


CR 2022/3 - Think Childcare Limited - scheme of arrangement, interim dividend and permitted dividend

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Class Ruling

Think Childcare Limited – scheme of arrangement, interim dividend and permitted dividend

📌 Relying on this Ruling

This publication (excluding appendixes) 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.

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What this Ruling is about

1. This Ruling sets out the income tax consequences of the dividend paid by Think Childcare Limited (TNK) on 2 September 2021 (Interim Dividend), the dividend paid by TNK on 21 October 2021 (Permitted Dividend) and the scheme of arrangement whereby shareholders in TNK and Think Childcare Development Limited (TND) disposed of their shares in return for the scheme consideration.
2. Full details of the scheme are set out in paragraphs 35 to 60 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* (ITAA 1936) or the *Income Tax Assessment Act 1997* (ITAA 1997) (as detailed in the table in Appendix 2 to this Ruling), unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you were a TNK or TND shareholder who:
 - was a resident of Australia as defined in subsection 6(1) or a non-resident (other than non-residents who were carrying on a business at or through a permanent establishment in Australia)

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- was not exempt from Australian income tax
 - held your ordinary shares in TNK and TND, being stapled securities (together, the 'Stapled Securities'), on capital account; that is, the Stapled Securities were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
 - disposed of your TNK shares to Busy Bees Early Learning Australia Pty Ltd (Busy Bees) under a scheme of arrangement pursuant to Part 5.1 of the *Corporations Act 2001* (Corporations Act) between TNK and its independent securityholders (TNK Scheme) and received scheme consideration for that disposal (TNK Scheme Consideration), or disposed of your TND shares to FEL Child Care Developments Pty Ltd (FEL) under the separate inter-conditional scheme of arrangement pursuant to Part 5.1 of the Corporations Act between TND and certain of its shareholders (TND Scheme) and received Scheme Consideration for that disposal (TND Scheme Consideration)
 - received the Interim Dividend and the Permitted Dividend
 - acquired your TNK or TND shares on or after 20 September 1985.
5. This Ruling does not apply to you if you:
- acquired your TNK or TND shares under an employee share scheme arrangement
 - are subject to the investment manager regime in Subdivision 842-I in respect of your TNK or TND shares
 - are an 'MGE Entity' as defined in paragraph 42 of this Ruling
 - are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme set out in paragraphs 35 to 60 of this Ruling.
- Note:** Division 230 will not apply to individuals, unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2021 to 30 June 2022.

Ruling

Interim Dividend

7. The Interim Dividend of 8 cents per share is a 'dividend' as defined in subsection 6(1).
8. The Interim Dividend is a frankable distribution pursuant to section 202-40.

Permitted Dividend

9. The Permitted Dividend of 24 cents per share is a 'dividend' as defined in subsection 6(1).
10. The Permitted Dividend is a frankable distribution pursuant to section 202-40.

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Assessability of the Interim Dividend and Permitted Dividend, franking credits and tax offsets

Resident shareholders

11. If you are a resident of Australia as defined in subsection 6(1), you are required to include the Interim Dividend and the Permitted Dividend in your assessable income (subparagraph 44(1)(a)(i)).
12. If you satisfy the residency requirements in section 207-75, you include the franking credits attached to the Interim Dividend and the Permitted Dividend in your assessable income and you are entitled to a tax offset equal to the amount of those credits (section 207-20), provided you are a 'qualified person' (as defined in Division 1A of former Part IIIAA).
13. If you received the Interim Dividend and the Permitted Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership and you are not a corporate tax entity, the franking credits attached to the Interim Dividend and/or Permitted Dividend are included in your assessable income, provided you are a 'qualified person' (subsection 207-35(1)).
14. If you are a partner in a partnership or a beneficiary of a trust and the Interim Dividend and the Permitted Dividend flows indirectly through the partnership or trust to you, you include your share of the Interim Dividend and the Permitted Dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credit attached to the Interim Dividend and the Permitted Dividend, provided both you and the partnership or trust (as is relevant) are each a qualified person (section 207-45 and former subsection 160APHU(1)).
15. The tax offset is refundable, subject to the refundable tax offset rules in Division 67.

Non-resident shareholders

16. If you are a non-resident and the Interim Dividend and the Permitted Dividend are not attributable to a permanent establishment in Australia, the Interim Dividend and the Permitted Dividend are not included in your assessable income (section 128D) and you are not liable to withholding tax in respect of the Interim Dividend or the Permitted Dividend (paragraph 128B(3)(ga)).
17. You do not include the amount of the franking credits attached to the Interim Dividend and the Permitted Dividend in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70).

Qualified persons

Interim Dividend

18. The Interim Dividend you received does not constitute a 'related payment' for the purposes of paragraph 207-145(1)(a) and former section 160APHN and the primary qualification period therefore applies.
19. You will be a qualified person in relation to the Interim Dividend if, during the period from when you acquired your TNK shares to 10 October 2021 (inclusive), you held your TNK shares for a continuous period of at least 45 days during which you did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former

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section 160APHM) in respect of the shares. The period of 45 days does not include the day on which your TNK shares were acquired or the day of disposal.

Permitted Dividend

20. The Permitted Dividend you received constitutes a related payment for the purposes of paragraph 207-145(1)(a) and former section 160APHN, and the secondary qualification period therefore applies.

21. You will be a qualified person in relation to the Permitted Dividend if, during the period from 28 August 2021 to 13 October 2021 (inclusive), you held your TNK shares for a continuous period of at least 45 days during which you did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM) in respect of the shares. The period of 45 days does not include the day on which your TNK shares were acquired or the day of disposal.

Exempting entity

22. TNK was not an 'exempting entity' when the Interim Dividend and/or the Permitted Dividend were paid to you, nor was it a 'former exempting entity' at that time (Division 208).

23. 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 Interim Dividend or the Permitted Dividend you received, nor to deny the tax offset to which you are otherwise entitled to under Division 207 at the time when the Interim Dividend and the Permitted Dividend was paid.

Anti-avoidance provisions

Section 177EA

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

Section 204-30

25. 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 Interim Dividend or Permitted Dividend.

Capital gains tax consequences

CGT event A1

26. CGT event A1 happened on 21 October 2021 (Scheme Implementation Date) in relation to your TNK shares when you disposed of each of your TNK shares to Busy Bees in accordance with the TNK Scheme (section 104-10).

27. CGT event A1 happened on the Scheme Implementation Date in relation to your TND shares when you disposed of each of your TND shares to FEL in accordance with the TND Scheme (section 104-10).

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Capital proceeds

28. The capital proceeds received by you in relation to each of the CGT events is the money received or entitled to be received in respect of CGT event A1 happening (subsection 116-20(1)).

29. The capital proceeds received by you in relation to each TNK share disposed of under the TNK Scheme is \$3.1999 per TNK share. This amount includes the Permitted Dividend of 24 cents (subsection 116-20(1)).

30. The capital proceeds received by you in relation to each TND share disposed of under the TND Scheme is \$0.0001 per TND share.

Anti-overlap provisions

31. Any capital gain made when CGT event A1 happened to your TNK shares is reduced by the amount of the Permitted Dividend that is included in your assessable income under section 44 (section 118-20). Where the amount of the Permitted Dividend exceeds the capital gain, you cannot make or increase a capital loss (subsection 118-20(2)).

Capital gain or capital loss

32. You made a capital gain if the capital proceeds from the disposal of your TNK or TND shares exceeded the cost base of those shares (subsection 104-10(4)). The capital gain is the difference.

33. You made a capital loss if the capital proceeds from the disposal of your TNK or TND shares was less than the reduced cost base of those shares (subsection 104-10(4)). The capital loss is the difference.

Section 118-20

34. If you made a capital gain from the disposal of a TNK share, the anti-overlap provision in section 118-20 will apply to reduce your capital gain to the extent that the Permitted Dividend is included your assessable income.

Scheme

35. 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.

Background

Think Childcare Limited and Think Childcare Development Limited

36. Think Childcare Group, comprising TNK and TND, is a leading operator in the Australian child care sector. TNK owns and operates predominantly mature child care services and provides management services to clients, including third-party partners and TND. TND develops purpose-built child care services and provides TNK with an acquisition pipeline for child care services.

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37. TNK is a public company limited by shares which was incorporated on 21 July 2014 and was listed on the Australian Securities Exchange (ASX) on 24 October 2014.

38. In December 2019, each fully-paid ordinary share in TNK was stapled to a fully-paid ordinary share in TND on a 1:1 basis. The Stapled Securities have been listed on the ASX since 24 December 2019, trading as Think Childcare Group.

39. Both TNK and TND are Australian residents for tax purposes.

40. TNK is the head of the TNK Tax Group, consisting of TNK and its wholly-owned subsidiaries. TND is the head company of a separate Australian income tax consolidated group.

Share structure

41. At the time the Interim Dividend and Permitted Dividend were paid, the membership interests in TNK were comprised solely of fully-paid ordinary shares (which were stapled to TND shares). TNK's ordinary shareholders are a mix of individuals, companies, trusts, partnerships and superannuation funds, some of whom are non-residents.

42. Mathew Graeme Edwards, Isamax Pty Ltd as trustee for the Edwards Family Trust, Sues Tpywg Pty Ltd as trustee for EDSUPER, and any other entities controlled by Mathew Graeme Edwards are referred to as the 'MGE Entities', which own approximately 22.15% of the shares in TNK. The MGE Entities are not covered by this Ruling.

43. Shareholders who are not the MGE Entities are referred to as 'independent securityholders' in the Ruling.

Busy Bees

44. Busy Bees is an Australian-resident company that was incorporated on 21 February 2014. It operates a network of child care centres across Australia.

45. Busy Bees is ultimately a subsidiary of a foreign parent entity.

Scheme of Arrangement

46. On 16 June 2021, Think Childcare Group and Busy Bees entered into an agreement (Implementation Agreement) under which the following were proposed to be undertaken:

- Busy Bees would acquire all TNK shares held by independent securityholders by way of a court-approved scheme of arrangement under Part 5.1 of the Corporations Act (TNK Scheme).
- FEL, a wholly-owned subsidiary of Busy Bees, would acquire all TND shares held by independent securityholders by way of a court approved scheme of arrangement under Part 5.1 of the Corporations Act (TND Scheme).

Note: The TNK Scheme and TND Scheme are collectively referred to as the 'Scheme' in this Ruling.

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47. On 29 September 2021, the TNK Scheme, the TND Scheme and the unstapling of the TNK and TND shares were approved by a majority of eligible independent securityholders at a court-convened meeting.

48. On 6 October 2021, the court approved the Scheme and provided orders pursuant to Part 5.1 of the Corporations Act.

49. On 7 October 2021 (Effective Date), TNK lodged a copy of the court orders approving the Scheme of Arrangement with the Australian Securities & Investments Commission (ASIC).

50. The Scheme was implemented on the Scheme Implementation Date.

51. Shareholders received total cash consideration of \$3.1999 per TNK share (TNK Scheme Consideration), which included the Permitted Dividend of 24 cents per share, and cash consideration of \$0.0001 per TND share (TND Scheme Consideration).

Interim Dividend and Permitted Dividend

52. Think Childcare Group declared and paid the following dividends to its independent securityholders:

- a fully franked Interim Dividend of 8 cents per Stapled Security, and
- a fully franked Permitted Dividend of 24 cents per Stapled Security.

53. The total amount of dividends paid to TNK shareholders were:

- \$4,924,610.64 in respect of the Interim Dividend, and
- \$14,773,831.92 in respect of the Permitted Dividend.

54. The full amount of each of these dividends was sourced from the declaration and payment of dividends from Think Childcare Services Pty Ltd and Baker Street Childcare Education Pty Ltd (TCS/BKS Dividends), each a wholly-owned direct subsidiary of TNK. The TCS/BKS Dividends were booked as income separately in TNK's accounts and were not offset against any prior year loss. The TCS/BKS Dividends were sourced from current year profits derived by Think Childcare Services Pty Ltd and Baker Street Childcare Education Pty Ltd from activities undertaken in Australia.

Interim Dividend

55. The Interim Dividend was not conditional on the Scheme becoming effective and does not form part of the Scheme Consideration to be received by independent securityholders for their TNK or TND shares under the Scheme. It was funded by existing cash reserves of TNK. TNK shareholders that held the Stapled Securities on 25 August 2021 (Interim Dividend Record Date) were paid the Interim Dividend on 2 September 2021 (Interim Dividend Distribution Date).

Permitted Dividend

56. The Permitted Dividend was conditional on the Scheme becoming effective by a court order under paragraph 411(4)(b) of the Corporations Act in relation to the Scheme coming into effect.

57. The Permitted Dividend did not affect the Scheme Consideration payable by FEL for the TND shares under the TND Scheme.

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Other matters

58. On 14 October 2021 (Scheme Record Date), TNK had:
- a total of 61,557,633 fully-paid ordinary share on issue, and
 - a franking account balance of \$6,054,253.71.
59. TNK did not debit the Interim Dividend or the Permitted Dividend to its share capital account.

Key dates

60. The following table is a summary of the key dates for the Scheme of Arrangement, the Interim Dividend and the Permitted Dividend:

Date	Event
30 July 2021	Explanatory Booklet lodged with ASIC
18 August 2021	Interim Dividend declared
18 August 2021	First court date
19 August 2021	Explanatory Booklet registered with ASIC
24 August 2021	Explanatory Booklet dispatched to Think Childcare Group shareholders
25 August 2021	Interim Dividend Record Date
2 September 2021	Interim Dividend Distribution
23 September 2021	Permitted Dividend declared
29 September 2021	Scheme meetings
29 September 2021	General Meeting
6 October 2021	Second court date
7 October 2021	Effective Date – office copy of court orders approving the Schemes with ASIC lodged
11 October 2021	Permitted Dividend Record Date
14 October 2021	Scheme Record Date
21 October 2021	Implementation Date
21 October 2021	Permitted Dividend Distribution
21 October 2021	Completion of MGE Share Acquisition Agreement
21 October 2021	Completion of MGE Agreements

Commissioner of Taxation
27 January 2022

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Appendix 1 – Explanation

❶ *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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Interim Dividend and Permitted Dividend

61. The term 'dividend' is defined in subsection 6(1) 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.

62. The payment of the Interim Dividend and the Permitted Dividend is a distribution of money which TNK made to its shareholders. TNK did not debit the Interim Dividend and the Permitted Dividend against its share capital account.

63. Therefore, the exclusion in paragraph (d) of the definition of dividend does not apply and the Interim Dividend and the Permitted Dividend each constitute a dividend for the purposes of subsection 6(1).

Frankable distribution

64. 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.

65. None of the circumstances in section 202-45 apply to the Interim Dividend or the Permitted Dividend. Therefore, the Interim Dividend and the Permitted Dividend are frankable distributions under sections 202-40 and in turn are capable of being franked in accordance with section 202-5.

Assessability of the Interim Dividend and Permitted Dividend

Residents

66. The assessable income of a resident shareholder includes dividends paid by the company out of profits derived by it from any source (subparagraph 44(1)(a)(i)).

67. As the Interim Dividend and the Permitted Dividend were paid to shareholders out of profits derived by TNK, shareholders who are residents of Australia (as defined in subsection 6(1)) are required to include the Interim Dividend and the Permitted Dividend in their assessable income under subparagraph 44(1)(a)(i).

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

68. The assessable income of a non-resident shareholder includes dividends paid by a company out of profits derived from sources in Australia (subparagraph 44(1)(b)(i)).

69. However, subsection 44(1) 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 ITAA 1997.

70. Subsection 128B(1) imposes Australian withholding tax on income which consists of a dividend paid by a resident company to a non-resident on or after 1 January 1968.

71. Subparagraph 128B(3)(ga)(i) excludes from subsection 128B(1) income derived by a non-resident that consists of the franked part of a dividend. As the Interim Dividend and the Permitted Dividend were fully franked, they will not be subject to Australian withholding tax when derived by a non-resident shareholder.

72. Section 128D operates to treat the Interim Dividend and the Permitted Dividend as non-assessable non-exempt income.

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73. Accordingly, a non-resident who received the fully franked Interim Dividend and the Permitted Dividend (other than those shareholders who received the Interim Dividend and Permitted Dividend in carrying on business in Australia at or through a permanent establishment in Australia) is not required to include the Interim Dividend and Permitted Dividend as assessable income pursuant to subparagraph 44(1)(b)(i) (section 128D) and is not liable to Australian withholding tax in relation to the Interim Dividend and Permitted Dividend received (subparagraph 128B(3)(ga)(i)).

Gross-up and tax offset

74. 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.

75. 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)).

76. A shareholder that is not a qualified person in relation to the Interim Dividend or the Permitted Dividend:

- does not include the franking credit attached to the relevant 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 relevant dividend (paragraph 207-145(1)(f)).

77. 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 Interim Dividend and the Permitted Dividend (subsection 207-35(1)).

Qualified person, related payment rule and holding period rule

Qualified person

78. 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)).

79. Paragraph 207-145(1)(a), which refers to Division 1A of former Part IIIAA, provides the statutory tests you must satisfy to be a qualified person in relation to a franked distribution you have received in order for you to be entitled to a tax offset for the franking credit on the distribution.

80. Former section 160APHU 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.

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81. The test of what constitutes a qualified person is set out in former subsection 160APHO(1). Broadly, if you were not under an obligation to make a related payment in relation to the dividend, you will have to satisfy the holding period rule in relation to the primary qualification period. If you were under an obligation to make a related payment in relation to the dividend, you will have to satisfy the holding period requirement within the secondary qualification period.

82. You are also a qualified person if you hold your TNK shares as an individual and you satisfy the small shareholder exemption rule in former section 160APHT. You satisfy the small shareholder exemption rule if the total amount of franking credits to which you would be entitled does not exceed \$5,000 in the relevant income year.

Related payment rule

83. In order to determine the relevant qualification period, it is necessary to determine whether (under the Scheme) you or an associate have made, were under an obligation to make or are likely to make a related payment in respect of the dividend you have received (former subsection 160APHN(2)).

84. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA are set out in former section 160APHN. Broadly, a related payment is where a scheme 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.

Interim Dividend

85. Under the terms of the Implementation Agreement, the Scheme Consideration was not reduced by the amount of the Interim Dividend. The Interim Dividend was not conditional on the TNK Scheme or TND Scheme becoming effective. It was paid at the discretion of the TNK Board.

86. Therefore, it is considered that the payment of the Interim Dividend is not an integral part of the Scheme of Arrangement and you (or a partner in a partnership or a beneficiary of a trust that has an interest in TNK shares) are not to be taken to have made a related payment in respect of the Interim Dividend.

Permitted Dividend

87. The Permitted Dividend was contingent on the Scheme being approved and becoming effective. Under the terms of the Implementation Agreement, the Scheme Consideration was reduced by the amount of the Permitted Dividend which TNK paid to its shareholders. The reduction of the Scheme Consideration, calculated with reference to the amount of the Permitted Dividend, has the effect of passing the benefit of the Permitted Dividend from a TNK shareholder to Busy Bees.

88. Therefore, you (or a partner in a partnership or a beneficiary of a trust that has an interest in TNK shares) are taken to have made a related payment in respect of the Permitted Dividend you received.

Holding period rule

89. The holding period rule requires that you hold your TNK shares, on which the Interim Dividend and the Permitted Dividend were paid, 'at risk' for a continuous period of

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at least 45 days during the relevant qualification period (former paragraph 160APHO(2)(a)).

Interim Dividend

90. With regards to the Interim Dividend, the relevant qualification period is the primary qualification period.

91. The primary qualification period is the period beginning on the day after the date of acquisition of the share and ends 45 days after the day on which a share becomes ex dividend (former section 160APHD).

92. Under former subsection 160APHE(1), a share becomes ex dividend on the day after the last day on which the acquisition by a person of the share entitles them to receive the dividend.

93. In respect of the Interim Dividend, eligibility to receive the Interim Dividend was determined on the Interim Dividend Record Date (25 August 2021), being the last day on which the acquisition by a person of a TNK share entitled the person to receive Interim Dividend. Accordingly, the day on which TNK shares became ex dividend for the Interim Dividend was 26 August 2021.

94. Accordingly, the primary qualification period begins on the day after the day on which you acquired the shares and ends 45 days after the ex dividend date (26 August 2021). This means that the primary qualification period for the Interim Dividend ended on 10 October 2021 (inclusive).

95. Therefore, if you held your TNK share without 'materially diminished risks of loss or opportunities for gain' for at least 45 consecutive days from the day after you acquired the shares to 10 October 2021, you would be a qualified person in respect of the Interim Dividend.

Permitted Dividend

96. With regards to the Permitted Dividend, the relevant qualification period is the secondary qualification period.

97. The secondary qualification period is the period beginning 45 days before, and ending 45 days after, the day on which a share becomes ex dividend (former section 160APHD).

98. In respect of the Permitted Dividend, eligibility to receive the Permitted Dividend was determined on the Permitted Dividend Record Date (11 October 2021), being the last day on which the acquisition by a person of a TNK share entitled the person to receive the Permitted Dividend. It follows that the TNK shares became ex dividend (for the purposes of former subsection 160APHE(1)) for the Permitted Dividend on 12 October 2021. Accordingly, the secondary qualification period for the Permitted Dividend is notionally the period beginning 45 days before, and ending 45 days after, 12 October 2021, namely 28 August 2021 to 26 November 2021.

99. However, pursuant to former subsection 160APHO(3), any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the TNK shares are to be excluded.

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100. Under the Scheme, you ceased to hold your TNK shares at risk on the Scheme Record Date (14 October 2021), because on that day you became committed to dispose of your TNK shares in exchange for the Scheme Consideration.

101. TNK shareholders will no longer be considered to hold their TNK shares at risk for the purposes of Division 1A of former Part IIIAA as of 14 October 2021. Accordingly, the secondary qualification period runs from 28 August 2021 until 13 October 2021 (inclusive).

102. Therefore, if you disposed of your TNK shares to Busy Bees under the Scheme, you satisfied the holding period rule if you held those shares at risk for at least 45 continuous days (not including the day on which you acquired the TNK share, or the day on which you disposed of the TNK share) during the period 28 August 2021 to 13 October 2021.

Refundable tax offset

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

104. Certain taxpayers are specifically excluded from the operation of the refundable tax offset rules under section 67-25. These excluded entities include:

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A))
- trustees of a trust who are liable to be assessed under sections 98 or 99A (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 (1D)), and
- non-resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

105. 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 your income tax liability, you are entitled to a refund of the difference (table item 40 of section 63-10).

Anti-avoidance provisions

Section 177EA

106. Section 177EA is a general anti-avoidance provision that operates to prevent franking credit trading. For section 177EA to apply, the conditions of paragraphs 177EA(3)(a) to (e) must be satisfied.

107. TNK is a corporate tax entity. The payment of the Interim Dividend accords with the dividend history of TNK. The transfer of the TNK shares under the Scheme is a scheme for the disposition of membership interests. The Permitted Dividend was a frankable distribution which was paid to the shareholders of TNK as part of this Scheme, who could reasonably be expected to receive imputation benefits. Therefore, the conditions of paragraphs 177EA(3)(b) to (d) are satisfied.

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108. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided by subsection 177EA(17)), it would be concluded that (on the part of TNK, TNK shareholders or any other relevant party) there is a more than merely incidental purpose of conferring an imputation benefit under the Scheme (paragraph 177EA(3)(e)).

109. Considering the circumstances of the Scheme, it cannot be concluded that TNK or you entered into or carried out the Scheme for the purpose of enabling you 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) to deny the whole, or any part, of the imputation benefit received in relation to either the Interim Dividend or the Permitted Dividend.

Section 204-30

111. Section 204-30 applies where a corporate tax entity streams the payment of dividends to its members in such a way that certain shareholders (referred to as favoured members) obtain imputation benefits and other shareholders (referred to as disadvantaged members) obtain lesser or no imputation benefits, whether or not they receive other benefits. The favoured members are those that derive a greater benefit from imputation benefits than disadvantaged members.

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

113. Under the Scheme, you received imputation benefits when the Interim Dividend and the Permitted Dividend were each paid. The Interim Dividend and the Permitted Dividend were paid equally to all independent securityholders and were fully franked regardless of the tax profiles of independent securityholders. Accordingly, it cannot be said that TNK selectively directed the flow of franked dividends to those members who obtained the most benefit from the franking credits.

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

Capital gains tax consequences

CGT event A1

115. 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)).

116. The acquisition of shares in TNK and TND under a court-approved Scheme of Arrangement does not involve a disposal of shares under a contract.¹

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?*

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117. Therefore, CGT event A1 happened when there was a change of ownership in your TNK shares to Busy Bees or a change of ownership in your TND shares to FEL Childcare Development Limited under the Implementation Agreement (subsections 104-10(1) and (2)). The change of ownership occurred on the Scheme Implementation Date of 21 October 2021 (paragraph 104-10(3)(b)).

118. A shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a TNK share or TND 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 TNK share or TND share (subsection 104-10(4)).

Capital proceeds

119. The capital proceeds received by you 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)).

120. 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

Interim Dividend

121. The Interim Dividend was not paid in respect of the disposal of TNK shares under the Scheme. It was not conditional on whether or not the Scheme proceeded. The Scheme was not conditional on the declaration of the Interim Dividend. The Interim Dividend was not dependent on Busy Bees or a third party financing or facilitating payment of the Interim Dividend, or Busy Bees or a third party being obliged to bring about the result that the Interim Dividend would be paid to existing shareholders. Therefore, the Interim Dividend is independent of the Scheme.

122. The Commissioner considers that the Interim Dividend was not received in respect of the disposal of TNK shares under the Scheme. Accordingly, the Interim Dividend does not form part of the capital proceeds in respect of CGT event A1 happening.

Permitted Dividend

123. A dividend declared by a company that is subject to a takeover can form part of the vendor shareholders' capital proceeds from the disposal of the shares. Taxation Ruling TR 2010/4 states at paragraph 9 that:

A dividend declared or paid by the target company to the vendor shareholder will be money or property that the vendor shareholder has received, or is entitled to receive, under the contract or the scheme of arrangement, in respect of the transfer of the shares, if the vendor shareholder has bargained for the receipt of the dividend (whether or not in addition to other consideration) in return for giving up the shares. That is to say, if the dividend forms the whole or part of that sum of money or property in return for which the vendor shareholder is willing, and under the contract has promised or under the scheme of

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.*

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arrangement is bound, to transfer the shares in the target company, it will be capital proceeds in respect of the CGT event A1 happening.

124. The payment of the Permitted Dividend did not occur independently of the Scheme. This is primarily reflected in the following Scheme attributes:

- The TNK Scheme Consideration of \$3.1999 per TNK share was reduced by the amount of the Permitted Dividend.
- The Permitted Dividend was only payable if the Scheme became effective.

125. These Scheme attributes support a conclusion that the Permitted Dividend was received in respect of the disposal of TNK shares under the Scheme. Accordingly, the Permitted Dividend forms part of the capital proceeds which a TNK shareholder received in respect of CGT event A1 happening.

126. Therefore, the capital proceeds that you received from CGT event A1 happening for the disposal of each of your TNK shares is the TNK Scheme Consideration of \$3.1999 per share. This amount includes the Permitted Dividend of 24 cents (subsection 116-20(1)).

127. The capital proceeds that you received from CGT event A1 happening for the disposal of each of your TND shares is the TND Scheme Consideration of \$0.0001 per TND share.

Anti-overlap provision

128. A capital gain made from a CGT event is reduced if the capital gain includes an amount that is included in assessable income under another provision of the ITAA 1936 or the ITAA 1997 (section 118-20). This has the effect of reducing (but not below zero) the capital gain by the amount that is assessable under the other provision. A capital loss made from a CGT event will not be increased by the operation of section 118-20.

129. Where a dividend forms part of the capital proceeds from the disposal of shares and is assessable income under subsection 44(1), section 118-20 will reduce any capital gain by the amount of the dividend.

130. The Permitted Dividend is included in the assessable income of the TNK shareholders under subsection 44(1). Therefore, section 118-20 will operate to reduce (but not below zero) any capital gain made by a TNK shareholder from CGT event A1 happening by the amount of the Permitted Dividend that is included in the TNK shareholder's assessable income under subsection 44(1).

131. However, under paragraph 118-20(1B)(b), the capital gain made by a TNK shareholder is not reduced by the amount of the franking credit that is included in the assessable income.

132. The amount of a capital loss made by a TNK shareholder is not adjusted by the amount of the Permitted Dividend under section 118-20.

Capital gain or capital loss

133. You made a capital gain if the capital proceeds from the disposal of your TNK or TND share exceed its cost base (subsection 104-10(4)). The capital gain is the difference.

134. You made a capital loss if the capital proceeds from the disposal of your TNK or TND share is less than its reduced cost base (subsection 104-10(4)). The capital loss is the difference.

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135. The cost base and reduced cost base of the TNK or TND share depends on your individual circumstances.

Discount capital gain

136. If you make a capital gain from the disposal of your TNK or TND share, you are eligible to treat the capital gain as a discount capital gain provided that:

- you are an individual, a complying superannuation entity, or (subject to the rules in Subdivision 115-C) a trust (section 115-10)
- the capital gain was worked out using a cost base that was calculated without reference to indexation (subsection 115-20(1)), and
- you acquired, or were taken to have acquired, your TNK or TND share on or before 21 October 2020, which was at least 12 months prior to CGT event A1 happening (subsection 115-25(1)).

Non-resident shareholders

137. You disregard a capital gain or capital loss you make from a CGT event if you are a non-resident or the trustee of a non-resident 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 (subsection 855-10(1)).

138. The term 'taxable Australian property' is defined in the table in section 855-15. Where you are a non-resident or a trustee of a non-resident trust for CGT purposes just before CGT event A1 happened to your TNK or TND shares under the Scheme, you cannot disregard a capital gain or capital loss you made from CGT event A1 happening (under subsection 855-10(1)) if, relevantly, your TNK or TND shares were:

- an indirect Australian real property interest which is not covered by table item 5 of section 855-15 (table item 2 of section 855-15)
- covered by subsection 104-165(3) (table item 5 of section 855-15).

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Appendix 2 – Legislative provisions

139. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

<i>Income Tax Assessment Act 1936</i>	subsection 6(1)
<i>Income Tax Assessment Act 1936</i>	section 44
<i>Income Tax Assessment Act 1936</i>	subsection 44(1)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(a)(i)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(b)(i)
<i>Income Tax Assessment Act 1996</i>	section 98
<i>Income Tax Assessment Act 1996</i>	section 99A
<i>Income Tax Assessment Act 1936</i>	Division 1A of former Part IIIAA
<i>Income Tax Assessment Act 1936</i>	former section 160APHD
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHE(1)
<i>Income Tax Assessment Act 1936</i>	former section 160APHM
<i>Income Tax Assessment Act 1936</i>	former section 160APHN
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHN(2)
<i>Income Tax Assessment Act 1936</i>	former section 160APHT
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHO(1)
<i>Income Tax Assessment Act 1936</i>	former paragraph 160APHO(2)(a)
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHO(3)
<i>Income Tax Assessment Act 1936</i>	former section 160APHU
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHU(1)
<i>Income Tax Assessment Act 1936</i>	subsection 128B(1)
<i>Income Tax Assessment Act 1936</i>	paragraph 128B(3)(ga)
<i>Income Tax Assessment Act 1936</i>	subparagraph 128B(3)(ga)(i)
<i>Income Tax Assessment Act 1936</i>	section 128D
<i>Income Tax Assessment Act 1936</i>	section 177EA
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(b)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(c)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(d)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(e)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 177EA(17)
<i>Income Tax Assessment Act 1997</i>	Division 63
<i>Income Tax Assessment Act 1997</i>	section 63-10
<i>Income Tax Assessment Act 1997</i>	Division 67
<i>Income Tax Assessment Act 1997</i>	section 67-25
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1A)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1B)

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<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1C)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1DA)
<i>Income Tax Assessment Act 1997</i>	section 104-10
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(1)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(2)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(3)
<i>Income Tax Assessment Act 1997</i>	paragraph 104-10(3)(b)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(4)
<i>Income Tax Assessment Act 1997</i>	subsection 104-165(3)
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-C
<i>Income Tax Assessment Act 1997</i>	section 115-10
<i>Income Tax Assessment Act 1997</i>	subsection 115-20(1)
<i>Income Tax Assessment Act 1997</i>	subsection 115-25(1)
<i>Income Tax Assessment Act 1997</i>	subsection 116-20(1)
<i>Income Tax Assessment Act 1997</i>	section 118-20
<i>Income Tax Assessment Act 1997</i>	paragraph 118-20(1B)(b)
<i>Income Tax Assessment Act 1997</i>	subsection 118-20(2)
<i>Income Tax Assessment Act 1997</i>	section 202-5
<i>Income Tax Assessment Act 1997</i>	section 202-40
<i>Income Tax Assessment Act 1997</i>	section 202-45
<i>Income Tax Assessment Act 1997</i>	section 204-30
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(3)(c)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(8)
<i>Income Tax Assessment Act 1997</i>	Division 207
<i>Income Tax Assessment Act 1997</i>	section 207-20
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(1)
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(2)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(1)
<i>Income Tax Assessment Act 1997</i>	section 207-45
<i>Income Tax Assessment Act 1997</i>	section 207-70
<i>Income Tax Assessment Act 1997</i>	section 207-75
<i>Income Tax Assessment Act 1997</i>	subsection 207-145(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(a)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(e)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(f)
<i>Income Tax Assessment Act 1997</i>	Division 208
<i>Income Tax Assessment Act 1997</i>	section 208-195
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	Subdivision 842-I

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<i>Income Tax Assessment Act 1997</i>	subsection 855-10(1)
<i>Income Tax Assessment Act 1997</i>	section 855-15
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)

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References

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Legislative references:

- TAA 1953
- Corporations Act 2001 Pt 5.1
- Corporations Act 2001 411(4)(b)

Related Rulings/Determinations:

TD 2002/4; TR 2010/4

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