


# ***CR 2016/57 - Income tax: Pacific Brands Limited - Scheme of Arrangement and payment of Special Dividend***

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## Class Ruling

# Income tax: Pacific Brands Limited – Scheme of Arrangement and payment of Special Dividend

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### **📌 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 provisions

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
- paragraph 128B(3)(ga)(i) of the ITAA 1936
- section 128D of the ITAA 1936
- former section 160APHM of the ITAA 1936
- former section 160APHN of the ITAA 1936
- Division 1A of former Part IIIAA of the ITAA 1936
- paragraph 177EA(5)(b) of the ITAA 1936

- section 67-25 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997
- Subdivision 115-A of the ITAA 1997
- subsection 116-20(1) of the ITAA 1997
- paragraph 204-30(3)(c) of the ITAA 1997
- section 207-20 of the ITAA 1997
- section 204-35 of the ITAA 1997
- section 207-145 of the ITAA 1997
- Subdivision 207-C of the ITAA 1997
- subsection 855-10(1) of the ITAA 1997, and
- section 855-15 of the ITAA 1997.

All subsequent legislative references in this Ruling are to provisions of the ITAA 1997 unless specified otherwise.

## **Class of entities**

3. The class of entities to which this Ruling applies are shareholders of Pacific Brands Limited (PBL) other than HanesBrands Inc. (Hanes) that:

- continuously held their shares on capital account, that is, the shares are neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
- participated in the Scheme of Arrangement (SOA) under which HBI Australia Acquisition Co. Pty Ltd (Hanes Sub) acquired 100% of the ordinary shares in PBL
- received the Special Dividend and the Scheme Consideration, and
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their PBL shares.

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

## **Qualifications**

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

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 28 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

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7. This Ruling applies from 1 July 2016 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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

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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:

- the application for a class ruling received 26 April 2016
- the Scheme Implementation Deed (SID), together with its schedule and annexure, dated 28 April 2016
- the Scheme Booklet dated 20 May 2016, and
- other correspondence and documents received between 26 April 2016 and 13 July 2016.

**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

#### ***Pacific Brands Limited***

9. PBL is an Australian resident company that is listed on the Australian Securities Exchange (ASX).

10. PBL owns a portfolio of iconic consumer product brands including Bonds, Sheridan, Tontine, Berlei, Jockey, Voodoo and Dunlop Flooring.
11. As at 20 May 2016, PBL share capital structure consists of:
  - 917,226,291 fully paid ordinary shares, and
  - 15,623,817 Performance Rights on issue.
12. The shareholders of PBL are a mix of individuals, companies, superannuation funds and other institutional investors, some of which are non-residents.
13. As at 31 March 2016, 6.07% of the issued shares of PBL were held by non-residents.
14. As at 23 May 2016, PBL had recorded a Profits Reserve of \$120,414, 296 and Retained Profits of \$1,923,269.

### ***HanesBrands Inc.***

15. Hanes is a corporation based in the US that is listed on the New York Stock Exchange.
16. Hanes does not currently, directly or indirectly own, any of the ordinary shares in PBL.

### ***HBI Australia Acquisition Co. Pty Ltd***

17. Hanes Sub is a wholly owned subsidiary of Hanes and a company limited by shares incorporated in Australia.

### **The Scheme of Arrangement**

18. On 28 April 2016, PBL announced in the ASX that it had entered into a Scheme Implementation Deed (SID) with Hanes.
19. Under the SID which sets out a number of conditions precedent, Hanes Sub acquired 100% of the ordinary shares in PBL under the SOA pursuant to Part 5.1 of the *Corporations Act 2001*.
20. The conditions precedent included but were not limited to the following:
  - (a) the approval of PBL shareholders to the SOA – PBL shareholders approved the SOA at the scheme meeting held 24 June 2016
  - (b) Court approval of the SOA – Court approval for the SOA was provided on 27 June 2016, and
  - (c) Foreign Investment Review Board (FIRB) approval – FIRB approval was received on 6 May 2016.

21. Under the SOA, shareholders who held PBL shares on the Scheme Record Date of 8 July 2016 automatically transferred their PBL shares to Hanes Sub on the Scheme Implementation Date of 15 July 2016.

22. PBL shareholders received \$1.056 (\$1.15 minus the Special Dividend) per share in cash consideration (the Scheme Consideration) from Hanes Sub.

### **Special Dividend**

23. The Board of Directors of PBL declared a fully franked, Special Dividend of \$0.094 to PBL shareholders for each share held on the Special Dividend Record Date of 30 June 2016.

24. The Special Dividend was permitted under the SID. However:

- the SOA was not conditional on the Special Dividend being paid
- Hanes did not in any way facilitate or finance the payment of the Special Dividend, and
- Hanes was not obliged to bring about the result that the Special Dividend will be received by PBL shareholders.

25. The Special Dividend was sourced entirely from PBL's profits reserve and was not debited against PBL's share capital account.

26. The Special Dividend was paid to PBL shareholders on the Special Dividend Payment Date of 7 July 2016.

### **Other matters**

27. A condition precedent of the SOA proceeding was that PBL had taken all the steps to cancel and/or vest all Performance Rights on issue.

28. The PBL Board exercised a discretion associated with the Performance Rights that determined all outstanding Performance Rights vest or cancelled on 28 June 2016, the Effective Date for the SOA.

## **Ruling**

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### **Special Dividend**

29. The Special Dividend of \$0.094 paid to PBL shareholders constituted a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

## **Assessability and withholding tax of the Special Dividend**

30. A resident PBL shareholder who received the fully franked Special Dividend is required to include the dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

31. A non-resident PBL shareholder who received the fully franked Special Dividend (other than those carrying on business in Australia at or through a permanent establishment in Australia) is not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and is not liable to Australian withholding tax in respect of the dividend (paragraph 128B(3)(ga) of the ITAA 1936).

32. A non-resident PBL shareholder who received the fully franked Special Dividend and is carrying on business in Australia at or through a permanent establishment in Australia, where the Special Dividend is attributable to the permanent establishment, is required to include the dividend as assessable income under subparagraph 44(1)(c)(i) of the ITAA 1936 and is not liable to Australian withholding tax in respect of the dividend (subsection 128B(3E) of the ITAA 1936).

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

### ***Tax Offset***

33. A resident PBL shareholder, and a non-resident PBL shareholder that is carrying on business in Australia at or through a permanent establishment in Australia, who received the fully franked Special Dividend:

- (a) is required to include the amount of the franking credit in their assessable income, and
- (b) is entitled to a tax offset equal to the amount of the franking credit,

under section 207-20 and subsection 207-75(2), subject to being a qualified person in relation to the Special Dividend.

34. A PBL shareholder that is the trustee of a trust (not being a complying superannuation entity) or a partnership, not being an entity taxed as a corporate tax entity, is required to include the amount of the franking credit attached to the Special Dividend in its assessable income under subsection 207-35(1), subject to the trustee or the partnership satisfying the qualified person rule.

### ***Qualified person***

35. Having regard to the relevant circumstances of the scheme, PBL shareholders are considered to have made a 'related payment' in respect of the Special Dividend for the purposes of paragraph 207-145(1)(a) and former section 160APHN of the ITAA 1936.

36. Therefore, a PBL shareholder will be a qualified person in relation to the Special Dividend if, from 17 May 2016 until 7 July 2016 inclusive, they continued to hold their PBL shares and did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of their PBL shares for a continuous period of at least 45 days.

#### ***Refundable tax offset***

37. The franking credit tax offset that PBL 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 pursuant to section 67-25.

#### **Capital gains tax (CGT)**

##### ***CGT event A1***

38. CGT event A1 happened when a PBL shareholder disposed of their PBL shares to Hanes Sub under the SOA being the Scheme Implementation Date of 15 July 2016 (section 104-10).

##### ***Capital gain or capital loss***

39. A PBL shareholder will make a capital gain if the capital proceeds from the disposal of PBL shares exceed the cost base of the shares (subsection 104-10(4)). The capital gain is the amount of the excess.

40. A PBL shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the PBL shares (subsection 104-10(4)). The capital loss is the amount of the difference.

##### ***Capital proceeds***

41. The capital proceeds for CGT event A1 happening to a PBL shareholder is the money received or entitled to be received in respect of the event happening (paragraph 116-20(1)(a)).

42. The capital proceeds received by a PBL shareholder who disposed of PBL shares pursuant to the SOA was \$1.056 per share. The Special Dividend of \$0.094 is not included in the capital proceeds.



### ***Discount capital gain***

43. A capital gain made by a PBL shareholder when the PBL shares were disposed of under the SOA is a discount capital gain if the shareholder acquired the shares at least 12 months before 15 July 2016, being the Scheme Implementation Date, and the other conditions in Division 115 are satisfied.

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

44. A non-resident PBL shareholder who participated in the SOA disregards any capital gain or capital loss made when CGT event A1 happened if the PBL shares were not 'taxable Australian property' (section 855-10).

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

45. Section 177EA of the ITAA 1936 will not apply in respect of the Special Dividend.

46. Section 204-30 will not apply in respect of the Special Dividend.

47. Section 207-145 will not apply to the whole, or any part, of the Special Dividend received by a PBL shareholder.

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**Commissioner of Taxation**

3 August 2016

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## **Appendix 1 – Explanation**

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**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.*

### **Special Dividend is a dividend**

48. 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.

49. The payment of the Special Dividend will be a distribution of money by PBL to its shareholders.

50. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes any:

... moneys paid or credited by a company to a shareholder ... where the amount of the moneys paid or credited, ... is debited against an amount standing to the credit of the share capital account of the company...

51. The Special Dividend will not be debited against PBL's share capital account. Therefore, the exclusion in paragraph (d) will not apply and the Special Dividend paid to PBL shareholders will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

### **Assessability of the Special Dividend – residents**

52. Subparagraph 44(1)(a)(i) of the ITAA 1936 includes in the assessable income of an Australian resident shareholder in a company:

...dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

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

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

54. Subparagraph 44(1)(b)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder in a company:

... dividends (other than non-share dividends) paid to the shareholder by the company to the extent to which they are paid out of profits derived by it from sources in Australia.

55. 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 and the ITAA 1997 that expressly deals with dividends excludes some or all of the dividend from assessable income.

56. Subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes the franked part of a dividend received by a non-resident from liability to withholding tax which would otherwise arise pursuant to subsection 128B(1) of the ITAA 1936. As the Special Dividend was fully franked, it will not be subject to Australian withholding tax when derived by a non-resident PBL shareholder.

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

58. Accordingly, non-resident PBL shareholders who received the fully franked Special Dividend (other than shareholders who received the Special Dividend in carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as assessable income pursuant to subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and are not liable to Australian withholding tax in relation to the dividend (subparagraph 128B(3)(ga)(i) of the ITAA 1936).

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

59. A non-resident's liability to withholding tax on dividend income received pursuant to subsection 128B(1) of the ITAA 1936 is subject to subsection 128B(3E) of the ITAA 1936. Subsection 128B(3E) of the ITAA 1936 states that section 128B of the ITAA 1936 does not apply to dividend income that:

- (a) 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; and
- (b) is attributable to the permanent establishment; and
- (c) is not paid to the person in the person's capacity as a trustee.

60. Subparagraph 44(1)(c)(i) of the ITAA 1936 includes dividends in the assessable income of a non-resident shareholder of a resident company, where the non-resident shareholder is carrying on business in Australia at or through a permanent establishment of the shareholder in Australia which:

... are attributable to the permanent establishment, to the extent to which they are paid out of profits derived by the company from sources outside Australia.

61. Accordingly, a non-resident PBL shareholder that carries on business in Australia at or through a permanent establishment who received the fully franked Special Dividend is required to include the dividend in their assessable income, to the extent to which the Special Dividend is attributable to the permanent establishment, pursuant to subparagraph 44(1)(c)(i) of the ITAA 1936 and is not liable to Australian withholding tax in relation to the dividend.

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

62. Section 207-20 provides:

- (1) If an entity makes a franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the franking credit on the distribution. This is in addition to another amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a tax offset for the income year in which the distribution is made. The tax offset is equal to the franking credit on the distribution.

63. Therefore, subject to satisfying the qualified person rule, where the fully franked Special Dividend is received directly by a PBL shareholder and the PBL shareholder satisfies the residency requirement in section 207-75, the PBL shareholder:

- is required to include the amount of the franking credit attached to the Special Dividend in their assessable income, and
- is entitled to a tax offset equal to the amount of the franking credit.

64. If the fully franked Special Dividend was received by a PBL 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. Subsection 207-35(1) provides:

If:

- (a) a franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a corporate tax entity when the distribution is made; and
- (c) if the entity is a trustee of a trust – the trust is not a complying superannuation entity when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the franking credit on the distribution.

65. Where a PBL shareholder that is a partnership or a trustee of a trust is a qualified person, the PBL shareholder is required to include the amount of the franking credit attached to the Special Dividend in the assessable income of the trust or partnership under subsection 207-35(1).

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

### ***Qualified person***

66. Paragraph 207-145(1)(a) provides that where a franked distribution is 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
- entitled to a tax offset in respect of the franking credit attached to the franked distribution.

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

68. The main test of what constitutes a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 which is known as the holding period rule, is set out in former subsection 160APHO(1) of the ITAA 1936, states:

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, or 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 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 secondary qualification period in relation to the dividend.

69. 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.

70. Former subsection 160APHO(2) of the ITAA 1936 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 is required to satisfy the holding period rule 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 is required to satisfy the holding period requirement within the secondary qualification period.

***Related payment rule***

71. In order to determine the relevant qualification period, it is necessary to determine whether a PBL shareholder has made, or is under an obligation to make, or is likely to make, a related payment in respect of any of the Special Dividend received.

72. Former section 160APHN of the ITAA 1936 sets out for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 non-definitive examples of what constitutes the making of a related payment.

73. Former subsection 160APHN(2) of the ITAA 1936 provides that a:

... taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

74. Former subsection 160APHN(3) of the ITAA 1936 contains examples 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 the dividend or distribution or causing a payment or the transfer of property in accordance with the direction of another person or persons).

75. Former subsection 160APHN(4) of the ITAA 1936 outlines the circumstances of transactions referred to in subsection 160APHN(3) 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 the dividend or distribution).

76. The Commissioner considers that the circumstances of the payment of the Special Dividend of \$0.094 per share are an integral part of the scheme. The Special Dividend is a permitted distribution provided for in the SID. The declaration and payment of the Special Dividend was conditional on PBL shareholders approving the SOA. Therefore, the shareholders of PBL shareholders in approving the SOA and receiving the Special Dividend was part of the scheme that caused the PBL shares ('property') to be transferred to Hanes Sub ('another person') for the purposes of former subsection 160APHN(3) of the ITAA 1936.

77. Therefore, a PBL shareholder is taken to have made or to have been likely to make a related payment in respect of the Special Dividend.

### ***Holding period requirement***

78. The holding period rule requires shareholders to hold their ordinary shares at-risk for a continuous period of not less than 45 days during the relevant qualification period.

79. As a PBL shareholder is considered to have made or be likely to make a related payment in respect of the Special Dividend, a PBL shareholder is also required to satisfy the holding period requirement within the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

80. The secondary 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 ...

- (a) if the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest becomes *ex dividend*...

81. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 as follows:

A share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes *ex dividend* on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

82. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 30 June 2016, being the last day on which acquisition by a person of a PBL share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 1 July 2016.

83. The secondary qualification period thus runs from 45 days before the ex-dividend date of 1 July 2016. In practical terms, this means that the secondary qualification period runs from 17 May 2016 to 15 August 2016. 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 PBL shares are to be excluded. This would mean that the secondary qualification period would be from 17 May 2016 until the date that PBL shareholders are no longer at risk for the purposes of former Division 1A of Part III of the ITAA 1936.

84. Entitlement to participate in the SOA will be determined on the SOA Record Date that is 8 July 2016. PBL shareholders who dispose of their shares under the SOA will no longer be considered to hold their PBL shares at risk for the purposes of former Division 1A of Part IIIA of the ITAA 1936 as of 8 July 2016.

85. Accordingly, for a PBL shareholder who disposes of its shares under the SOA, the secondary qualification period will run for a period of 52 days from 17 May 2016 to 7 July 2016 (inclusive). A PBL shareholder who receives the Special Dividend will need to hold its shares at risk for continuous period of not less than 45 days during this period in order to be a qualified person for the purposes of former Division 1A of Part IIIA of the ITAA 1936. Further pursuant to former paragraph 160APHO(2)(a) of the ITAA 1936, neither the date of acquisition nor the date of disposal is included in the relevant 45 day period.

### **Refundable tax offset**

86. PBL shareholders who are entitled to a tax offset under subsection 207-20(2) in respect of the franking credit received (or entities entitled to a tax offset under section 207-45 equal to their share of the franking credit) will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

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

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A))
- a trustee of a trust who is liable to be assessed under section 98 or 99A of the ITAA 1936 (paragraph 67-25(1B)(b))
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the



- company on behalf of its shareholders (subsections 67-25(1C) and 67-25(1D)), and
- foreign resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

88. PBL shareholders (or entities entitled to a tax offset under section 207-45) were entitled to the refundable tax offset unless specifically excluded pursuant to section 67-25.

## **Exempting entity**

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

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

## **CGT consequences**

### ***CGT event A1***

91. CGT event A1 happens when an entity disposes of a CGT asset. This occurs 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 a contract for the disposal, or if there is no contract, when the change of ownership occurs (subsections 104-10(1) and (3)).

92. The disposal of shares pursuant to the SOA is not under a contract (paragraph 9 of Taxation Determination TD 2002/4 *Income tax: capital gains: what is the first element of the cost base and reduced cost base of a share in a company you acquire in exchange for a share in another company in a takeover or merger?*).

93. CGT event A1 happened when PBL shareholders disposed of their PBL shares pursuant to the SOA (subsections 104-10(1) and 104-10(2)). The disposal happened on 15 July 2016, the Scheme Implementation Date (paragraph 104-10(3)(b)).

94. The time when CGT event A1 happened determines the year of income in which a PBL shareholder made a capital gain or a capital loss, and may affect whether the shareholder is entitled to the CGT discount for any capital gain made.

95. A PBL shareholder made a capital gain when CGT event A1 happened if the capital proceeds from the disposal of their PBL shares were more than the cost base of the shares. A PBL shareholder made a capital loss if the capital proceeds were less than the reduced cost base of the PBL shares (subsection 104-10(4)).

### ***Capital proceeds***

96. The capital proceeds received by a PBL shareholder upon CGT event A1 happening to their PBL shares under the SOA is the money the shareholder received, or was entitled to receive, '... in respect of the event happening' (subsection 116-20(1)).

97. 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 money, or entitlement to receive 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 (*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*).

98. Prior to when PBL shareholders voted on the SOA, there was no certainty that the Special Dividend would be declared and paid. The declaration and payment of the Special Dividend was conditional upon the SOA becoming effective and was nevertheless at the discretion of the PBL Board. Neither Hanes (nor Hanes Sub or a related entity) had any influence or control over the decision to pay the Special Dividend, nor did Hanes (nor Hanes Sub or a related entity) provide funds to enable PBL to pay the Special Dividend. Therefore, the Commissioner considers that the Special Dividend was not received in respect of the disposal of PBL shares under the SOA. Accordingly, the Special Dividend does not form part of the capital proceeds which a PBL shareholder received or was entitled to receive in respect of CGT event A1 happening. The payment of the Special Dividend was independent of the Scheme Consideration.

99. Therefore, the Commissioner considers that the Special Dividend was not received in respect of the disposal of PBL shares under the SOA. Accordingly, the Special Dividend does not form part of the capital proceeds which a PBL shareholder received or was entitled to receive in respect of CGT event A1 happening. The payment of the Special Dividend was independent of the Scheme Consideration.

100. Accordingly, a PBL shareholder will receive capital proceeds of \$1.056 per PBL share pursuant to the SOA.

***Discount capital gain***

101. 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.

102. To be eligible to treat a capital gain as a discount capital gain, the capital gain must:

- (a) be made by an individual, a complying superannuation entity, a trust or (in certain circumstances) a life insurance company (section 115-10)
- (b) result from a CGT event happening after 11.45am legal time in the Australian Capital Territory on 21 September 1999 (section 115-15)
- (c) have been worked out using a cost base that was not subject to indexation (subsection 115-20(1)), and
- (d) result from a CGT event happening to a CGT asset that was acquired by the entity at least 12 months before the CGT event (subsection 115-25(1)).

103. Where a PBL shareholder made a capital gain when they disposed of PBL shares, the capital gain may be treated as a discount capital gain if the PBL shares were acquired at least 12 months before 15 July 2016 when the shares were disposed of under the SOA, being the Scheme Implementation Date, subject to the other requirements listed in paragraph 102 of this Explanation being satisfied.

***Foreign resident shareholders***

104. Under subsection 855-10(1), an entity disregards a capital gain or capital loss from a CGT event if the entity is 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'.

105. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these five categories as follows:

Item 1	taxable Australian real property
Item 2	an indirect Australian real property interest not covered by item 5
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2 or 5
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3, and

Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).
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106. A foreign resident or the trustee of a foreign trust for CGT purposes cannot disregard, under subsection 855-10(1), a capital gain from CGT event A1 if just before the CGT event happens:

- their PBL shares were an 'indirect Australian real property interest' not covered by item 5 (item 2 of the table in section 855-15 of the ITAA 1997)
- their PBL shares had been used at any time by the foreign resident in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997), or
- their PBL shares were covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

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

#### **Section 177EA**

107. Section 177EA of the ITAA 1936 is a general anti-avoidance rule that is intended to prevent abuse of the imputation system through schemes which circumvent the basic rules for the franking of dividends.

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

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

109. In broad terms, there needs to be a scheme in which, having regard to the relevant circumstances of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out 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. Under this arrangement, a PBL shareholder is the 'relevant taxpayer' and the scheme comprises the circumstances surrounding the SOA.

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

- (a) the disposal of shares in PBL (a corporate tax entity) pursuant to the SOA is a scheme for the disposition of membership interests
- (b) the Special Dividend is a frankable distribution that was paid to PBL shareholders in respect of their PBL shares
- (c) the Special Dividend is a franked distribution, and
- (d) PBL shareholders could reasonably be expected to receive imputation benefits as a result of the Special Dividend.

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

112. The relevant circumstances of the scheme indicate that there was no requisite purpose of conferring an imputation benefit under the scheme. It includes the fact that the disposition of the shares in PBL occurred pursuant to the proposed SOA under the *Corporations Act 2001* to be voted upon by PBL shareholders.

113. The Special Dividend was fully franked, which was a continuation of PBL's dividend policy. PBL had only ordinary shares on issue and the Special Dividend was paid per share held by all PBL shareholders at the Special Dividend Record Date. The Special Dividend was debited to the current year earnings account of PBL and paid to shareholders of PBL that were the true economic owners of the company, allowing the shareholders to share in the accumulated profits of PBL.

114. In considering the manner, form and substance of the scheme, it is considered that the scheme was not entered into for the purpose, other than a merely incidental purpose of enabling the relevant taxpayer to obtain an imputation benefit. Having regard to the relevant circumstances of the scheme, the Commissioner has formed the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

**Section 204-30**

115. Section 204-30 applies where a corporate tax entity 'streams' the payment of distributions to its members in such a way that an imputation benefit is or would be received by a member of the entity that derives a greater benefit from franking credits, while other members receive lesser or no imputation benefits regardless of whether or not they receive other benefits (paragraphs 204-30(1)(a), (b) and (c)).

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

...

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

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

118. 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.

119. The Special Dividend will be paid equally to all PBL shareholders, and will be fully franked. Accordingly, it cannot be said that PBL selectively directed the flow of franked distributions to those members who could most benefit from the imputation benefits.

120. 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)(c) to deny the whole, or any part, of the imputation benefit to be received in relation to the Special Dividend.

**Section 207-145**

121. Pursuant to subsection 207-145(1), 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 following circumstances:

- (a) the entity is not a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIA of the *Income Tax Assessment Act 1936*;

- (b) the Commissioner has made a determination under paragraph 177EA(5)(b) of that Act that no imputation benefit (within the meaning of that section) is to arise in respect of the distribution for the entity;
- (c) the Commissioner has made a determination under paragraph 204-30(3)(c) of this Act that no imputation benefit is to arise in respect of the distribution for the entity ;
- (d) the distribution is made as part of a dividend stripping operation

...

122. Explanation of whether a PBL shareholder is a qualified person for the purpose of the former Division 1A is provided in paragraphs 66 to 84 of this Ruling.

123. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit in relation to the Special Dividend.

124. Paragraph 207-145(1)(d) applies if a franked distribution is made as part of a dividend stripping operation. 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.

125. Having regard to the circumstances of the SOA under which PBL shareholders disposed of their PBL shares to Hanes Sub, the Commissioner considers that the payment of the Special Dividend to PBL shareholders was not made as part of a dividend stripping operation. Therefore, paragraph 207-145(1)(d) will not apply.

126. Consequently, section 207-145 will not apply to the Special Dividend received by the PBL shareholders.

## **Appendix 2 – Detailed contents list**

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

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TR 2010/4

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Income tax ~~ Capital management ~~ Anti avoidance rules - Divisions 45A-45C  
Income tax ~~ Capital management ~~ Assesability of distribution

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