CR 2011/36 - Income tax: scrip for scrip: exchange of shares in AXA Asia Pacific Holdings Limited for shares in AMP Limited

Class Ruling

Income tax: scrip for scrip: exchange of shares in AXA Asia Pacific Holdings Limited for shares in AMP Limited

Contents Para

This publication provides you with the following level of protection:

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

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

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

What this Ruling is about

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

Relevant provision(s)

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

- Section 44 of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Former Division 1A of Part IIIAA of the ITAA 1936;
- Section 177EA of the ITAA 1936;
- Section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Section 109-10 of the ITAA 1997;
- Section 110-25 of the ITAA 1997;
- Section 110-55 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;

- Section 116-20 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997;
- Section 204-30 of the ITAA 1997; and
- Section 207-20 of the ITAA 1997.

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders (excluding AXA *Societe Anonyme* (AXA SA), AMP Limited (AMP) and related entities) of AXA Asia Pacific Holdings Limited (AXA APH) (AXA APH Shareholders) who, on the Implementation Date of the scheme:

(a) participate in the scheme and exchange their AXA APH Shares for ordinary shares in AMP (AMP Shares) and cash;

(b) hold their AXA APH Shares on capital account;

(c) are a 'resident of Australia' within the meaning of subsection 6(1) of the ITAA 1936;

(d) are not a 'temporary resident' of Australia within the meaning of section 995-1;

(e) are not 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of these expressions in Subdivision 124-M; and

(f) are not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their AXA APH Shares.

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

4. This Ruling does not apply in respect of AXA APH Shares acquired under either the AXA APH General Tax Exempt Plan or the AXA APH General Tax Deferred Plan on or before 30 June 2009, in respect of which an election under former section 139E of the ITAA 1936 has not been made and a cessation time as mentioned in former subsection 139B(3) of the ITAA 1936 has not happened immediately before the proposal.

Qualifications

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

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 26 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

Date of effect

9. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

10. The following description of the scheme is based on information provided by the Applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Application for a Class Ruling dated 13 December 2010 on behalf of AXA APH;

- Amended Class Ruling application received on 22 December 2010;
- Merger Implementation Deed between AXA APH and AMP dated 29 November 2011;
- Framework Deed between AXA APH, AMP and AXA SA dated 29 November 2010;
- Procurement Deed between AMP and AXA SA dated 29 November 2010;
- AAPHL Share Sale Deed between AXA SA and AMP dated 29 November 2010;
- Asian Subsidiary Deed between AXA APH, AMP, AXA SA and National Mutual International Pty Limited (NMI) dated 29 November 2010;
- Co-operation Deed between AMP and AXA SA dated 29 November 2010;
- Explanatory Memorandum for the proposed merger of the Australian and New Zealand Businesses of AXA Asia Pacific Holdings Limited with AMP Limited and the sale of the Asian Businesses to AXA SA (Explanatory Memorandum) received from the Applicant on 20 January 2011; and
- Correspondence from the Applicant dated between 24 January 2011 and 16 February 2011.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

Overview

11. The scheme that is the subject of this ruling involves the acquisition by AMP of AXA APH Shares from AXA APH Shareholders.

Background of key entities

12. AXA APH is a resident of Australia for income tax purposes. It is listed on the Australian Securities Exchange (ASX) and is the head company of the AXA APH income tax consolidated group.

13. AMP is an Australian resident entity listed on the ASX and is the head company of the AMP income tax consolidated group. AMP Financial Services Holdings Limited (AMP FSH) is a wholly owned Australian resident subsidiary that is a member of the AMP tax consolidated group.

14. AXA SA, AXA APH and AMP have entered into an arrangement (AMP Acquisition) under which:

(a) AMP FSH will acquire from AXA SA and its subsidiaries all the AXA APH Shares that are held by and registered in the name of AXA SA and/or its subsidiaries, being approximately 53.9% of the total number of AXA APH Shares (Share Sale Transaction);

(b) AMP FSH will acquire the remaining AXA APH Shares (being approximately 46.1%) pursuant to a scheme of arrangement under section 411 of the *Corporations Act 2001* (Cth) (Corporations Act) between AXA APH and AXA APH Shareholders (Share Scheme). The Share Scheme is subject to the approval of the AXA APH Shareholders and the Supreme Court of Victoria (Court);

(c) AXA APH will propose a further scheme of arrangement under section 411 of the Corporations Act between AXA APH and the registered holders (AXA APH Rightsholders) of rights granted under the Executive Performance Plan 2004 (AXA APH Rights) pursuant to which all AXA APH Rights on issue at the Record Date of that scheme will be cancelled (Rights Scheme). The Rights Scheme is subject to the approval of AXA APH Rightsholders and the Court; and

(d) by further transactions AMP will retain the Australian and New Zealand businesses and operations of AXA APH and AXA SA will acquire all of the Asian businesses and operations of AXA APH.

Value received by AXA APH Shareholders under the Share Scheme

15. AXA APH Shareholders will receive as Share Scheme Consideration approximately $6.43 in value for each AXA APH Share (subject to the adjustments described in paragraph 16), comprising:

(a) 0.73 AMP Share (Share Component); and

(b) a variable cash component (Cash Component).

16. The Cash Component will be adjusted to take account of the volume-weighted average price (VWAP) of AMP Shares for the 10 consecutive Trading Days (as defined in the Listing Rules of the Australian Securities Exchange Limited (ASX)) immediately after the Effective Date (that period being the Post Scheme VWAP Period) (AMP VWAP).

17. The value received by AXA APH Shareholders will be adjusted as follows:

Scenario 1 – the AMP VWAP is higher than $5.60

The Cash Component will vary so that AXA APH Shareholders will receive 50% of the benefit of the increase in the value of the Share Component. AXA APH Shareholders may receive more than $6.43 value in this case. The Cash Component is calculated by the following formula:

$$\text{Cash Component} = \$6.43 + \frac{(\text{VWAP} - \$5.60) \times (0.73)}{2} - (0.73 \times \text{VWAP})$$

Scenario 2 – the AMP VWAP is between $4.50 and $5.60 (inclusive)

The Cash Component will vary such that the value AXA APH Shareholders receive is expected to be $6.43. The Cash Component is calculated by the following formula:

Cash Component = $6.43 – (0.73 x VWAP)

Scenario 3 – the AMP VWAP is less than $4.50

The Cash Component will vary and be calculated as if the AMP VWAP were $4.50. In this case AXA APH Shareholders may receive value of less than $6.43 in exchange for their AXA APH Shares. If the AMP VWAP falls below $4.50 before the Share Scheme meeting, the board of AXA APH may terminate the Share Scheme. The Cash Component is calculated by the following formula:

Cash Component = $6.43 – (0.73 x $4.50)

18. An AXA APH Shareholder whose address as shown on the AXA APH Share Register is a place outside Australia and its external territories, New Zealand, the United Kingdom, Hong Kong and the United States is an Ineligible Overseas Shareholder for the purposes of the scheme.

19. Ineligible Overseas Shareholders do not receive AMP Shares. Instead, the AMP Shares that would otherwise have been issued to them will be issued to a nominee appointed by AMP on the Implementation Date and they will receive an amount equivalent to the proportion of the net proceeds of the sale (of the AMP Shares) obtained by the nominee.

20. AXA APH Shareholders with fractional entitlements to a part of an AMP Share will have their fractional entitlement rounded up or rounded down to the nearest whole number of AMP Shares.

21. The time and date for determining entitlement to the Share Scheme Consideration (Scheme Record Date for the Share Scheme) is 16 March 2011.

Final 2010 dividend provided by AXA APH

22. AXA APH Shareholders will be entitled to receive the final AXA APH Dividend for the year ending 31 December 2010 (Final 2010 Dividend) if AXA APH declares a dividend for this period. The amount of any Final 2010 Dividend will be a maximum of 9.25 cents per share pursuant to the Framework Deed.

23. Since the year ending 31 December 2005, AXA APH has always paid an interim and final dividend,
in September and March respectively.

24. If AXA APH pays the Final 2010 Dividend, it will:

(a) pay the Final 2010 Dividend to all persons registered as the holder of AXA APH Shares at the Dividend Record Date of 4 March 2011 (in accordance with relevant corporations law requirements);

(b) debit the Final 2010 Dividend to its retained earnings account (and pay the Final 2010 Dividend only out of earnings and profits); and

(c) determine the extent (if any) of the franking credit which may be allocated to the distribution. If a franking credit is allocated, the Final 2010 Dividend will be franked to the same extent in respect of each AXA APH Share.

Other matters

25. The scheme does not include any further or different arrangements entered into by any particular shareholder or shareholders failing within the class of entities to which this Ruling applies.

Assumptions

26. This Ruling Request is made on the basis of the scheme as described in paragraphs 10 to 25 outlined above as well as the additional assumptions outlined below:

(a) the Final 2010 Dividend meets the requirements of a ‘dividend’ as defined under subsection 6(1) of the ITAA 1936; and

(b) there is sufficient retained earnings at the Implementation Date to pay the Final 2010 Dividend.

Ruling

CGT event A1 happens on the disposal of AXA APH Shares

27. CGT event A1 will happen as a result of the disposal by an AXA APH Shareholder of their AXA APH Shares to AMP under the scheme described in the Ruling (subsection 104-10(1)).

28. 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)).

29. The time of the event is when the AXA APH Shares are acquired by AMP on the Implementation Date (paragraph 104-10(3)(b)).

Capital gain or loss

30. An AXA APH Shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a AXA APH Share exceeds its cost base. An AXA APH Shareholder will make a capital loss if those capital proceeds are less than its reduced cost base (subsection 104-10(4)).

Capital proceeds

31. The capital proceeds from a CGT event are the money and the market value of any property received or entitled to be received (worked out at the time of the event happening) (subsection 116-20(1)).

32. The capital proceeds for each AXA APH share are the Cash Component and market value of the Share Component received in respect of CGT event A1 happening, worked out at the time of the CGT event (being the Implementation date).

33. The Final 2010 Dividend will not form part of the capital proceeds received by an AXA APH Shareholder from the disposal of an AXA APH Share.

If a capital gain is made

Availability of scrip for scrip roll-over

34. Subject to the qualification in paragraph 35 of this Ruling, an AXA APH Shareholder who makes a capital gain from the disposal of an AXA APH share may choose scrip for scrip roll-over under Subdivision 124-M (section 124-780).

35. Scrip for scrip roll-over cannot be chosen if any capital gain the AXA APH Shareholder makes from a replacement AMP Share would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

If scrip for scrip roll-over is chosen

36. If an AXA APH Shareholder chooses scrip for scrip roll-over, the capital gain that will be made from the disposal of an AXA APH Share is disregarded to the extent the AXA APH Shareholder will receive replacement AMP Shares for the disposal of their AXA APH Shares. The capital gain is not disregarded to the extent that the AXA APH Shareholder will receive cash for the disposal of their AXA APH Shares (subsections 124-785(1) and 124-790(1)).

If scrip for scrip roll-over is not chosen, or cannot be chosen

37. If an AXA APH Shareholder does not, or cannot, choose scrip for scrip roll-over, any capital gain made from the disposal of an AXA APH Share is not disregarded.

Discount capital gain

38. AXA APH Shareholders who will make a capital gain where scrip for scrip roll-over is not chosen or cannot be chosen, may be eligible to treat the gain as a discount capital gain provided they satisfy the requirements of Subdivision 115-A.

Cost base of AMP Shares

If scrip for scrip roll-over is chosen

39. Where scrip for scrip roll-over is chosen, the first element of the cost base of each AMP Share is worked out by reasonably attributing to it the cost base of the AXA APH Share exchanged for the relevant AMP Share. The cost base is reduced by so much of it that is attributable to the Cash Component (subsections 124-785(2) and (3)).

40. The first element of the reduced cost base of the AMP Share is calculated in the same manner (subsection 124-785(4)).

41. In working out the amount of the cost base of an AXA APH Share that is reasonably attributable to the Cash Component, the Commissioner accepts the following method:

$$\text{Cost base of AXA APH Shares exchanged} \times \frac{\text{Cash Component}}{\text{Market value of Share Component} + \text{Cash Component}}$$

The remaining portion of the cost base is used to determine the first element of the cost base (and reduced cost base) for the replacement AMP Shares issued as consideration for the transfer of the AXA APH Shares (subsections 124-785(2), 124-785(3) and 124-785(4)). The Commissioner accepts that the cost base of the AMP Shares can be worked out using the following method:

$$\text{Cost base of AXA APH Shares exchanged} \times \frac{\text{Market value of Share Component}}{\text{Market value of Share Component} + \text{Cash Component}}$$

If scrip for scrip roll-over is not chosen, or cannot be chosen

42. Where scrip for scrip roll-over is not, or cannot, be chosen, the first element of the cost base and reduced cost base of each AMP Share received is equal to the market value of the part of the AXA APH Share given in exchange for the AMP Share (subsections 110-25(2) and 110-55(2)). The Commissioner accepts the following method for working out the relevant part of the AXA APH Shares given in exchange for AMP Shares:

$$\text{Market value of AXA APH Shares exchanged} \times \frac{\text{Market value of Share Component}}{\text{Market value of Share Component} + \text{Cash Component}}$$

Acquisition date of AMP Shares

43. AXA APH Shareholders will acquire their AMP Shares on the date those shares are issued to each AXA APH shareholder, that is, the Implementation Date (item 2 of the table in section 109-10).

44. However, for the purposes of determining eligibility to a discount capital gain, AXA APH Shareholders who choose scrip for scrip roll-over are taken to have acquired their AMP Shares when they acquired the corresponding AXA APH Shares (item 2 of the table in subsection 115-30(1)).

Dividends received

Inclusion of dividends in assessable income

45. AXA APH Shareholders must include in their assessable income the Final 2010 Dividend received under subparagraph 44(1)(a)(i) of the ITAA 1936.

46. Subject to the AXA APH Shareholder being a qualified person, the AXA APH Shareholder must include in their assessable income an amount equal to the franking credit received on the Final 2010 Dividend under subsection 207-20(1).

Entitlement to a tax offset

47. AXA APH Shareholders who are required to include an amount equal to the franking credit in their assessable income will be entitled to a tax offset equal to the franking credit under subsection 207-20(2), provided the requirements of Division 207 are satisfied.

Qualified persons

48. Having regard to the relevant circumstances of the scheme, nothing in the offer documents (that is, any documents relating to the AMP Acquisition) indicates that the AXA APH Shareholder has made, is under an obligation to make, or is likely to make a related payment in respect of the Final 2010 Dividend.

49. As the AXA APH Shareholders are not taken, for the purposes of Division 1A of the former Part IIIAA of the ITAA 1936 (former Division 1A of the ITAA 1936), to be under an obligation to make a related payment in respect of the Final 2010 Dividend as a result of the scheme, the relevant holding period is, therefore, the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

50. For those AXA APH Shareholders that have not previously satisfied the holding period rule during a primary qualification period for the purposes of former Division 1A of the ITAA 1936, they will be considered to have satisfied the holding period rule under former section 160APHO of the ITAA 1936 and, therefore, be a qualified person in relation to the Final 2010 Dividend if:

(a) the AXA APH Shareholder acquired the AXA APH Share or interest in the share on or before 29 January 2011; and

(b) during the period when the share or interest in the share was held, the AXA APH Shareholder did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) for a continuous period of at least 45 days.

The anti-avoidance provisions

51. 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 Final 2010 Dividend.

52. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit (within the meaning of that section) is to arise in respect of the distribution for Minority Shareholders.

Commissioner of Taxation
6 April 2011

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Subdivision 124-M

53. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this ruling are outlined in the Ruling part of this document.

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

55. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main conditions and exceptions that are relevant to the circumstances of the proposed acquisition of AXA APH by AMP are:

(a) shares in a company are exchanged for shares in another company;

(b) the exchange occurs as part of a single arrangement;

(c) conditions for roll-over are satisfied;

(d) further conditions are not applicable or are satisfied; and

(e) exceptions to obtaining scrip for scrip roll-over are not applicable.

56. Under the scheme the conditions for roll-over under Subdivision 124-M are satisfied. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted other than the following matter relating to the determination of market value.

57. The Commissioner accepts that the market value of the AMP Shares on the Implementation Date of the scheme may be determined by reference to the AMP VWAP.

58. The Commissioner accepts that the market value of that portion of the AXA APH Shares given in exchange for AMP Shares may be determined by reference to the market value of AMP Shares on the Implementation Date.

Dividends received

Inclusion of dividends in assessable income

59. Subsection 44(1) of the ITAA 1936 requires that the assessable income of a resident shareholder in a company includes dividends that are paid to the shareholder by the company out of profits derived by it from any source.

Inclusion of franking credits in assessable income

60. Subject to the AXA APH Shareholder being a qualified person, the AXA APH Shareholder must include in their assessable income an amount equal to the franking credit received in relation to the Final 2010 Dividend under subsection 207-20.

Qualified Persons

61. Former Division 1A of the ITAA 1936 contains the measures known as the holding period rule and the related payment rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received, and thus be entitled to a tax offset for the franking credit attached to the distribution.

62. The test of what constitutes a 'qualified person' is provided in former section 160APHO of the ITAA 1936 as follows:

> A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a ***qualified person*** in relation to the dividend if:
>
> (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
>
> (b) where the taxpayer or an associate of a taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification in relation to the dividend.

63. Former subsection 160APHO(2) of the ITAA 1936, referred to in the preceding paragraph, sets out the holding period requirement. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

64. In order to determine the relevant qualification period, it is necessary to determine whether, under the present arrangement, the AXA APH Shareholders are considered to be under an obligation to make a related payment.

65. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A of the ITAA 1936.

66. In the present case, it is considered that the proposed payment of the Final 2010 Dividend is not an integral part of the Scheme. The payment of the Final 2010 Dividend is not conditional upon AXA APH obtaining approval from the AXA APH Shareholders at the Scheme Meeting for the AXA APH Scheme to be entered into. Further, the payment of any amount of the Final 2010 Dividend by AXA APH does not have the effect of reducing the Scheme Consideration an AXA APH Shareholder will receive from AMP.

67. In these circumstances, in determining whether an AXA APH Shareholder is taken to have made or be likely to make a related payment in respect of the Final 2010 Dividend, it is considered that the circumstances surrounding the payment of the Final 2010 Dividend would not constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936. As such, it can be concluded that an AXA APH Shareholder will not be taken to have made or not be likely to make a related payment in respect of the Final 2010 Dividend.

Holding period requirement

68. As the AXA APH Shareholders are taken, for the purposes of former Division 1A of the ITAA 1936, to not have made or not be likely to make a related payment in respect of the Final 2010 Dividend, the relevant holding period is thus the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

69. The primary qualification period is defined in former section 160APHD of the ITAA 1936 as follows:

> In relation to a taxpayer in relation to shares or an interest in shares, means the period beginning on the day after the day on which the taxpayer acquired the shares or interest and ending:
>
> (a) if the shares are not preference shares – on the 45th day after the day on which the shares or interest became *ex dividend*;

70. The ex-dividend date of the Final 2010 Dividend for tax purposes is 5 March 2011 pursuant to former section 160APHE of the ITAA 1936.

71. The primary qualification period thus runs from the day after the date of acquisition of an AXA APH share until 45 days after the ex-dividend date of 5 March 2011, as determined in paragraph 68. In practical terms, for those shareholders who have not previously satisfied the holding period rule this means that the primary qualification period runs from the day after the date of acquisition to 20 April 2011. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the AXA APH Shares are to be excluded. This would mean that the primary qualification period would run from the day after the date of acquisition until the date that AXA APH Shareholders are no longer at risk for the purposes of former Division 1A of the ITAA 1936.

72. In this context, entitlement to participate in the Scheme will be determined on the Scheme Record Date on the basis of being an AXA APH Shareholder who is registered in the register as the holder of the relevant Scheme Share on 16 March 2011. It is considered that once an AXA APH Shareholder is identified as an AXA APH Shareholder, that AXA APH Shareholder would no longer be considered to hold their shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 as at that time the AXA APH Shareholder is committed to disposing of their AXA APH Share and receiving the Scheme Consideration.

73. Accordingly, the primary qualification period would run from the day after the date of acquisition until 15 March 2011 (inclusive). AXA APH Shareholders who receive the Final 2010 Dividend would need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A of the ITAA 1936. Thus, for those AXA APH Shareholders who have not previously satisfied the primary qualification period, they would need to have acquired their AXA APH shares by 29 January 2011 and hold them at risk until 15 March 2011 in order to be a qualified person.

Anti-avoidance provisions – imputation benefits

Section 204-30

74. Section 204-30 is a general anti-streaming measure. It is designed to curb the inappropriate use of franking credits through streaming arrangements. It permits the Commissioner to make determinations where an entity streams one or more distributions, whether in a single franking period or in a number of franking periods, in such a manner whereby:

- an imputation benefit is, or apart from section 204-30 would be, received by the member of the entity as a result of a distribution or distributions; and
- that member derives a greater benefit from franking credits than another member of the entity; and

- the other member of the entity receives a lesser imputation benefit, or receives no imputation benefits, whether or not the other member receives other benefits.

75. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from imputation benefits than other members. The term 'derives a greater benefit from franking credits' (imputation benefits) is defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

76. The Final 2010 Dividend will be paid to all holders of AXA APH ordinary shares. The current proposal does not have any regard to the ability of the recipient shareholders to effectively utilise the franking credits in determining which shareholders will receive the franked distribution.

77. Therefore, it cannot be concluded that the dividends involve the payment of franked distributions in a selective manner to favoured members to the exclusion of disadvantaged members. Consequently, section 204-30 will not apply to the distribution.

Section 177EA

78. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. Subsection 177EA(3) of the ITAA 1936 provides relevantly that the section applies if:

(a) there is a scheme for a disposition of membership interests in a corporate tax entity; and

(b) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; and

(c) the distribution was, or is expected to be, a franked distribution; and

(d) except for this section, the person would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and

(e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

79. In this instance, the Final 2010 Dividend is frankable and a part of a scheme which includes the disposition of AXA APH Shares. Therefore, section 177EA of the ITAA 1936 will apply if, having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme, did so for a non-incidental purpose of enabling the shareholders to obtain an imputation benefit.

80. Subsection 177EA(17) of the ITAA 1936 provides a non-exclusive list of 'relevant circumstances' to which one must have regard. The list includes a variety of matters (including the eight matters in subparagraphs 177D(b)(i) to (viii) of the ITAA 1936) which individually and collectively could indicate the requisite purpose; however, not all of the circumstances listed will be relevant to every case.

81. The key circumstances of the Final 2010 Dividend are that they will be debited against AXA APH's retained profits and will be payable to all of its registered ordinary shareholders as at the Dividend Record Date (that is, 4 March 2011). Furthermore, the declaration and payment of the Final 2010 Dividend is independent of the scheme. These circumstances, individually and collectively, suggest that the requisite purpose for the application of section 177EA of the ITAA 1936 is not present, and therefore the section will not apply in this case. Accordingly, the Commissioner will not seek to make a determination pursuant to paragraph 177EA(5)(b) of the ITAA 1936.

Appendix 2 – Detailed contents list

82. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- acquisition of securities
- acquisition of shares
- banking, finance & securities
- CGT capital proceeds
- CGT event A1
- company tax
- financial instruments
- frankable credits
- frankable dividends
- holding Period Rule
- imputation benefits
- imputation system
- ordinary shares
- securities
- securities transactions

Legislative references:

- ITAA 1936
- ITAA 1936 44
- ITAA 1936 Pt IIIA Div 1A
- ITAA 1936 160APHD
- ITAA 1936 160APHE
- ITAA 1936 160APHM
- ITAA 1936 160APHN
- ITAA 1936 160APHO
- ITAA 1936 177D
- ITAA 1936 177EA
- ITAA 1997
- ITAA 1997 104-10
- ITAA 1997 109-10
- ITAA 1997 115-30
- ITAA 1997 116-20
- ITAA 1997 Subdiv 124-M
- ITAA 1997 204-30
- ITAA 1997 207-20
- TAA 1953
- Copyright Act 1968

ATO references

NO:	1-2JFIZTP
ISSN:	1445-2014
ATOlaw topic:	Income Tax ~~ Capital Gains Tax ~~ CGT event A1 - disposal of a CGT asset Income Tax ~~ Capital Gains Tax ~~ roll-overs - scrip for scrip