


CR 2015/29 - Income tax: Chandler Macleod Group Limited Scheme of Arrangement and Permitted Dividend

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Class Ruling

Income tax: Chandler Macleod Group Limited Scheme of Arrangement and Permitted Dividend

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① This publication provides you with the following level of protection:

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

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

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

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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subsection 44(1) of the ITAA 1936
- section 128B of the ITAA 1936
- section 128D of the ITAA 1936
- Division 1A of former Part IIIA of the ITAA 1936
- section 177EA of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997

- Division 115 of the ITAA 1997
- section 116-20 of the ITAA 1997
- section 204-30 of the ITAA 1997
- Division 207 of the ITAA 1997
- Division 208 of the ITAA 1997, and
- section 855-10 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 shareholders of Chandler Macleod Group Limited (Chandler Macleod) who:

- (a) continuously held their Chandler Macleod shares on both 31 March 2015 (Dividend Record Date) and 9 April 2015 (Scheme Record Date)
- (b) held their Chandler Macleod shares on capital account, that is, they are neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1), and
- (c) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their Chandler Macleod shares.

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

In this Ruling, these shareholders of Chandler Macleod are referred to as 'Scheme Shareholders'.

4. This Ruling does not deal with the taxation consequences of Chandler Macleod shares that are subject of any of the following:

- (a) Senior Executive Option Plan
- (b) Senior Executive Share Plan
- (c) Exempt Employee Share Plan
- (d) Deferred Tax Employee Share Plan, or
- (e) Retention Program.

Qualifications

5. 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 8 to 32 of this Ruling.

6. 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

7. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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

8. 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:

- Class Ruling Application dated 19 February 2015
- the Scheme Implementation Deed (SID) dated 14 January 2015 together with its Schedules and Annexures
- the Scheme Booklet dated 20 February 2015
- announcements by Chandler Macleod to the Australian Securities Exchange (ASX), and
- other correspondence provided by the applicant on 29 January 2015.

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

Relevant Entities

Chandler Macleod

9. Chandler Macleod is an Australian resident company listed on the ASX. It has domestic and global operations in 7 countries including Australia, in Asia, New Zealand and the United Kingdom.

10. Chandler Macleod is one of the largest human resources providers in Australia involved in planning, sourcing, assessing, developing and managing operations and services.

11. Shareholders of Chandler Macleod are a mix of individuals, companies, trusts, partnerships, superannuation funds and other institutional investors.

12. Chandler Macleod has regularly paid fully franked dividends to its shareholders, including interim dividends. Chandler Macleod has paid \$0.024, \$0.030 and \$0.032 for the years ended 30 June 2012 to 30 June 2014 respectively.

13. The sum of the market values of Chandler Macleod's assets that are taxable Australian real property does not exceed the sum of the market values of its assets that are not taxable Australian real property.

14. Neither Chandler Macleod nor any Chandler Macleod director held any shares in Recruit Holdings Co., Ltd (Recruit) or RGF Staffing Melbourne Two Pty Ltd (RGF) or disposed of shares in Recruit or RGF in the four month period before the Scheme Booklet was issued.

15. As at 14 January 2015 when the Scheme was announced in the ASX:

- there were 547,985,086 Chandler Macleod ordinary shares and 774,171 Chandler Macleod Options
- a significant majority of the Chandler Macleod shares were held by Australian residents with only a very small percentage held by non-residents
- no non-residents, either alone or together with any associates, beneficially held more than 10% of the Chandler Macleod shares, and
- Chandler Macleod is not a corporate tax entity that is effectively owned by entities which cannot fully utilise franking credits.

Recruit and RGF

16. Recruit is a Japanese company listed on the Tokyo Stock Exchange and incorporated on 26 August 1963.

17. Recruit is involved in providing human resources and support services on information technology and marketing. Their global operations include expanding into the Australian market through a wholly owned subsidiary RGF.

18. RGF is an Australian proprietary company which registered with the Australian Securities & Investments Commission (ASIC) on 6 January 2015.

19. Neither Recruit nor RGF (including any subsidiaries) held Chandler Macleod shares or had voting power in Chandler Macleod prior to the acquisition of the shares pursuant to the Scheme described below.

The Scheme of Arrangement (the Scheme)

20. On 14 January 2015, Chandler Macleod announced in the ASX that it had executed the SID with Recruit and RGF.
21. Under the SID, which is subject to the satisfaction of conditions precedent, it was proposed that Recruit through its subsidiary RGF would acquire all of the Chandler Macleod shares by way of a scheme of arrangement under Part 5.1 of the *Corporations Act 2001*.
22. The Scheme Consideration is cash consideration of \$0.53 for each Chandler Macleod share held by participants in the Scheme as at the Scheme Record Date (9 April 2015) which must be paid to the participants for the transfer of the shares to RGF.
23. The Scheme Consideration will be financed through cash reserves and will also include equity funding indirectly raised by Recruit from an initial public offering.
24. On 17 February 2015, Chandler Macleod announced in the ASX that the Foreign Investment Review Board has notified Recruit that the Federal Government had no objection, on foreign investment grounds, to Recruit's proposal to acquire 100% of the Chandler Macleod shares through its wholly owned subsidiary RGF under a scheme of arrangement.
25. On 19 February 2015, the Deed Poll between Recruit and RGF was executed in favour of the Chandler Macleod shareholders who participate in the Scheme.
26. On 25 March 2015, a meeting of Chandler Macleod shareholders (other than Excluded Shareholders) was held where the Scheme was approved by the requisite 75% of votes cast by shareholders.
27. On 31 March 2015, the Scheme became Effective (Effective Date).
28. On 16 April 2015, the Scheme was implemented (Scheme Implementation Date) and the Scheme Consideration was paid to Chandler Macleod shareholders for the transfer of their shares to RGF.

Permitted Dividend

29. On 16 February 2015, the Board of Chandler Macleod determined to pay a fully franked dividend of \$0.017 for every Chandler Macleod share.
30. On 8 April 2015, Chandler Macleod paid the fully franked dividend of \$0.017 (Permitted Dividend) for every Chandler Macleod share held on 31 March 2015 (Dividend Record Date).
31. The Permitted Dividend represented an interim fully franked dividend in respect of the half year ended 31 December 2014 sourced from current year's profits and retained profits of Chandler Macleod and no part of the amount was debited against its share capital account.

32. Neither Recruit nor RGF (nor any related entity) had any influence or control over the decision to determine or pay the Permitted Dividend.

Ruling

Permitted Dividend

33. The Permitted Dividend of \$0.017 paid to Scheme Shareholders is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability and withholding tax of the Permitted Dividend

34. The Permitted Dividend is assessable income of a resident Scheme Shareholder (subparagraph 44(1)(a)(i) of the ITAA 1936).

35. For a non-resident Scheme Shareholder (other than those carrying on business in Australia at or through a permanent establishment in Australia), the Permitted Dividend is not assessable income under subsection 44(1) of the ITAA 1936 (section 128D of the ITAA 1936) and is not subject to Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

36. For a non-resident Scheme Shareholder carrying on business in Australia at or through a permanent establishment in Australia and where the Permitted Dividend is attributable to that permanent establishment, the Permitted Dividend is assessable income (subparagraphs 44(1)(b)(i) and 44(1)(c)(i) of the ITAA 1936) and is not subject to Australian withholding tax (subsection 128B(3E) of the ITAA 1936).

Gross-up and tax offset

Tax offset

37. The franking credit is included in the assessable income of the Scheme Shareholder who will also be entitled to a tax offset equal to the amount of the franking credit (section 207-20). This is subject to the Scheme Shareholder satisfying the residency requirements in section 207-75 and being a qualified person in relation to the Permitted Dividend.

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

Refundable tax offset

39. The tax offset that Scheme Shareholders are entitled to under Division 207 is subject to the refundable tax offset rules in Division 67. Certain trustees and corporate tax entities are excluded from the refundable tax offset rules because of section 67-25.

Qualified person

40. Neither Scheme Shareholders nor an associate of a Scheme Shareholder will be taken to have made a related payment for the purposes of former section 160APHN of the ITAA 1936.

41. Accordingly, to be a 'qualified person' in relation to the Permitted Dividend, a Scheme Shareholder will need to hold their shares 'at risk' for a continuous period of at least 45 days during the primary qualification period (former section 160APHO of the ITAA 1936).

42. A Scheme Shareholder will be a qualified person in relation to the Permitted Dividend, if in the period commencing on or before 22 February 2015 and ending on 8 April 2015 inclusive, they hold their shares for a continuous period of 45 days (not counting the day on which the share was acquired or the day of disposal of the share) and did not have 'materially diminished risks or loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of their shares.

Exempting entity

43. Chandler Macleod is not an exempting entity (as defined in section 208-20) at the time the Permitted Dividend was paid.

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

44. CGT event A1 happened on 16 April 2015 when a Scheme Shareholder disposed of their shares to RGF under the Scheme (subsections 104-10(1) and 104-10(2) and paragraph 104-10(3)(b)).

Capital gain or capital loss

45. A Scheme Shareholder will make a capital gain when CGT event A1 happens if the capital proceeds from the disposal of a Chandler Macleod share exceed the cost base of that share (subsection 104-10(4)). The capital gain is the amount of the excess.

46. A Scheme Shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the Chandler Macleod share (subsection 104-10(4)). The capital loss is the amount of the difference.

Capital proceeds

47. The capital proceeds received by a Scheme Shareholder is \$0.53 per share. The Permitted Dividend amount is not included in the capital proceeds.

Discount capital gain

48. A capital gain made by a Scheme Shareholder is a discount capital gain if they acquired the shares at least 12 months before the date of disposal (that is, the Scheme Implementation Date of 16 April 2015) and the other conditions in Division 115 are satisfied.

Foreign resident shareholders

49. A non-resident Scheme Shareholder disregards any capital gain or loss made when CGT event A1 happened if their shares were not 'taxable Australian property' (section 855-10).

The anti-avoidance provisions

50. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received by Scheme Shareholders in relation to the Permitted Dividend.

51. 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 Scheme Shareholders in respect of the Permitted Dividend.

52. The Commissioner will not make any adjustments under Subdivision 207-F in respect of the Permitted Dividends.

Appendix 1 – Explanation

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

Permitted Dividend is a dividend

53. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' excludes a distribution that is debited against an amount standing to the credit of the share capital account of the company.

54. Chandler Macleod accounted for the entire distribution by debiting retained earnings and not its share capital account. Therefore, the Permitted Dividend is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

55. The Permitted Dividend is also a dividend for Chandler Macleod shareholders who are not Scheme Shareholders (being those shareholders who did not hold the shares on the Scheme Record Date).

Assessability of the Permitted Dividend – residents

56. Dividends (other than non-share dividends) paid to the shareholder by the company out of profits derived by it from any source are included in the assessable income of an Australian resident shareholder (subparagraph 44(1)(a)(i) of the ITAA 1936).

57. As the Permitted Dividend will be paid out of profits derived by Chandler Macleod, the assessable income of a resident Scheme Shareholders will include the Permitted Dividend.

Assessability of the Permitted Dividend – non-residents (not carrying on business at or through a permanent establishment)

58. Dividends (other than non-share dividends) paid to the shareholder by the company to the extent to which they are paid out of profits derived by it from sources in Australia are included in the assessable income of a non-resident shareholder (subparagraph 44(1)(b)(i) of the ITAA 1936).

59. However, subsection 44(1) of the ITAA 1936 does not apply to a dividend to the extent to which another provision of the ITAA 1936 that expressly deals with dividends excludes some or all of the dividend from assessable income.

60. Subsection 128B(1) of the ITAA 1936 expressly deals with dividends by imposing Australian withholding tax on dividends paid by resident company and is derived by the non-resident on or after 1 January 1968.

61. However, subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes from subsection 128B(1) of the ITAA 1936 income derived by a non-resident that consists of the franked part of a dividend. As the Permitted Dividend will be fully franked, it will not be subject to Australian withholding tax when derived by the non-resident Scheme Shareholder.

62. In addition, section 128D of the ITAA 1936 states that income that would be subject to withholding tax but for subparagraph 128B(3)(ga)(i) of the ITAA 1936 is not assessable income and is not exempt income.

63. As the payment of the Permitted Dividend is income that would be subject to withholding tax but for subparagraph 128B(3)(ga)(i) of the ITAA 1936, it will not be assessable income, and will not be exempt income of the non-resident Scheme Shareholder.

64. Accordingly, for a Scheme Shareholder who received the fully franked Permitted Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) the dividend will not be included in assessable income under subsection 44(1) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be subject to Australian withholding tax (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

Assessability of the Permitted Dividend – non-residents (carrying on business at or through a permanent establishment)

65. The application of subsection 128B(1) of the ITAA 1936 is subject to subsection 128B(3E) of the ITAA 1936. Subsection 128B(3E) states that section 128B does not apply to dividend income that is paid to a non-resident carrying on business in Australia at or through its Australian permanent establishment and which is attributable to that permanent establishment.

66. Subparagraph 44(1)(c)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder of a resident company (who is carrying on business in Australia at or through a permanent establishment of the shareholder in Australia) dividends received to the extent they are paid out of profits from non-Australian sources and is attributable to the permanent establishment.

67. Accordingly, for a non-resident Scheme Shareholder carrying on business in Australia at or through a permanent establishment who received the fully franked Permitted Dividend (to the extent the Permitted Dividend is attributable to the permanent establishment) the dividend is included in their assessable income under subparagraph 44(1)(c)(i) of the ITAA 1936 and will not be subject to Australian withholding tax.

Gross-up and tax offset

68. Section 207-20 provides a general rule for shareholders receiving a franked distribution which is to include as assessable income the franking credit on the distribution and to also entitle the shareholder to a tax offset equal to the franking credit on the distribution.

69. Therefore, subject to being a qualified person in relation to the Permitted Dividend, if the fully franked Permitted Dividend was received directly by a Scheme Shareholder who satisfies the residency requirement in section 207-75, the franking credit attached to the Permitted Dividend is included in their assessable income and they will be entitled to a tax offset equal to the franking credit amount.

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

71. Subsection 207-35(1) requires the amount of the franking credit on the distribution to a partnership or a trust to be included in the assessable income of the partnership or the trustee in calculating the net income of the partnership or trust.

72. Therefore, subject to being a qualified person, a Scheme Shareholder that is a trustee of a trust or a partnership is required to include the amount of the franking credit on the Permitted Dividend in the assessable income of that trust or partnership under subsection 207-35(1).

Qualified person

73. Paragraph 207-145(1)(a) provides that in relation to a franked distribution made to an entity, only a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 is required to include the amount of the franking credit in their assessable income and is entitled to a tax offset in respect of the franking credit attached to the franked distribution.

74. Former section 160APHU of the ITAA 1936 provides that a partner in a partnership or the beneficiary of a trust cannot be a qualified person in relation to a dividend unless the partnership or the trustee of the trust is also a qualified person in relation to the dividend.

75. Division 1A of former Part IIIAA of the ITAA 1936 contains the tests that must be satisfied for an entity to be a 'qualified person' in relation to a franked distribution.

76. The main test of what constitutes a 'qualified person', known as the holding period rule, is in former subsection 160APHO(1) of the ITAA 1936, which states that a person is a qualified person in relation to a dividend if the person has satisfied the holding period rule during the primary qualification period (if there is no related payment involved) or during the secondary qualification period (if there is a related payment involved).

77. Former subsection 160APHO(2) of the ITAA 1936 requires the taxpayer to hold the shares for at least 45 days if the shares are not preference shares, or at least 90 days if the shares are preference shares.

78. Former sections 160APHP, 160APHQ, 160APHR and 160APHT of the ITAA 1936 provide other means by which an entity can be a 'qualified person' in relation to a franked distribution.

Related payment rule

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

80. Former section 160APHN of the ITAA 1936 gives examples of, but does not limit, what constitutes, for the purposes of Division 1A of former Part IIIA of the ITAA 1936, the making of a related payment by a taxpayer or an associate of a taxpayer in respect of a dividend paid in respect of shares, or in respect of a distribution made in respect of interests in shares, held by the taxpayer.

81. Former subsection 160APHN(2) of the ITAA 1936 states an entity or its associate is taken to have made a related payment if the entity or associate is under any obligation to (or may reasonably be expected to) pass on the benefit of a dividend or distribution to other persons.

82. Former subsection 160APHN(3) of the ITAA 1936 contains examples of transactions that may be considered related payments as it may have the effect of passing the benefit of the dividend or distribution to one or more other persons (for example, causing a payment or payments to be made in accordance with the directions of the other person or other persons).

83. Former subsection 160APHN(4) of the ITAA 1936 outlines the circumstances of transactions that may have the effect of passing the benefit of the dividend or distribution to one or more other persons (for example, where an amount paid or credited is equal to the amount of dividend or distribution).

84. Where a shareholder is not taken to have made a related payment to another person, the shareholder will need to satisfy the holding period requirement in the primary qualification period in order to be a 'qualified person'.

85. However, where a shareholder is taken to have made a related payment to another person, the shareholder will need to satisfy the holding period requirement in the secondary qualification period in order to be a 'qualified person'.

86. The payment of the Permitted Dividend is not an integral part of the Scheme. The payment of the Permitted Dividend was not conditional on the Scheme becoming effective. Furthermore, the payment of the Permitted Dividend does not influence the determination of the Scheme Consideration payable to the Scheme Shareholders. It represents a distribution of profits that have accrued to shareholders of Chandler Macleod.

87. In these circumstances, it is concluded that neither the Scheme Shareholders nor associates of the Scheme Shareholders have taken any steps to pass on the benefit of the Permitted Dividend to one or more other persons for the purposes of former Division 1A. Therefore, a Scheme Shareholder is not taken to have made or be likely to make a related payment in respect of the Permitted Dividend.

Holding period requirement

88. As the Chandler Macleod ordinary shares are not preference shares, a Scheme Shareholder is required to hold the shares on which a Permitted Dividend has been paid for a continuous period of at least 45 days during the relevant qualification period.

89. An entity does not count the day on which the shareholder acquired the shares or the day on which the disposal occurred, if any, for the purposes of the holding period rule. Furthermore, any days on which the shareholder has materially diminished risks of loss or opportunities for gain in respect of the shares (within the meaning of former sections 160APHM and 160APHJ of the ITAA 1936) are to be excluded. The exclusion of those days is not taken to break the continuity of the period for which the shareholder held the shares.

90. Under former subsection 160APHM(2) of the ITAA 1936, a taxpayer is taken to have materially diminished risks of loss or opportunities for gain in respect of shares if the taxpayer's 'net position' (defined in former subsection 160APHJ(5) of the ITAA 1936) on a particular day in relation to the shares has less than 30% of those risks and opportunities.

91. As the Scheme Shareholders are taken, for the purposes of Division 1A of former Part IIIA of the ITAA 1936, not to have made, or be under an obligation to make, a related payment in respect of the Permitted Dividend, the relevant qualification period is the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

92. The former section 160APHD of the ITAA 1936 defines the 'primary qualification period' in relation to a taxpayer in relation to shares as beginning on the day after the day on which the taxpayer acquired the shares and ending on the 45th day after the day on which the shares became *ex dividend*.

93. The former section 160APHE of the ITAA 1936 defines when a share becomes an 'ex dividend' which is the day after the last day on which the shares can be acquired by a person so as to become entitled to the dividend or distribution on the shares (that is, the day after the day books are closed).

94. The day on which the shares became *ex dividend* is 27 March 2015 for the purposes of former subsection 160APHE(1) of the ITAA 1936. Therefore, the primary qualification period for the purposes of the former section 160APHD of the ITAA 1936 will begin the day after the day the shareholder acquired the shares and will end 45 days after 27 March 2015.

95. Former subsection 160APHO(3) of the ITAA 1936 stipulates that any days on which a taxpayer has materially diminished risks of loss or opportunities for gain are to be excluded in determining whether the shares are held 'at risk'. Therefore, consideration should be given to which days a Scheme Shareholder may have a materially diminished risk of loss or opportunities for gain in respect of the Chandler Macleod shares.

96. In this context, entitlement to the Scheme Consideration for disposing the shares will be determined on the Scheme Record Date of 9 April 2015.

97. It is considered that once a Scheme Shareholder is identified as being entitled to participate in the Scheme, that shareholder would no longer be considered to hold their shares at risk, as at that time the Scheme Shareholder is committed to disposing of their Chandler Macleod shares and receiving the Scheme Consideration.

98. As a result, the portion of the primary qualification period during which a Scheme Shareholder may actually hold its share at risk would run, inclusive, from the day the share was acquired until no later than 8 April 2015 (being one day prior to the Scheme Record Date).

99. As discussed above, a Scheme Shareholder who receives the Permitted Dividend would need to hold their shares at risk for 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A of the ITAA 1936. Further, pursuant to former subsection 160APHO(2)(a) of the ITAA 1936, the date of acquisition or disposal are not included in the relevant 45 day period.

100. As such, a Scheme Shareholder will only be entitled to the franking offset in respect of a share which is held at risk for a continuous period of at least 45 days. This means that if it was acquired on or before 22 February 2015, they must hold it at risk for a continuous period of at least 45 days up to, but no later than, 8 April 2015.

Exempting entity

101. The general rule in Division 207 regarding the gross-up and tax offset will not apply if the franked dividend is paid by an exempting entity (section 208-195).

102. Section 208-20 states that a corporate tax entity is an exempting entity at a particular time if it is effectively owned by prescribed persons at that time. Subsection 208-25(1) provides in broad terms that an entity is effectively owned by prescribed persons if not less than 95% of accountable membership interests or accountable partial interests (broadly direct and indirect ownership interests) are held by or on behalf of prescribed persons.

103. A prescribed person in relation to another corporate tax entity is defined in section 208-40. Generally, the definition includes companies, trustees, partnerships or individuals that are foreign residents or if they were to receive a distribution from the corporate tax entity, the distribution would be exempt income or non-assessable non-exempt income of the company, trust estate, partnership or individual.

104. Based on Chandler Macleod's recent shareholder register the total percentage of non-resident shareholder ownership in the accountable membership interests of Chandler Macleod at the time of payment of the Permitted Dividend does not amount to Chandler Macleod being effectively owned by prescribed persons.

105. Accordingly, Chandler Macleod is not an 'exempting entity', nor is it a 'former exempting entity' because it has never ceased to be an 'exempting entity' (section 208-50).

106. Therefore, the general rule in Division 207 regarding the gross-up and tax offset will continue to apply in respect of the Permitted Dividend.

CGT consequences***CGT event A1***

107. CGT event A1 in section 104-10 will happen when an entity disposes of a CGT asset. This will occur when there is a change in the ownership of a CGT asset from one entity to another. The time of CGT event A1 is when the disposing entity enters into the contract for the disposal, or if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

108. A takeover or merger effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract (paragraph 9 of 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 a merger?*).

109. CGT event A1 will happen when a Scheme Shareholder disposes of a Chandler Macleod share pursuant to the Scheme (subsections 104-10(1) and 104-10(2)). The disposal will occur on the Scheme Implementation Date of 16 April 2015 when the share is disposed of by a Scheme Shareholder (paragraph 104-10(3)(b)).

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

Capital proceeds

111. The capital proceeds from CGT event A1 received by a Scheme Shareholder is the money received, or entitled to be received, in respect of the event happening (subsection 116-20(1)).

112. The term 'in respect of the event happening' in subsection 116-20(1) requires that the relationship between the CGT event and the receipt of the money, or entitlement to receive the money, must be more than coincidental or caused simply by temporal proximity. An amount is not included in the capital proceeds from a CGT event merely because it is received in association with the event.

113. 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* explains when a dividend declared or paid will constitute capital proceeds under section 116-20. Paragraph 9 and 11 states that this is where a vendor shareholder has bargained for the receipt of the dividend in return for giving up shares or the vendor shareholders acceptance of the scheme of arrangement (by requisite majority) is conditional upon a payment declaration or facilitation of the dividend.

114. In the present circumstances, prior to when the Scheme Shareholders will vote on the Scheme, there is some certainty that the Permitted Dividend would be declared and paid notwithstanding the Scheme may not become effective. However the Board of Directors of Chandler Macleod (the Board) may review the amount if the scheme does not proceed.

115. Furthermore, the payment of the Permitted Dividend was not conditional upon the Scheme becoming effective and the declaration and payment of the Permitted Dividend was at the discretion of the Board. Neither Recruit nor RGF (nor any related entity) had any influence or control over the decision to pay the Permitted Dividend, or its quantum (subject to the \$0.017 ceiling in the SIA) nor were they providing any funds to Chandler Macleod to finance the payment of the Permitted Dividend. The payment of the Permitted Dividend was to be funded entirely by Chandler Macleod, with no actual or contingent funding support from Recruit or RGF.

116. It is considered that the Permitted Dividend is not to be received in respect of the disposal of Chandler Macleod shares under the Scheme and accordingly, does not form part of the capital proceeds a Scheme Shareholder is entitled to receive in respect of CGT event A1 happening. It is considered the payment of the Permitted Dividend is independent of the Scheme Consideration.

117. Therefore, the capital proceeds the Scheme Shareholder will receive from Recruit is \$0.53 per Chandler Macleod share.

Discount capital gain

118. Division 115 provides a CGT discount that reduces the amount of CGT otherwise payable by a taxpayer by the relevant discount percentage in accordance with Subdivision 115-B. Only discount capital gains are eligible for the CGT discount.

119. Section 115-10 specifies which taxpayers are eligible to make discount capital gains. It includes an individual, a complying superannuation entity, a trust, or in certain circumstances a life insurance company. Subsection 115-20(1) provides that to be eligible the capital gain must be worked out using a cost base that was not subject to indexation. In addition, subsection 115-25(1) provides that the CGT asset must have been acquired at least 12 months before disposal.

120. Therefore, a capital gain made by a Scheme Shareholder when they disposed of a Chandler Macleod share, is a discount capital gain if they acquired the shares at least 12 months before the date of disposal (that is the Scheme Implementation Date of 16 April 2015) subject to the other requirements of Division 115 being satisfied.

Foreign resident shareholders

121. An entity disregards a capital gain or capital loss from a CGT event if they are a non-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)).

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

123. Accordingly, a Scheme Shareholder who is a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens under the Scheme, cannot disregard under subsection 855-10(1) a capital gain or capital loss from CGT event A1 happening if:

- (a) their Chandler Macleod share was an indirect Australian real property interest (item 2 of the table in section 855-15); or

- (b) their Chandler Macleod share had been used at any time by the foreign resident, or the trustee of a foreign trust for CGT purposes, in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15); or
- (c) their Chandler Macleod share was covered by subsection 104-165(3) (item 5 of the table in section 855-15).

124. An indirect Australian real property interest under section 855-25 is a membership interest held by an entity in another entity if the interest passes the non-portfolio interest test under section 960-195 and the principal asset test in section 855-30.

125. An interest held by an entity (the **holding entity**) in another entity (the **test entity**) passes the non-portfolio interest test at a time if the sum of the *direct participation interests held by the holding entity and its associates in the test entity at that time is 10% or more (section 960-195).

126. A *membership interest held by an entity (the **holding entity**) in another entity (the **test entity**) passes the principal asset test if the sum of the *market values of the test entity's assets that are *taxable Australian real property exceeds the sum of the *market values of its assets that are not taxable Australian real property (section 855-30(2)).

127. On the information provided none of the Chandler Macleod shares disposed of as part of the Scheme pass the non-portfolio interest test or the principal asset test. Consequently, the Chandler Macleod shares held by non-resident shareholders do not constitute indirect Australian real property interest.

128. Where an individual or a company stops being an Australian resident, CGT event I1 happens (subsection 104-160(1)). Subsection 104-165(3) provides that if an individual chooses to disregard making a capital gain or a capital loss from a CGT asset covered by CGT event I1 under subsection 104-165(2), that CGT asset is taken to be taxable Australian property until the earlier of:

- (a) a CGT event happening in relation to the asset, if the CGT event involves the individual ceasing to own the asset, and
- (b) the individual again becoming an Australian resident.

129. Consequently, an individual Scheme Shareholder, who stopped being an Australian resident after they acquired the shares disposed of under the Scheme and has chosen to disregard the capital gain or capital loss from CGT event I1, cannot disregard under subsection 855-10(1) a capital gain or capital loss from the disposal of their Shares under the Scheme.

The anti-avoidance provisions**Section 177EA**

130. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares.

131. Where section 177EA applies, the Commissioner has a discretion pursuant to subsection 177EA(5) of the ITAA 1936 to make a determination to either:

- debit the company's franking account pursuant to paragraph 177EA(5)(a) of the ITAA 1936; or
- deny the imputation benefit on the distribution that flowed directly or indirectly to each shareholder pursuant to paragraph 177EA(5)(b) of the ITAA 1936.

132. Under this arrangement, the 'relevant taxpayer' is a Scheme Shareholder and the scheme comprises the circumstances surrounding the Scheme of Arrangement.

133. In the present case, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied as:

- (a) the disposal of the ordinary shares in Chandler Macleod (a corporate tax entity) pursuant to the Scheme is a scheme for the disposition of membership interests
- (b) the Permitted Dividend is a frankable distribution that has been paid to Scheme Shareholders in respect of their Chandler Macleod shares
- (c) the Permitted Dividend is a franked distribution, and
- (d) Scheme Shareholders could reasonably be expected to receive imputation benefits as a result of the Permitted Dividend.

134. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of Chandler Macleod, its shareholders or any other relevant party who entered into or carried out the scheme or any part of the scheme, there is a purpose (other than an incidental purpose) of enabling Scheme Shareholders to obtain an imputation benefit.

135. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. Having regard to the relevant circumstances of the scheme, and considering the manner, form and substance of the scheme, the Commissioner has concluded that the scheme was not entered into for the requisite purpose of enabling Scheme Shareholders to obtain an imputation benefit.

136. Therefore, the Commissioner will not exercise his discretion to make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Permitted Dividend.

Section 204-30

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

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

138. Relevantly, if section 204-30 applies, the Commissioner has a discretion under subsection 204-30(3) to make a written determination either:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); or
- (b) that no imputation benefit is to arise in respect of any streamed distribution made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

139. 'Streaming' is not defined for the purposes of section 204-30. However, the Commissioner understands this to refer to a company 'selectively directing the flow of franked distributions to those members who can most benefit from the franking credits' (paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002).

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

141. Under the current arrangement, all Scheme Shareholders will receive an imputation benefit when the Permitted Dividend is paid. Resident shareholders derive a greater imputation benefit in the form of a tax offset (paragraph 204-30(6)(a) than non-resident shareholders who will not be liable to dividend withholding tax (paragraph 204-30(6)(e)).

142. However, the Permitted Dividend will be paid equally to all Scheme Shareholders, and will be fully franked. Accordingly, it cannot be said that Chandler Macleod selectively directed the flow of franked distributions to those members who could most benefit from the imputation benefits.

143. As the conditions in subsection 204-30(1) are not met, the Commissioner will not exercise his discretion to make a determination under subsection 204-30(3)(a) or (c) to deny the whole, or any part, of the imputation benefit to be received in respect of the Permitted Dividend.

Section 207-145

144. Subsection 207-145(1) provides that gross-up and tax offset treatment under sections 207-20, 207-35 and 207-45 does not apply if an entity makes a franked distribution to another entity in one or more of the circumstances listed in subsection 207-145(1). One of these circumstances is where the distribution is made as part of a dividend stripping operation (paragraph 207-145(1)(d)).

145. A distribution will be taken to be made as part of a dividend stripping operation, pursuant to section 207-155, if the making of the distribution arose out of, or was made in the course of, a scheme that:

- (a) was by way of, or in the nature of, dividend stripping; or
- (b) had substantially the effect of a scheme by way of, or in the nature of, dividend stripping.

146. The Board of Chandler Macleod determined the Permitted Dividend to be a fully franked dividend payable to all shareholders which was sourced from current and retained profits. Consequently, the scheme cannot be viewed as one that is in the nature of dividend stripping or one that had substantially the effect of a scheme by way of, or in the nature of, dividend stripping. Therefore, paragraph 207-145(1)(d) will not apply.

147. Therefore, section 207-145 will not apply to the Permitted Dividend received by the Scheme Shareholders.

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Previous draft:

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Related Rulings/Determinations:

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