

# ***CR 2022/38 - Australian Pharmaceutical Industries Ltd - scheme of arrangement, ordinary dividend and special dividend***



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## Class Ruling

# Australian Pharmaceutical Industries Ltd – scheme of arrangement, ordinary dividend and special dividend

### **❶ 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.

| <b>Table of Contents</b>                   | <b>Paragraph</b> |
|--|------------------|
| What this Ruling is about                  | 1                |
| Who this Ruling applies to                 | 4                |
| When this Ruling applies                   | 6                |
| <b>Ruling</b>                              | <b>7</b>         |
| <b>Scheme</b>                              | <b>33</b>        |
| <b>Appendix 1 – Explanation</b>            | <b>57</b>        |
| <b>Appendix 2 – Legislative provisions</b> | <b>118</b>       |

### **What this Ruling is about**

1. This Ruling sets out the income tax consequences of the ordinary dividend paid by Australian Pharmaceutical Industries Ltd (API) on 15 December 2021, the special dividend paid by API on 29 March 2022 and the scheme of arrangement whereby WFM Investments Pty Ltd (WFM) acquired the remaining ordinary shares on issue in API on 31 March 2022 (Scheme of Arrangement).
2. Full details of this scheme are set out in paragraphs 33 to 56 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 of this Ruling), unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if you were an API shareholder who:
  - held your API shares on
    - 12 November 2021 (Ordinary Dividend Record Date) and received the ordinary dividend

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- 25 March 2022 (Special Dividend Record Date) and received the special dividend, and
  - 29 March 2022 (Scheme Record Date), and
  - held your API shares on capital account; that is, you did not hold your API shares as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)).
5. This Ruling does not apply to you if you:
- acquired your API shares under an API employee share plan, option or rights plan
  - are subject to the investment manager regime in Subdivision 842-I in relation to your API shares, or
  - are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme set out in paragraphs 33 to 56 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**

### **Dividends**

7. The ordinary dividend and special dividend are 'dividends' as defined in subsection 6(1).
8. The ordinary dividend and special dividend are frankable distributions pursuant to section 202-40.

### **Assessability of the dividends, franking credits and tax offsets**

#### ***Resident shareholders***

9. If you are a resident of Australia as defined in subsection 6(1), you are required to include the ordinary dividend and special dividend in your assessable income (subparagraph 44(1)(a)(i)).
10. If you satisfy the residency requirements in section 207-75, you include the franking credits attached to the dividends 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).
11. If you received the dividends 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 dividends are included in your assessable income, provided you are a qualified person (subsection 207-35(1)).
12. If you are a partner in a partnership or a beneficiary of a trust and the dividends flow indirectly through the partnership or trust to you, you include your share of the

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dividends in your assessable income and you are entitled to a tax offset equal to your share of the franking credits attached to the dividends, provided both you and the partnership or trust, as is relevant, are each a qualified person (section 207-45 and former subsection 160APHU(1)).

13. The tax offset is refundable, subject to the refundable tax offset rules in Division 67.

### ***Non-resident shareholders***

#### ***Dividends attributable to a permanent establishment in Australia***

14. If you are a non-resident and the dividends are attributable to a permanent establishment in Australia, you include the dividends in your assessable income (paragraphs 44(1)(b) and (c)) and you are not liable to pay withholding tax in respect of the dividends (subsection 128B(3E)).

15. If you are also a qualified person (as defined in Division 1A of former Part IIIAA), you include the amount of the franking credits attached to the dividends in your assessable income and you are entitled to a tax offset equal to the amount of those credits (section 207-20 and subsection 207-75(2)). The tax offset is not refundable (subsection 67-25(1DA)).

#### ***Dividends not attributable to a permanent establishment in Australia***

16. If you are a non-resident and the dividends are not attributable to a permanent establishment in Australia, the dividends are not included in your assessable income (section 128D) and you are not liable to withholding tax in respect of the dividends (paragraph 128B(3)(ga)).

17. You do not include the amount of the franking credits attached to the dividends in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70).

### ***Related payment and qualified persons***

18. The ordinary dividend and special dividend you received constitute a 'related payment' for the purposes of paragraph 207-145(1)(a) and former section 160APHN, and the secondary qualification period applies.

19. You will be a qualified person in relation to the ordinary dividend if, during the period from 29 September 2021 to 28 December 2021 (inclusive), you held your API 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 API shares were acquired or the day of disposal.

20. You will be a qualified person in relation to the special dividend if, during the period from 9 February 2022 to 10 May 2022 (inclusive), you held your API 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 API shares were acquired or the day of disposal.

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**Exempting entity**

21. API was not an exempting entity when the dividends were paid to you, nor was it a former exempting entity at that time (Division 208).

22. 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 dividends you received, nor to deny the tax offset to which you are otherwise entitled to under Division 207 at the time when the dividends were paid.

**Anti-avoidance provisions****Section 177EA**

23. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part of, the imputation benefits received in relation to the dividends.

**Section 204-30**

24. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits received in relation to the dividends.

**Section 207-145**

25. Section 207-145 will not apply to the whole, or any part, of the dividends. The Commissioner does not consider that the ordinary dividend or the special dividend were made as part of a dividend stripping operation (under section 207-155) or a distribution washing arrangement (under section 207-157). Accordingly, section 207-145 will not apply to adjust your assessable income to exclude the amount of the franking credits on the dividends, nor will it deny the tax offsets to which you would otherwise be entitled.

**Capital gains tax consequences****CGT event A1**

26. CGT event A1 happened to you on 31 March 2022 (Scheme Implementation Date) when you disposed of each of your API shares to WFM in accordance with the Scheme of Arrangement (section 104-10).

**Capital proceeds**

27. The capital proceeds from CGT event A1 happening to your API share is the Scheme Consideration of \$1.50 per share you received in respect of the disposal of each API share (subsection 116-20(1)).

28. The capital proceeds do not include the ordinary dividend or the special dividend.

**Capital gain or capital loss**

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

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

#### *Discount capital gain*

31. If you made a capital gain from the disposal of an API share, you are eligible to treat the capital gain as a 'discount capital gain' provided you acquired, or are taken to have acquired, your API share on or before 30 March 2021 and you satisfy the other requirements of Division 115.

#### **Foreign-resident shareholders**

32. If you were a 'foreign resident' or the trustee of a foreign trust for capital gains tax (CGT) purposes (as defined in subsection 995-1(1)) just before the Scheme Implementation Date, you disregard any capital gain or capital loss made as a result of CGT event A1 happening, unless your API shares were taxable Australian property for the purposes of section 855-10.

## **Scheme**

33. 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**

##### ***Australian Pharmaceutical Industries Ltd***

34. API commenced business in 1910 and operates in all Australian states and territories via its primary pharmaceutical wholesaling business. API's business includes 488 Priceline Pharmacy stores and 975 Soul Pattinson Chemist, Pharmacist Advice and Club Premium pharmacy members. API also operates 85 Clear Skincare clinics in Australia and New Zealand.

35. API listed on the Australian Securities Exchange (ASX) on 16 June 1997, and remained publicly listed on the ASX until it was delisted as a result of the Scheme of Arrangement.

36. API is an Australian resident for tax purposes.

37. As at 31 August 2021, API had:

- a total of 492,656,035 ordinary shares on issue held by 13,059 shareholders
- its top 20 shareholders beneficially held 59% of the total ordinary shares. Non-resident shareholders owned less than 20% of the total ordinary shares, none of which individually, or together with associates, owned more than 10%, and
- a franking account balance of \$81,120,215.

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**WFM Investments Pty Ltd**

38. WFM was incorporated on 25 June 2021 for the purpose of acquiring API. WFM is a wholly-owned subsidiary of Wesfarmers Limited (WES). WES is an Australian-resident company and has been listed on the ASX since 1984.

39. Prior to the implementation of the Scheme of Arrangement, WFM held 19.3% of the ordinary shares in API which it acquired from an API shareholder on 7 October 2021.

**Scheme of Arrangement**

40. On 8 November 2021, API announced that it had entered into a Scheme Implementation Agreement with WFM, subject to shareholder and court approval in accordance with Part 5.1 of the *Corporations Act 2001*.

41. Under the Scheme of Arrangement, each share in API held by an API shareholder would be transferred to WFM, resulting in API becoming a wholly-owned subsidiary of WES. In exchange for each API share, API shareholders would receive \$1.55 per share subject to a reduction for any ordinary dividend or special dividend paid prior to the Scheme Implementation Date (Scheme Consideration).

42. At a shareholder meeting held on 17 March 2022, API shareholders approved the Scheme of Arrangement.

43. On 21 March 2022, the Scheme of Arrangement was approved by the Federal Court of Australia. API shares were suspended from trading on the ASX from close of trading on 22 March 2022.

44. On the Scheme Record Date, each API shareholder's entitlement to the Scheme Consideration was determined.

45. The Scheme Consideration was paid to API shareholders and API shares were transferred to WFM on the Scheme Implementation Date of 31 March 2022.

**Ordinary dividend**

46. On 28 October 2021, API declared a fully franked dividend of 2 cents per API share to API shareholders who held their shares on the Ordinary Dividend Record Date payable on 15 December 2021.

47. The ordinary dividend was debited from API's retained profits reserve and funded from existing cash and debt facilities. The ordinary dividend was not debited against API's share capital account.

48. The ordinary dividend was not subject to the Scheme of Arrangement becoming effective.

**Special dividend**

49. On 8 November 2021, API announced its intention to declare a fully franked special dividend of up to 3 cents per API share to API shareholders who held their shares at 7.00pm AEST on the Special Dividend Record Date and payable on 29 March 2022.

50. The special dividend was debited from the retained profits reserve and sourced from existing cash reserves and debt facilities. The special dividend was not debited against API's share capital account.

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51. The special dividend was subject to the Scheme of Arrangement becoming effective.

#### **Other matters**

52. Neither WFM, WES, nor any of their associates, had any influence or control over the declaration and payment of the ordinary dividend or the special dividend.

53. Neither WFM, WES, nor any of their associates, facilitated or financed the payment of the ordinary dividend or the special dividend.

54. The Scheme of Arrangement was not conditional on the ordinary dividend or the special dividend being declared and WFM did not have any right to terminate the Scheme Implementation Agreement if API did not declare and pay the ordinary dividend or the special dividend.

55. On the Scheme Implementation Date, the sum of the market values of API's assets that were taxable Australian real property did not exceed the sum of the market values of its other assets for the purposes of section 855-30.

#### **Key dates**

56. The following table is a summary of the key dates for the Scheme of Arrangement, the ordinary dividend and the special dividend:

| <b>Date</b>                       | <b>Event</b>                                 |
|-----------------------------------|--|
| 8 November 2021                   | Scheme Implementation Agreement executed     |
| 8 November 2021                   | Announcement date                            |
| 7.00pm (AEST) on 12 November 2021 | Ordinary Dividend Record Date                |
| 15 December 2021                  | Ordinary Dividend Payment Date               |
| 14 February 2022                  | Date of Scheme Booklet                       |
| 14 February 2022                  | First Court hearing                          |
| 2.00pm (AEST) on 17 March 2022    | Scheme meeting                               |
| 10.15am (AEST) on 21 March 2022   | Second Court hearing (court approved scheme) |
| 22 March 2022                     | Effective date                               |
| 7.00pm (AEST) on 25 March 2022    | Special Dividend Record Date                 |
| 7.00pm (AEST) on 29 March 2022    | Scheme Record Date                           |
| 29 March 2022                     | Special Dividend Payment Date                |
| 31 March 2022                     | Scheme Implementation Date                   |

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**Commissioner of Taxation**

13 April 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.*

| <b>Table of Contents</b>  | <b>Paragraph</b> |
|---|------------------|
| Dividends   | 57               |
| Assessability of the dividends  | 61               |
| <i>Residents</i>  | 61               |
| <i>Non-residents carrying on a business at or through a permanent establishment</i>     | 63               |
| <i>Non-residents not carrying on a business at or through a permanent establishment</i> | 66               |
| Gross-up and tax offset   | 72               |
| Qualified person, related payment rule and holding period rule                          | 75               |
| <i>Qualified person</i>   | 75               |
| <i>Related payment rule</i>   | 79               |
| <i>Holding period rule</i>  | 83               |
| Refundable tax offset   | 93               |
| The anti-avoidance provisions   | 96               |
| <i>Section 177EA</i>  | 96               |
| <i>Section 204-30</i>   | 98               |
| Capital gains tax consequences  | 101              |
| <i>CGT event A1</i>   | 101              |
| <i>Capital proceeds</i>   | 106              |
| <i>Capital gain or capital loss</i>   | 111              |
| <i>Discount capital gain</i>  | 114              |
| <i>Foreign-resident shareholders</i>  | 115              |

### Dividends

57. 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, but excludes a distribution debited against an amount standing to the credit of the share capital account of the company.

58. The ordinary dividend and special dividend are dividends as they were distributions made by API to its shareholders and were not debited against its share capital account.

59. 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.

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60. The ordinary dividend and the special dividend are frankable distributions under section 202-40 as none of the circumstances in section 202-45 apply.

### **Assessability of the dividends**

#### **Residents**

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

62. As the dividends were paid by API to its resident shareholders out of profits derived by API, resident shareholders are required to include the dividends in their assessable income.

#### ***Non-residents carrying on a business at or through a permanent establishment***

63. A non-resident's liability to withholding tax on dividend income received in subsection 128B(1) is subject to subsection 128B(3E). Subsection 128B(3E) states that section 128B does not apply to dividend income that is:

- paid to a person who is a non-resident carrying on business in Australia at or through a permanent establishment of the person in Australia
- attributable to the permanent establishment, and
- not paid to the person in the person's capacity as trustee.

64. Subparagraph 44(1)(c)(i) includes the dividends in the assessable income of a non-resident shareholder that is carrying on business in Australia at or through a permanent establishment where the dividends are attributable to the permanent establishment.

65. Accordingly, if you are a non-resident API shareholder carrying on a business in Australia at or through a permanent establishment who received the dividends (otherwise than in their capacity as trustee), you include the dividends in your assessable income, to the extent to which the dividends were attributable to the permanent establishment (subparagraphs 44(1)(b)(i) and (c)(i)) and you will not be liable for Australian withholding tax in relation to the dividends.

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

66. 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)).

67. 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.

68. 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.

69. 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 dividends were fully franked, they will not be subject to Australian withholding tax.

70. Section 128D operates to treat the dividends as non-assessable non-exempt income.

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

### **Gross-up and tax offset**

72. 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)).

73. A shareholder that is not a qualified person in relation to the dividends:

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

74. 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 their share of the amount of the franking credit attached to the dividends (subsection 207-35(1)).

### **Qualified person, related payment rule and holding period rule**

#### ***Qualified person***

75. 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 the dividend (subsection 207-145(1)).

76. 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 received in order for you to be entitled to a tax offset for the franking credit on the distribution.

77. 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.

78. 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 are required 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 are required to satisfy the holding period requirement in relation to the secondary qualification period.

#### ***Related payment rule***

79. In order to determine the relevant qualification period, it is necessary to determine whether, under the Scheme of Arrangement, you or an associate have made, were under

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an obligation to make, or are likely to make, a related payment in respect of the ordinary dividend and/or special dividend you received (former subsection 160APHN(2)).

80. 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 which has the effect of passing the benefit of the dividend to one or more other persons.

81. Under the terms of the Scheme Implementation Deed, the Scheme Consideration was reduced by the amount of the ordinary dividend and the special dividend which API paid to its shareholders. The reduction of the Scheme Consideration, calculated with reference to the amount of the dividends, has the effect of passing the benefit of the dividends from an API shareholder to WFM.

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

### ***Holding period rule***

83. The holding period rule requires that you hold your API shares on which the ordinary dividend and the special dividend were paid, 'at risk' for a continuous period of at least 45 days during the relevant qualification period (former paragraph 160APHO(2)(a)). The relevant qualification period is the secondary qualification period.

84. 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).

85. 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.

86. In respect of the ordinary dividend, the last day on which a person who held an API share was entitled to receive the ordinary dividend was the record date for the dividend which was 12 November 2021. It follows that the API shares became ex dividend (for the purposes of former subsection 160APHE(1)) for the ordinary dividend on 13 November 2021. Accordingly, the secondary qualification period is notionally the period beginning 45 days before, and ending 45 days after 13 November 2021, namely 29 September 2021 to 28 December 2021 (inclusive).

87. In respect of the special dividend, the last day on which a person who held an API share was entitled to receive the special dividend was the record date for the dividend which was 25 March 2022. It follows that the API shares became ex dividend (for the purposes of former subsection 160APHE(1)) for the special dividend on 26 March 2022. Accordingly, the secondary qualification period is notionally the period beginning 45 days before, and ending 45 days after 26 March 2022, namely 9 February 2022 to 10 May 2022.

88. Any days on which an API shareholder has materially diminished risks of loss or opportunities for gain in respect of their API shares are excluded, but the exclusion is not taken to break the continuity period during which they held the shares (former subsection 160APHO(3)).

89. Under the Scheme of Arrangement, you ceased to hold your API shares at risk on the Scheme Record Date of 29 March 2022, because on that day you became committed to dispose of your API shares in exchange for the Scheme Consideration.

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90. Accordingly, if you disposed of your API shares to WES under the Scheme of Arrangement, 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 API share, or the day on which you disposed of the API share), in relation to the:

- ordinary dividend during the period 29 September 2021 to 28 December 2021 (inclusive), and
- special dividend, during the period 9 February 2022 to 28 March 2022 (inclusive).

91. You will need to determine whether you satisfy the holding period rule having regard to your personal circumstances, which will require you to take into account any positions you may have entered into that has 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM) in respect of your API shares. This is outside the scope of this Ruling.

92. The small shareholder exception in former section 160APHT does not apply as the dividends constitute related payments as discussed in paragraphs 79 to 82 of this Ruling. Therefore, a shareholder who is an individual and who has franking credit offsets not exceeding \$5,000 for the income year ended 30 June 2022 must also satisfy the holding period requirement in relation to the dividends (former subsection 160APHT(2)).

### **Refundable tax offset**

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

94. 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)).

95. 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).

### **The anti-avoidance provisions**

#### **Section 177EA**

96. Section 177EA is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of a particular scheme is to enable a taxpayer to obtain an imputation benefit.

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97. It is considered that the conditions for applying section 177EA are not satisfied in relation to API's payment of the ordinary dividend or the special dividend. Therefore, the Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or part, of the imputation benefits received by API shareholders in relation to the dividends.

### **Section 204-30**

98. Section 204-30 applies where a corporate tax entity streams the payment of dividends to its members in such a way that members to whom distributions are streamed 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.

99. Under the scheme, you received imputation benefits when the dividends were paid to you. The dividends were paid equally to all API shareholders and were fully franked regardless of the tax profiles of API's shareholders. Accordingly, it cannot be said that API selectively directed the flow of franked dividends to certain members.

100. As the conditions in subsection 204-30(1) were 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 received by you as an API shareholder in relation to the dividends.

### **Capital gains tax consequences**

#### **CGT event A1**

101. 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)).

102. The acquisition of your API shares under a court-approved Scheme of Arrangement does not involve a disposal of shares under a contract.

103. Therefore, CGT event A1 happened when there was a change of ownership in your API shares to WFM under the Scheme Implementation Deed (subsections 104-10(1) and (2)). The change of ownership occurred on the Scheme Implementation Date of 31 March 2022 (paragraph 104-10(3)(b)).

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

105. A shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an API 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 API share (subsection 104-10(4)).

#### **Capital proceeds**

106. The capital proceeds you received 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)).

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107. 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.<sup>1</sup>

108. The ordinary dividend and special dividend were not paid in respect of the disposal of API shares under the Scheme of Arrangement. The Scheme of Arrangement was not conditional on the declaration of the dividends. The ordinary dividend and the special dividend were not dependent on WFM or a third-party financing or facilitating payment of the dividends, or WFM or a third party being obliged to bring about the result that the dividends would be paid to existing shareholders.

109. The Commissioner considers that the dividends were not received in respect of the disposal of API shares under the Scheme of Arrangement. Accordingly, the dividends do not form part of the capital proceeds in respect of CGT event A1 happening.

110. Therefore, the capital proceeds that you received from CGT event A1 happening on the disposal of each API share is the Scheme Consideration \$1.50 per API share.

#### *Capital gain or capital loss*

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

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

113. The cost base and reduced cost base of the API share depends on your individual circumstances.

#### *Discount capital gain*

114. If you make a capital gain from the disposal of your API 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 API share on or before 30 March 2021, which was at least 12 months prior to CGT event A1 happening (subsection 115-25(1)).

#### *Foreign-resident shareholders*

115. You disregard a capital gain or capital loss you make from a CGT event if you 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 (subsection 855-10(1)).

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<sup>1</sup> 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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Status: **not legally binding**

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116. The term 'taxable Australian property' is defined in the table in section 855-15 to include an indirect Australian real property interest. As the sum of the market values of API's taxable Australian real property assets did not exceed the sum of the market value of its non-taxable Australian real property assets at the time the CGT event occurred, the principal asset test in section 855-30 is not satisfied; meaning your API share is not an indirect Australian real property interest.

117. However, you cannot disregard a capital gain or capital loss you made when CGT event A1 happened to your API share, if, relevantly, your API share:

- was used at any time in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- was covered by subsection 104-165(3) (table item 5 of section 855-15, about individuals choosing to disregard capital gains upon ceasing to be Australian residents).



Status: **not legally binding****Appendix 2 – Legislative provisions**

118. 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> | subsection 44(1)                 |
| <i>Income Tax Assessment Act 1936</i> | subparagraph 44(1)(a)(i)         |
| <i>Income Tax Assessment Act 1936</i> | paragraph 44(1)(b)               |
| <i>Income Tax Assessment Act 1936</i> | subparagraph 44(1)(b)(i)         |
| <i>Income Tax Assessment Act 1936</i> | paragraph 44(1)(c)               |
| <i>Income Tax Assessment Act 1936</i> | subparagraph 44(1)(c)(i)         |
| <i>Income Tax Assessment Act 1936</i> | section 98                       |
| <i>Income Tax Assessment Act 1936</i> | section 99A                      |
| <i>Income Tax Assessment Act 1936</i> | section 128B                     |
| <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> | subsection 128B(3E)              |
| <i>Income Tax Assessment Act 1936</i> | section 128D                     |
| <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 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 160APHT           |
| <i>Income Tax Assessment Act 1936</i> | former subsection 160APHT(2)     |
| <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> | section 177EA                    |
| <i>Income Tax Assessment Act 1936</i> | paragraph 177EA(5)(b)            |
| <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                      |

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|                                       |                         |
|---------------------------------------|-------------------------|
| <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)    |
| <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> | Division 115            |
| <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> | Subdivision 115-C       |
| <i>Income Tax Assessment Act 1997</i> | subsection 116-20(1)    |
| <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 207-75(2)    |
| <i>Income Tax Assessment Act 1997</i> | section 207-145         |
| <i>Income Tax Assessment Act 1997</i> | subsection 207-145(1)   |
| <i>Income Tax Assessment Act 1997</i> | paragraph 207-145(1)(a) |

**CR 2022/38****Status: not legally binding**

|                                       |                         |
|---------------------------------------|-------------------------|
| <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> | section 207-155         |
| <i>Income Tax Assessment Act 1997</i> | section 207-157         |
| <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       |
| <i>Income Tax Assessment Act 1997</i> | section 855-10          |
| <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 855-30          |
| <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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Status: **not legally binding**

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## References

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*Related Rulings/Determinations:*

TD 2002/4; TR 2010/4

*Legislative references:*

- TAA 1953
- Corporations Act 2001 Pt 5.1

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ATO references

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CGT asset  
Income tax ~~ Capital gains tax ~~ Capital proceeds  
Income tax ~~ Capital management ~~ Assessability of distribution  
Income tax ~~ Capital management ~~ Franking credits / tax offsets  
Income tax ~~ Capital management ~~ Qualified person rule  
Income tax ~~ Capital management ~~ Scheme of arrangement

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