Ruralco shares.

107. The fully franked Special Dividend was paid to all shareholders, which included a mix of residents and non-residents, in proportion to the number of shares that each of these shareholders held on the Special Dividend record date irrespective of their ability to utilise the relevant franking credits.

108. In considering the manner, form and substance of the scheme, it is considered that the scheme is not being entered into by Ruralco or the shareholders for more than an incidental purpose of enabling the shareholders to obtain imputation benefits. The provision of imputation benefits to shareholders remains incidental, in the sense of being subservient to, the purpose of transferring their shares to Nutrien Sub.

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

110. Therefore, the Commissioner considers that the requisite purpose is not present and accordingly, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit to be received in relation to the Special Dividend.

Section 204-30

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

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

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

113. Subsection 204-30(3) provides:

The Commissioner may make one or more of these determinations:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member;
- (b) that a specified exempting debit arises in the exempting account of the entity, for a specified distribution or other benefit to a disadvantaged member;

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

A determination must be in writing.

114. 'Streaming' is not defined for the purposes of section 204-30. However, paragraph 3.28 of the Explanatory Memorandum to the *New Business Tax System (Imputation) Bill 2002* provides that '...streaming is selectively directing the flow of franked distributions to those members who can benefit most from the imputation credits.'

115. 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 phrase 'derive a greater benefit from franking credits' is defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

116. In this case, shareholders that received the Special Dividend received an imputation benefit when the Special Dividend was paid. The imputation benefit for resident shareholders is in the form of a tax offset (paragraph 204-30(6)(a)) and for non-resident shareholders is in the form of not being liable to pay dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders may derive a greater benefit from franking credits than the non-resident shareholders.

117. However, Ruralco paid the Special Dividend equally to all of its shareholders and the Special Dividend was fully franked regardless of the recipient's tax profile. Accordingly, it cannot be said that Ruralco selectively directed the flow of franked distributions to those members who could most benefit from the franking credits.

118. As the conditions in subsection 204-30(1) have not been 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.

CGT consequences

CGT event A1

119. CGT event A1 happens if there is a change in the ownership of a CGT asset (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)).

120. The acquisition of shares in Ruralco under a court approved scheme of arrangement does not involve a disposal of shares under a contract.¹

121. Therefore, CGT event A1 happened when there was a change of ownership in a Ruralco share from a shareholder to Nutrien Sub under the SID (subsections 104-10(1) and (2)). The change of ownership occurred on the scheme implementation date of 30 September 2019 (paragraph 104-10(3)(b)).

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

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

¹ See paragraph 9 of 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?*

Capital proceeds

124. The capital proceeds received by a 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)).

125. 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.²

126. However, in this case, the determination of the Special Dividend did not occur independently of the scheme. Payment of the Special Dividend was contingent on Ruralco's shareholders approving the scheme. Once the scheme was approved, Ruralco was required to declare and pay the Special Dividend. In this way, the Special Dividend is part of the sum of money in return for which the shareholders will have, by approving the Scheme of Arrangement, demonstrated their willingness to transfer their Ruralco shares.³ Furthermore, Nutrien was required to lend to Ruralco the funds to enable Ruralco to pay the Special Dividend.

127. In this case, it is considered that the Special Dividend forms part of the capital proceeds which a shareholder received in respect of CGT event A1 happening.

128. Therefore, the capital proceeds that a shareholder received for the disposal of a Ruralco share is the Total Cash Consideration of \$4.40.

CGT anti-overlap provision

129. A capital gain made from CGT event A1 happening to their Ruralco shares is reduced by the amount of the Special Dividend that is included in a shareholder's assessable income under section 44 of the ITAA 1936 (section 118-20). This has the effect of reducing the capital gain (but not below zero) by the amount that is assessable under another provision.

130. However, a capital gain is not reduced by the amount of the franking credit, which is attached to the Special Dividend, where it is included in the shareholder's assessable income under section 207-20 (paragraph 118-20(1B)(b)).

Discount capital gain

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

132. One of those requirements is that the entity which made the capital gain as a result of a CGT event happening to its CGT asset must have acquired that asset at least 12 months before the CGT event (subsection 115-25(1)).

133. This means that a capital gain made by a shareholder is a discount capital gain if they acquired the Ruralco share at least 12 months before the date of disposal under the

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

³ Paragraph 11 of TR 2010/4.

scheme, being 12 months before the scheme implementation date of 30 September 2019, and the other requirements in Division 115 are satisfied.

Non-resident shareholders

134. Under subsection 855-10(1), an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

135. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these five categories of CGT assets:

| | |
|--------|---|
| Item 1 | taxable Australian real property |
| Item 2 | an indirect Australian real property interest not covered by item 5 |
| Item 3 | a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by items 1, 2 or 5 |
| Item 4 | an option or right to acquire a CGT asset covered by items 1, 2 or 3 |
| Item 5 | a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident). |

136. Table item 2 of section 855-15 defines taxable Australian property to include an indirect Australian real property interest. An indirect Australian real property interest under section 855-25 is an interest held by an entity in another entity if at that time it passes:

- the non-portfolio interest test under section 960-195, at that time or throughout a 12-month period that began no earlier than 24 months before that time and ended no later than that time, and
- the principal asset test in section 855-30.

137. The non-portfolio interest test under section 960-195 is as follows:

An interest held by an entity (the **holding entity**) in another entity (the **test entity**) passes the non-portfolio interest test at a time if the sum of the direct participation interests held by the holding entity and its associates in the test entity at that time is 10% or more.

138. A non-resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens, cannot disregard under subsection 855-10(1) a capital gain or capital loss from CGT event A1 happening if their shares in Ruralco are indirect Australian real property interests (table item 2 of section 855-15).

139. On the basis that there were no non-residents, either alone or together with any associates, who beneficially hold (or have held at any time in the previous 12 months) more than 10% of the shares in Ruralco, none of the Ruralco shares disposed of as part of the scheme passes the non-portfolio interest test. Consequently, shares held by non-residents do not constitute indirect Australian real property interests.

140. Since the first condition of an indirect Australian real property interest under section 855-25 is not satisfied, it is not necessary to consider the application of the principal asset test. The Ruralco shares do not constitute 'taxable Australian property' of non-resident shareholders.

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Income tax ~ Capital gains tax ~ CGT events ~ CGT event A1 - disposal of
a CGT asset
Income tax ~ Capital gains tax ~ Capital proceeds
Income tax ~ Capital management ~ 45 day rule
Income tax ~ Capital management ~ Anti avoidance rules ~ Other
Income tax ~ Capital management ~ Anti avoidance rules ~ Section 177EA
Income tax ~ Capital management ~ Assessability of distribution
Income tax ~ Capital management ~ Dividend streaming
Income tax ~ Capital management ~ Frankability of distribution
Income tax ~ Capital management ~ Franking credits / tax offsets
Income tax ~ Capital management ~ Qualified person rule

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