


CR 2019/20 - Income tax: Greencross Limited - Scheme of Arrangement and payment of Special Dividend

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Class Ruling

Income tax: Greencross Limited – Scheme of Arrangement and payment of Special Dividend

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❶ Relying on this ruling:

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

If this ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in the ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this ruling.

Further, if we think that the ruling disadvantages you, we may apply the law in a way that is more favourable to you.

Summary – what this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions 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
- section 128B of the ITAA 1936
- Division 1A of former Part IIIA of the ITAA 1936
- former section 160APHN of the ITAA 1936
- former section 160APHO of the ITAA 1936
- section 177EA of the ITAA 1936
- section 177F of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997
- section 106-50 of the ITAA 1997
- section 110-25 of the ITAA 1997
- Division 115 of the ITAA 1997

- subsection 116-20(1) of the ITAA 1997
- Subdivision 124-M of the ITAA 1997
- section 202-40 of the ITAA 1997
- section 204-20 of the ITAA 1997
- section 204-30 of the ITAA 1997
- section 207-20 of the ITAA 1997
- subsection 207-35(1) of the ITAA 1997
- section 207-45 of the ITAA 1997
- section 207-145 of the ITAA 1997
- section 208-195 of the ITAA 1997
- section 855-10 of the ITAA 1997

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

Class of entities

3. The class of entities to which this Ruling applies are the shareholders of Greencross Limited (**Greencross**) who:

- are residents or non-residents of Australia (other than non-residents who carry on a business at or through a permanent establishment in Australia) as defined in subsection 6(1) of the ITAA 1936
- held their Greencross shares on capital account, that is, the shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
- disposed of their Greencross shares to Vermont Aus Pty Ltd (**TPG BidCo**) under the Scheme of Arrangement pursuant to Part 5.1 of the *Corporations Act 2001* (Cth) (Corporations Act) between Greencross and TPG BidCo (Scheme of Arrangement) and received Scheme Consideration (as described in paragraph 22 of this Ruling) for that disposal
- acquired their shares in Greencross after 20 September 1985, and
- are not subject to the taxation of financial arrangement rules in Division 230 in relation to gains and losses on their Greencross shares.

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

4. In this Ruling, an entity belonging to this class of entities is referred to as a 'Scheme Shareholder'.

Qualifications

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

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 41 of this Ruling.

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

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

Date of effect

8. This Ruling applies from 1 July 2018 to 30 June 2019. The Ruling continues to apply after 30 June 2019 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 *Public Rulings*).

Scheme

9. The following description of the scheme is based on information provided by the applicant.

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

Greencross Limited

10. Greencross Limited (**Greencross**) is an Australian incorporated company that was listed on the Australian Securities Exchange on 13 June 2007 and delisted on 27 February 2019.

11. Greencross is a leading integrated pet care company.

12. As at 24 November 2018 Greencross had on issue 120,463,450 ordinary shares.

13. Based on the Greencross share register as at 29 October 2018, approximately 30% of Greencross ordinary shareholders were foreign institutional holders and a further 1% were foreign retail shareholders. Non-residents beneficially held more than 10% of the shares in Greencross.

14. As at 29 October 2018 at least 5% of the holders of Greencross shares were Australian residents and Greencross was not a 'former exempting entity' within the meaning of section 208-50.

15. Less than 50% of the total assets held by Greencross are Taxable Australian Real Property, as defined in section 855-20.

Vermont Aus HoldCo Pty Ltd

16. Vermont Aus HoldCo Pty Ltd (**HoldCo**) is an unlisted Australian proprietary company. One of the purposes of HoldCo is to issue Class B shares in accordance with the scheme.

17. Until the implementation of the Scheme of Arrangement on 27 February 2019, the shareholders of HoldCo were TPG Asia VII SF Pte Ltd and TPG Growth IV SF Pte Ltd, being funds advised by global private investment firm known as TPG (**TPG**).

18. Prior to entering the Scheme of Arrangement, TPG and its associates did not hold Greencross shares which carried more than 10% of the voting rights in Greencross, rights to dividends or to receive any distribution of capital in Greencross.

Vermont Aus Pty Ltd

19. Vermont Aus Pty Ltd (**TPG BidCo**) is a wholly owned subsidiary of HoldCo incorporated for the purpose of acquiring all the shares in Greencross.

The Scheme of Arrangement

20. On 5 November 2018 Greencross announced that it had entered into a Scheme Implementation Agreement (**SIA**) under which TPG BidCo agreed to acquire 100% of the shares in Greencross (**Scheme**). The Scheme is a scheme of arrangement under Part 5.1 of the Corporations Act.

21. The Scheme was subject to certain conditions set out in the SIA, including but not limited to:

- the Scheme being approved by Greencross shareholders, and
- the Scheme being approved by the Federal Court of Australia at the Second Court Hearing.

22. Under the terms of the Scheme, the value of the scheme consideration received by Scheme shareholders from TPG BidCo was \$5.55 per share less the amount of any special dividend paid by Greencross (**Scheme Consideration**). The form of the Scheme Consideration received by Scheme Shareholders depended on the election they made.

23. The Scheme Shareholders had the choice to elect the way in which they received their Scheme Consideration (**Election**). The choices were:

- (a) **Cash Consideration:** Payment of \$5.55 cash per Greencross share held by each Scheme Shareholder on the scheme record date of 22 February 2019 less the amount of any special dividend (**Cash Consideration**).
- (b) **Mixed Consideration:** Subject to minimum and maximum scrip thresholds the Scheme Shareholders could elect to receive a mix of Cash Consideration and Class B shares in HoldCo (**Scrip Consideration**) under one of the following options
 - (i) Mixed consideration option 1
 - payment of Cash Consideration per Greencross share in exchange for 50% of a Scheme Shareholder's shares, and
 - receipt of Scrip Consideration for the remainder of their Greencross shares, being such number of Class B shares in HoldCo as is equivalent to \$5.55 less the amount of any special dividend (**Mixed Consideration Option 1**).
 - (ii) Mixed consideration option 2
 - payment of Cash Consideration per Greencross share in exchange for 25% of a Scheme Shareholder's shares, and
 - receipt of Scrip Consideration for the remainder of their Greencross shares, being such number of Class B shares in HoldCo as is equivalent to \$5.55 less the amount of any special dividend (**Mixed Consideration Option 2**).

24. Under both Mixed Consideration options, the Class B shares in HoldCo were to be issued at a notional issue price of \$1.00 per share. The Mixed Consideration options were subject to the elections for mixed consideration resulting in:

- a minimum Scrip Consideration threshold value equal to at least 1.5% of the issued capital in HoldCo at the implementation of the Scheme. If the minimum Scrip

Consideration threshold was not satisfied then all Scheme Shareholders would be deemed to have made an Election to receive Cash Consideration

- a maximum Scrip Consideration threshold requiring the value of Scrip Consideration under the Scheme to not exceed 15% of the issued capital in HoldCo at the implementation of the Scheme . If the maximum Scrip Consideration threshold was to be reached, a scale back mechanism would apply whereby there would be a reduction of each Scheme Shareholder's Scrip Consideration on a pro rata basis so that the total number of Class B shares in HoldCo held by Scheme Shareholders did not exceed 15% of the total share capital on issue in HoldCo. (**Scaleback Mechanism**). Scheme Shareholders would receive Cash Consideration for each share which was excluded from Scrip Consideration as a result of the Scaleback Mechanism.

25. Under the terms of the Scheme, HoldCo could elect that a Scheme Shareholder who received Scrip Consideration would have their Class B HoldCo shares registered in the name of a custodian in accordance with the terms of a custody agreement where the allotment of the aggregate Scrip Consideration would result in there being more than 50 registered shareholders in HoldCo, or otherwise with the consent of Greencross.

26. A Scheme Shareholder who did not make a valid Election by 25 January 2019 to receive either of the Mixed Consideration options was deemed to have made an Election to receive the Cash Consideration. Ineligible foreign shareholders were deemed to have elected to receive the Cash Consideration.

27. On 29 January 2019 Greencross announced that:

- the minimum Scrip Consideration threshold was satisfied with 41 Scheme Shareholders, representing 4,375,378 shares, making elections to receive Scrip Consideration
- the total number of Class B HoldCo shares to be issued to Scheme Shareholders on implementation of the Scheme is less than the maximum scrip threshold. Therefore, the Scheme Shareholders who made valid elections for Scrip Consideration would not be subject to the Scaleback Mechanism
- a custodian is likely to be appointed by HoldCo to hold the Class B HoldCo shares issued as Scrip Consideration, and
- the election results were indicative only and the final election outcome would not be known until the buying

and selling of Greencross shares ended on the scheme record date of 22 February 2019.

28. Greencross consented to the appointment of a custodian. Under the terms of the custody agreement a Scheme Shareholder who received Scrip Consideration is:

- absolutely entitled to beneficial ownership of the Class B HoldCo shares issued as their Scrip Consideration and held by the custodian as bare trustee on their behalf, and
- entitled to the economic benefits associated with the Class B HoldCo shares.

29. HoldCo did not make a choice to deny Scheme Shareholders of Greencross partial roll-over under Subdivision 124-M (subsection 124-795(4)).

30. On 6 February 2019, the requisite majority of Scheme Shareholders approved the Scheme at the scheme meeting.

31. On 11 February 2019, the Scheme was approved by order of the Federal Court of Australia and it was announced by the ASX that Greencross shares would be suspended from the close of trading (**Effective Date**).

32. Scheme Shareholders were entitled to participate in the Scheme if they held Greencross shares as at 7.00pm AEST on 22 February 2019 (**Scheme Record Date**).

33. Scheme Shareholders who held Greencross shares on the Scheme Record Date automatically transferred their Greencross shares to TPG BidCo and received the Scheme Consideration on the Implementation Date of 27 February 2019.

34. On 27 February 2019 the Scheme Shareholders disposed of each share they held in Greencross to TPG BidCo (**Implementation Date**).

35. Scheme Shareholders who elected Cash Consideration received a total cash payment of \$5.55 per share comprising of:

- a fully franked Special Dividend of \$0.19 which was paid on 20 February 2019, and
- Cash Consideration of \$5.36 which was paid on the Implementation Date.

36. Scheme Shareholders who elected Mixed Consideration Option 1 received:

- a fully franked Special Dividend of \$0.19 which was paid on 20 February 2019 in respect of each of their Greencross shares held on the Special Dividend Record Date

- Cash Consideration of \$5.36 per share in respect of 50% of their Greencross Shares held on the Scheme Record Date, and
- Scrip Consideration of a beneficial interest of 5.36 Class B HoldCo shares for each of their remaining Greencross shares.

37. Scheme Shareholders who elected Mixed Consideration Option 2 received:

- a fully franked Special Dividend of \$0.19 which was paid on 20 February 2019 in respect of each of their Greencross shares held on the Special Dividend Record Date
- Cash Consideration of \$5.36 per share in respect of 25% of their Greencross shares held on the Scheme Record Date, and
- Scrip Consideration of a beneficial interest in 5.36 Class B HoldCo shares for each of their remaining Greencross shares.

Special Dividend

38. On 11 February 2019 the Board of Directors of Greencross (Greencross Board) declared a fully franked Special Dividend of \$0.19 per Greencross share (**Special Dividend**) held by Scheme Shareholders at 7.00pm AEST on 13 February 2019 (**Special Dividend Record Date**). The Special Dividend was paid on 20 February 2019.

39. The Special Dividend was subject to the Scheme of Arrangement becoming effective and was payable at the discretion of the Greencross Board. TPG, HoldCo or TPG BidCo did not influence the decision of the Greencross Board to declare the Special Dividend.

40. The Special Dividend was paid entirely from Greencross's existing cash reserves and banking facilities. The Special Dividend was debited against Greencross's retained earnings account. TPG, HoldCo or TPG BidCo did not finance or otherwise facilitate financing for the payment of the Special Dividend.

41. The Special Dividend complied with the requirements of the Corporations Act, including section 254T of that Act.

Ruling

Special Dividend

42. The Special Dividend paid to Scheme Shareholders is a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

43. The Special Dividend is a frankable distribution pursuant to section 202-40.

Assessability of the Special Dividend

Residents

44. A Scheme Shareholder who received the Special Dividend and is a resident of Australia as defined in subsection 6(1) of the ITAA 1936 is required to include the dividend in their assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).

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

45. A Scheme Shareholder who received the Special Dividend and is a non-resident (other than a non-resident carrying on business in Australia at or through a permanent establishment in Australia to which the dividend was attributable) is not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936. This is because the dividend will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936) and, as a result, the dividend will be treated as non-assessable, non-exempt income in the hands of such a Scheme Shareholder (section 128D of the ITAA 1936).

Gross up and tax offset

46. A Scheme Shareholder who received the Special Dividend directly and satisfies the residency requirements in section 207-75:

- must include the amount of the franking credits on the Special Dividend in their assessable income, and
- is entitled to a tax offset equal to the amount of the franking credits attached to the Special Dividend

in the income year it is paid (section 207-20), subject to the Scheme Shareholder being a 'qualified person' in relation to the Special Dividend.

47. A Scheme Shareholder (not being a corporate tax entity), who received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, is required to include an amount equal to the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1), subject to the trustee or the partnership being a 'qualified person' in relation to the Special Dividend.

48. The relevant members of a partnership or trust to whom a distribution flows indirectly through the partnership or trust, are entitled to a tax offset under section 207-45, equal to their share of the franking credit attached to the distribution included in the

assessable income of the partnership or trust under subsection 207-35(1).

Qualified persons

49. The payment of the Special Dividend constitutes a 'related payment' for the purposes of former section 160APHN of the ITAA 1936.

50. A Scheme Shareholder will be a qualified person in relation to the Special Dividend, if from 31 December 2018 to 21 February 2019 (inclusive), they continued to hold their Greencross 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 Greencross shares for a continuous period of at least 45 days.

Refundable tax offset

51. The franking credit tax offset that a Scheme Shareholder is entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, provided the Scheme Shareholder is not excluded by the operation of section 67-25.

Exempting Entity

52. Greencross 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 Greencross were held by non-residents (Division 208).

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

Capital gains tax (CGT) consequences

CGT event A1

54. CGT event A1 happened when a Scheme Shareholder disposed of each of their Greencross shares to TPG Bidco pursuant to the Scheme (section 104-10).

55. The time CGT event A1 happened was when the Greencross shares were transferred to TPG Bidco on the Implementation Date of 27 February 2019 (paragraph 104-10(3)(b)).

56. A Scheme Shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Greencross share exceeds the cost base of that share. A Scheme Shareholder makes a capital loss if the capital proceeds are less than the reduced cost base of the Greencross share (subsection 104-10(4)).

Capital proceeds

Scheme Shareholders that elected Cash Consideration

57. For Scheme Shareholders that elected to receive Cash Consideration, the capital proceeds received from CGT event A1 for each share they held in Greencross was the cash payment of \$5.36 per Greencross share (paragraph 116-20(1)(a)).

58. The Special Dividend of \$0.19 is not included in the capital proceeds.

Scheme Shareholders that elected either of the Mixed Consideration options

59. For Scheme Shareholders that elected to receive Mixed Consideration the capital proceeds received from CGT event A1 for the disposal of a Greencross share is either:

- Cash Consideration received, being \$5.36 per Greencross share for so many of the Greencross shares that they elected to receive Cash Consideration for (paragraph 116-20(1)(a)), or
- Scrip Consideration received being the market value (worked out at the time of CGT event A1) of the replacement Class B HoldCo shares received for so many of the Greencross shares that they elected to receive Scrip Consideration for (paragraph 116-20(1)(b)).

60. The Special Dividend of \$0.19 is not included in the capital proceeds.

Discount capital gain

61. If a Scheme Shareholder makes a capital gain from the disposal of a Greencross share they will be eligible to treat the capital gain as a 'discount capital gain' provided they satisfy the requirements of Division 115.

Non-resident Scheme Shareholders

62. A non-resident Scheme Shareholder who participated in the scheme may disregard any capital gain or capital loss made when

CGT event A1 happened if the Greencross share was not 'taxable Australian property' (section 855-10).

Availability of scrip for scrip roll-over if a capital gain is made

63. Subject to the qualifications in paragraphs 64 and 65 of this Ruling, a Scheme Shareholder that received beneficial ownership in replacement Class B HoldCo shares and made a capital gain from the disposal of a percentage of their Greencross shares may choose scrip for scrip roll-over (section 124-780).

64. Scrip for scrip roll-over cannot be chosen by a Scheme Shareholder that is a non-resident unless the replacement Class B HoldCo shares are 'taxable Australian property' just after they were acquired (subsection 124-795(1)).

65. Scrip for scrip roll-over cannot be chosen if any capital gain the Scheme Shareholder might subsequently make from the replacement Class B HoldCo shares would be disregarded, except because of a roll-over (subsection 124-795(2)).

66. If scrip for scrip roll-over is chosen, the capital gain that is referable to the receipt of a Class B HoldCo share is disregarded (subsection 124-785(1)).

Cost base of replacement Class B HoldCo shares

67. The cost base and reduced cost base of a replacement Class B HoldCo share acquired by a Scheme Shareholder in exchange for their Greencross share, is affected by whether the Scheme Shareholder chooses scrip for scrip roll-over.

68. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each replacement Class B HoldCo share is equal to the market value of each Greencross share given in exchange for the acquisition of a replacement Class B HoldCo share (subsections 110-25(2) and 110-55(2)). The market value is worked out at the time of the acquisition (subsection 110-25(2)).

69. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of a replacement Class B HoldCo share is worked out by reasonably attributing to it the cost base of the Greencross share for which it was exchanged and for which the roll-over was obtained (subsections 124-785(2) and 124-785(4)). In this case, due to the 1:5.36 exchange ratio, the cost base of a Greencross share is divided by 5.36 to determine the cost base of each replacement Class B HoldCo share.

Acquisition date of a replacement Class B HoldCo share

70. The acquisition date of the replacement Class B HoldCo share is the day when the Scheme Shareholder acquired the beneficial

ownership of the Class B HoldCo share. The Scheme Shareholder is considered to have an absolute entitlement to the Class B HoldCo share for the purposes of section 106-50 when the custody agreement was entered into.

71. However, for the purpose of determining whether a capital gain made from any later disposal of a replacement Class B HoldCo share is a discount capital gain, Scheme Shareholders who choose scrip for scrip roll-over are taken to have acquired the replacement Class B HoldCo share when they acquired the corresponding Greencross share involved in the roll-over (Item 2 of the table in subsection 115-30(1)).

Anti-avoidance provisions

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

73. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny Scheme Shareholders the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

74. The Commissioner will not make a determination pursuant to subsection 177F(1) of the ITAA 1936 to include any amount in the assessable income of Scheme Shareholders.

Commissioner of Taxation

20 March 2019

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.*

The Special Dividend

75. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders, whether in money or other property. However, paragraph (d) of the definition of 'dividend' excludes a distribution debited against an amount standing to the credit of the share capital account of the company.

76. The payment of the Special Dividend was a distribution in money made by Greencross to its shareholders. Greencross did not debit the Special Dividend against its share capital account.

77. Therefore, the exclusion in paragraph (d) does not apply and the Special Dividend constitutes a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

78. A distribution is a frankable distribution to the extent it is not unfrankable (section 202-40). Section 202-45 sets out the circumstances under which an amount or distribution is taken to be unfrankable.

79. None of the circumstances in section 202-45 apply to the Special Dividend. Therefore, the Special Dividend is a frankable distribution under section 202-40 and in turn is capable of being franked in accordance with section 202-5.

Assessability of the Special Dividend

Residents

80. 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.

81. As the Special Dividend was paid to Scheme Shareholders out of profits derived by Greencross, Scheme Shareholders who are residents of Australia are required to include the dividend or dividends (as applicable) in their assessable income under paragraph 44(1)(a) of the ITAA 1936.

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

82. 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.

83. Subsection 128B(1) of the ITAA 1936 imposes Australian withholding tax on income that:

- (a) is derived, on or after 1 January 1968, by a non-resident; and
- (b) consists of a dividend paid by a company that is a resident.

84. 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 Special Dividend was fully franked, it will not be subject to Australian withholding tax when derived by a non-resident Scheme Shareholder.

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

86. Accordingly, Scheme Shareholders who received the fully franked Special Dividend and are non-residents (other than those carrying on business in Australia at or through a permanent establishment in Australia to which the dividend is attributable) are 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 will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

Gross up and tax offset

87. A Scheme Shareholder (other than a partnership or a trust) that is a qualified person in accordance with paragraph 207-145(1)(a) which refers to Division 1A of former Part IIIA of the ITAA 1936:

- includes the franking credit attached to the Special Dividend in their assessable income (subsection 207-20(1)), and
- is entitled to a tax offset equal to the amount of the franking credit attached to the Special Dividend (subsection 207-20(2))

in the income year the Special Dividend is paid.

88. Subject to satisfying the 'qualified person' rule, the assessable income of a Scheme Shareholder (not being an entity taxed as a corporate tax entity) that is a partnership or a trustee of a trust (not being a complying superannuation fund), includes the amount of the

franking credit attached to the Special Dividend (subsection 207-35(1)).

89. A Scheme Shareholder that is not a qualified person in relation to the Special Dividend:

- does not include the franking credit attached to the dividend in their assessable income (paragraph 207-145(1)(e)), and
- is not entitled to a tax offset equal to the amount of the franking credit attached to the dividend (paragraph 207-145(1)(f)).

Qualified person

90. The impact of the qualified person rules as to inclusion of franking credits in assessable income and entitlement to tax offsets or otherwise are described in paragraphs 86 and 87 of this Ruling.

91. 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.

92. Paragraph 207-145(1)(a) which refers to former Division 1A of Part IIIAA of the ITAA 1936 provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' in relation to a franked distribution they have received and thus be entitled to a tax offset for the franking credit on the distribution.

93. The test of what constitutes a 'qualified person' is set out in former subsection 160APHO(1) of the ITAA 1936. Broadly, if Scheme Shareholders are not under an obligation to make a related payment in relation to a dividend or distribution, they will have to satisfy the holding period requirement within the primary qualification period. If Scheme Shareholders are under an obligation to make a related payment in relation to a dividend or distribution, they will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

94. 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.

95. Former section 160APHN of the ITAA 1936 gives examples of, but does not limit, what constitutes the making of a related payment, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

96. Former subsection 160APHN(3) of the ITAA 1936 lists examples of what may have the effect of passing the benefit of the Special Dividend to one or more other persons, for example, causing an amount or amounts to be set off against, or to be otherwise applied in reduction of, a debt or debts owed by the other person or other persons (former paragraph 160APHN(3)(f) of the ITAA 1936).

97. Former subsection 160APHN(4) of the ITAA 1936 lists the circumstances of making a related payment referred to in former paragraph 160APHN(3)(f) of the ITAA 1936 being broadly that the amount of the benefit passed on reflects the amount of the Special Dividend.

98. Under the terms of the SIA, the Scheme Consideration is reduced by the amount of the Special Dividend paid by Greencross to Scheme Shareholders. On this basis, it is considered that the payment of the Special Dividend is an integral part of the Scheme. Therefore, the requirements of former paragraphs 160APHN(3)(f) and 160APHN(4)(c) of the ITAA 1936 are satisfied.

99. The reduction of the Scheme Consideration has the effect of passing the benefit of the Special Dividend from a Scheme Shareholder to TPG BidCo. Therefore, a Scheme Shareholder, or a partner in a partnership or a beneficiary of a trust that has an interest in Greencross shares, is taken to have made a related payment in respect of the Special Dividend.

Holding period requirement

100. 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 (former paragraph 160APHO(2)(a) of the ITAA 1936).

101. As the Scheme Shareholders are taken, for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, to have made a related payment in respect of the Special Dividend, the relevant qualification period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

102. Former section 160APHD of the ITAA 1936 defines the 'secondary qualification period' 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 became *ex dividend*...

103. 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.

104. The eligibility for the Special Dividend was determined on the Special Dividend Record Date of 13 February 2019, being the last day on which acquisition by a person of a Greencross share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date of a Greencross share for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 14 February 2019.

105. The secondary qualification period runs from 45 days before and ends 45 days after the ex-dividend date of 14 February 2019. In practical terms, this means that the secondary qualification period runs from 31 December 2018 to 31 March 2019. 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 Greencross share is to be excluded. This means that the secondary qualification period runs from 31 December 2018 until the date that the Scheme Shareholders are no longer holding their shares at risk for the purposes of former Division 1A of Part III of the ITAA 1936.

106. Entitlement to participate in the Scheme of Arrangement was determined on the Scheme Record Date (22 February 2019). Scheme Shareholders who disposed of their shares under the SIA are no longer considered to have held their Greencross shares at risk for the purposes of Division 1A of former Part IIIA of the ITAA 1936 as of 22 February 2019.

107. Accordingly, for a Scheme Shareholder who disposed of their shares under the SIA, the secondary qualification period will run for a period of 31 December 2018 to 21 February 2019 (being the day prior to the Scheme Record Date). A Scheme Shareholder who received the Special Dividend will need to have held its shares at risk for a continuous period of not less than 45 days during this period in order to be a qualified person for the purposes of Division 1A of former 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.

108. The small shareholder exception in former section 160APHT of the ITAA 1936 does not apply as the Special Dividend constitutes a related payment as discussed at paragraphs 94 to 99 of this Ruling. Therefore, a Scheme Shareholder who is an individual and who has franking credit offsets not exceeding \$5,000 for the year of income ended 30 June 2019 must also satisfy the holding period requirement in relation to the Special Dividend (former section 160APHT(2) of the ITAA 1936).

Refundable tax offset

109. A Scheme Shareholder who is entitled to a tax offset pursuant to 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) is also subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

110. 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 (subsection 67-25(1B)), and
- 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)).

111. Division 63 sets out the rules on how, and in what order, tax offsets are applied against an income tax liability. Where a tax offset that is subject to the refundable tax offset rules in Division 67 exceeds the income tax liability, the Scheme Shareholder can get a refund of the remaining amount (item 40 of section 63-10).

Exempting entity

112. Section 208-195 provides that Division 207 of the ITAA 1997 does not apply to a distribution by an exempting entity unless it is expressly stated to apply under Subdivision 208-G.

113. Section 208-20 states:

A *corporate tax entity is an ***exempting entity*** at a particular time if, at that time, the entity is effectively owned by prescribed persons.

114. Subsection 208-25(1) broadly provides 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.

115. Section 208-40 provides the definition of a prescribed person in relation to another corporate tax entity. The definition includes companies, trustees, partnerships or individuals that are a foreign resident; or if they were to receive a distribution made by a corporate tax entity, the distribution would be exempt income or non-assessable non-exempt income of the company, trust estate, partnership or individual.

116. Greencross was not an exempting entity at the time the Special Dividends were paid to Scheme Shareholders, nor was it a former exempting entity at that time, as less than 95% of the accountable membership interests or accountable partial interests held in Greencross were held by foreign residents (Division 208).

117. Section 208-195 therefore does not apply to deny the gross-up of the assessable income of a Scheme 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 Scheme Shareholder is otherwise entitled pursuant to Division 207 at the time when the Special Dividend was paid.

CGT consequences

CGT event A1

118. CGT event A1 happens if there is a change in the ownership of a CGT asset (section 104-10). The event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

119. The acquisition of shares in Greencross under a court approved scheme of arrangement does not involve a disposal of shares under a contract.¹

120. Therefore, CGT event A1 happened when there was a change of ownership in a Greencross share from a Scheme Shareholder to TPG BidCo under the SIA (subsections 104-10(1) and 104-10(2)). The change of ownership occurred on the Implementation Date of 27 February 2019 (paragraph 104-10(3)(b)).

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

122. A Scheme Shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Greencross share are more than the cost base of the share. A Scheme Shareholder makes a capital loss if the capital proceeds are less than the reduced cost base of the Greencross share (subsection 104-10(4)). The cost base and reduced cost base of a Greencross share depends on each Scheme Shareholder's own circumstances.

Capital proceeds

123. The capital proceeds received by a Scheme Shareholder from a CGT event is the money and the market value of any property

¹ See paragraph 9 of the 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?*

received or entitled to be received (worked out at the time of the event happening) in respect of the event happening (subsection 116-20(1)).

124. The term 'in respect of the event happening' in subsection 116-20(1) requires the relationship between the event and the receipt of the money, or the entitlement to receive the money, to be more than coincidental. An amount is not capital proceeds received or entitled to be received in respect of a CGT event merely because it is received in association with the CGT event.²

125. In this case, the Special Dividend was not paid in respect of the disposal of Greencross shares under the Scheme. The determination to pay the Special Dividend was at the discretion of the Greencross Board. TPG BidCo had no control over Greencross's decision to pay the Special Dividend. TPG BidCo had no control over the quantum of the Special Dividend.

126. The payment of the Special Dividend was funded entirely by Greencross's cash reserves and existing debt facilities with no actual or contingent funding support from TPG BidCo.

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

128. Therefore, the capital proceeds that a Scheme Shareholder received for the disposal of a Greencross share is:

- (a) for Scheme Shareholders that elected to receive Cash Consideration, the capital proceeds received from CGT event A1 for each share they held in Greencross was the cash payment of \$5.36 per Greencross share (paragraph 116-20(1)(a)).
- (b) for Scheme Shareholders that elected to receive Mixed Consideration, the capital proceeds received from CGT event A1 for the disposal of a Greencross share is either:
 - Cash Consideration received, being \$5.36 per Greencross share for so many of the Greencross shares that they elected to receive Cash Consideration for (paragraph 116-20(1)(a)), or

² Taxation Ruling TR 2010/4: *Income tax: capital gains: when a dividend will be included in the capital proceeds from a disposal of shares that happens under a contract or a scheme of arrangement.*

- Scrip Consideration received being the market value (worked out at the time of CGT event A1) of the replacement Class B HoldCo shares received for so many of the Greencross shares that they elected to receive Scrip Consideration for (paragraph 116-20(1)(b)).

Discount capital gain

129. If a Scheme Shareholder made a capital gain from the disposal of their Greencross share, the Scheme Shareholder may be eligible to treat the capital gain as a discount capital gain provided that all the relevant requirements of Division 115 are met.

130. One of those requirements is that the entity which made the capital gain as a result of a CGT event happening to its CGT asset must have acquired that asset at least 12 months before the CGT event (subsection 115-25(1)).

131. This means that a capital gain made by a Scheme Shareholder is a discount capital gain if they acquired the Greencross share at least 12 months before the date of disposal under the Scheme, being 12 months before the Implementation Date of 27 February 2019, and the other requirements in Division 115 are satisfied.

Non-resident Scheme Shareholders

132. Under subsection 855-10(1), an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

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

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
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).

Indirect Australian real property interest

134. Subsection 855-25(1) provides that a membership interest held by an entity in another entity at a time, is an indirect Australian real property interest at that time if the interest satisfies both:

- the non-portfolio test in section 960-195 at either time specified in subparagraphs 855-25(1)(a)(i) and 855-25(1)(a)(ii), and
- the principal asset test in section 855-30 at that time.

135. Subsection 855-30(2) provides that a membership interest held by the holding entity in the test entity passes the principal asset test if the sum of the market values of the test entity's assets that are TARP assets exceeds the sum of the market values of its assets that are non-TARP assets.

136. The market value of Greencross's TARP assets does not exceed the market value of its non-TARP assets. Therefore the principal asset test is not satisfied.

137. Any Scheme Shareholder that satisfies the non-portfolio interest test in section 960-195 at either time specified in subparagraphs 855-25(1)(a)(i) and 855-25(1)(a)(ii) does not have an indirect Australian real property interest because the principal asset test is not satisfied. Therefore any capital gain or capital loss made when CGT event A1 happened by Scheme Shareholders that satisfy the non-portfolio interest test can be disregarded.

Availability of scrip for scrip roll-over if a capital gain is made

138. Scrip for scrip roll-over under Subdivision 124-M enables a shareholder to disregard a capital gain from a share that is disposed of if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base of the replacement share.

139. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the scheme that is the subject of this Ruling are:

- (a) an entity exchanges shares in a company for shares in another company (paragraph 124-780(1)(a))
- (b) the exchange is in consequence of a single arrangement that satisfies subsection 124-780(2) or (2A)
- (c) conditions for the roll-over in subsection 124-780(3) are satisfied
- (d) further conditions, if applicable, are satisfied, and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

Cost base of Class B HoldCo shares – if scrip for scrip roll-over chosen

140. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each replacement Class B HoldCo share is worked out by reasonably attributing to it, the sum of the parts of the cost bases of the Greencross shares exchanged for the relevant replacement shares under the scheme (subsections 124-785(2) and 124-785(4)).

Cost base of Class B HoldCo shares – if scrip for scrip roll-over not chosen

141. Where scrip for scrip roll-over is not, or cannot, be chosen, the first element of the cost base and reduced cost base of each replacement Class B HoldCo share received is equal to the market value of the part of the Greencross shares given in exchange (subsections 110-25(2), 110-55(2) and 112-30(1)), determined at the time of acquisition.

Acquisition date of Class B HoldCo shares

142. The acquisition date of the replacement Class B HoldCo share is on the day when the Scheme Shareholder acquires the beneficial ownership of the Class B HoldCo share. The Scheme Shareholder is considered to have an absolute entitlement to the Class B HoldCo share for the purposes of section 106-50 when the custody agreement was entered into.

143. However, for the purpose of determining whether a capital gain made from any later disposal of a replacement Class B HoldCo share is a discount capital gain, Scheme Shareholders who choose scrip for scrip roll-over are taken to have acquired the replacement Class B HoldCo Share when they acquired the corresponding Greencross share involved in the roll-over (Item 2 of the table in subsection 115-30(1)).

Anti-avoidance provisions

Section 177EA of the ITAA 1936

144. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that operates to prevent franking credit trading. For section 177EA to apply, the conditions of paragraphs 177EA(3)(a) to (e) must be satisfied.

145. The conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied as Greencross is a corporate tax entity, the Scheme is a scheme involving the disposal of Greencross shares in which there is a franked distribution and franking credits were received by Scheme Shareholders (the relevant taxpayers) that

participated in the Scheme and who could, therefore, reasonably be expected to receive imputation benefits.

146. Paragraph 177EA(3)(e) of the ITAA 1936, in broad terms, requires that in considering 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 taxpayer to obtain an imputation benefit.

147. 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. The relevant circumstances listed in the subsection encompass a range of diverse matters which, taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the imputation benefit is more than an incidental purpose of the Scheme.

148. The relevant circumstances are that the disposition of the ordinary shares in Greencross was made pursuant to a takeover by TPG BidCo by way of a scheme of arrangement under the Corporations Act voted upon by Greencross shareholders entitled to vote.

149. The Scheme of Arrangement under which Greencross was acquired by TPG BidCo is a normal commercial transaction.

150. Shareholders in Greencross have different tax and residency profiles. The fully franked Special Dividend was paid to all existing shareholders of Greencross in proportion to the number of shares that each shareholder held on the Special Dividend Record Date and irrespective of their ability to use the relevant franking credits. The Special Dividend allowed Greencross shareholders to share in the accumulated profits of Greencross.

151. Having regard to the relevant circumstances of the scheme, it cannot be concluded that Greencross or the Scheme Shareholders entered into or carried out the scheme for the purpose of enabling the Scheme Shareholders to obtain an imputation benefit.

152. As the requisite purpose is not present, 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 which Scheme Shareholders received in relation to the Special Dividend.

Section 204-30

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

greater benefit from imputation benefits than disadvantaged members.

154. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than another member entity. The 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 use imputation benefits.

155. Under the Scheme, Scheme Shareholders received an imputation benefit when the Special Dividend was paid. The Special Dividend was paid equally to all Scheme Shareholders, and was fully franked regardless of their tax profiles. Accordingly, it cannot be said that Greencross selectively directed the flow of franked dividends to those members who obtained the most benefit from the franking credits.

156. As the conditions in subsection 204-30(1) were not met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received by a Scheme Shareholder in relation to the Special Dividend.

Section 177F of the ITAA 1936

157. The Commissioner has the discretion to cancel all or part of a 'tax benefit' that has been obtained, or would, but for section 177F of the ITAA 1936, be obtained, by a taxpayer in connection with a scheme to which Part IVA applies.

158. Before the Commissioner can exercise the discretion in subsection 177F(1) of the ITAA 1936, the requirements of Part IVA of the ITAA 1936 must be satisfied. These requirements are that:

- (i) a 'tax benefit', as identified in section 177C of the ITAA 1936, was or would, but for section 177F of the ITAA 1936, have been obtained
- (ii) the tax benefit was or would have been obtained in connection with a 'scheme' as defined in section 177A of the ITAA 1936, and
- (iii) having regard to section 177D of the ITAA 1936, the scheme is one to which Part IVA applies.

159. In the present case, all the shares in Greencross were disposed of by the Scheme Shareholders. The consideration in respect of the disposal that was received by Scheme Shareholders who elected mixed consideration options included Class B shares in HoldCo. The Scheme Shareholders could either make a choice to obtain roll-over relief under Division 124-M or not choose roll-over relief.

160. Generally, where the non-inclusion of an amount in the assessable income of a taxpayer is attributable to the making of a choice available under either the ITAA 1936 or the ITAA 1997, that

amount is excluded from the meaning of 'obtaining by a taxpayer of a tax benefit in connection with a scheme' (subsection 177C(2) of the ITAA 1936).

161. Having regard to the facts and circumstances of this arrangement, Part IVA of the ITAA 1936 will not apply as, to the extent that a tax benefit may arise under the scheme, it cannot be concluded that the scheme was entered into for the dominant purpose of enabling the Scheme Shareholders to obtain a tax benefit as defined in section 177C of the ITAA 1936.

162. Therefore, the Commissioner will not make a determination under subsection 177F(1) of the ITAA 1936 in relation to the Scheme as it does not constitute a scheme to which Part IVA of the ITAA 1936 applies.

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