

CR 2023/71 - SILK Laser Australia Limited - scheme of arrangement and special dividend



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Status: **legally binding**

Class Ruling

SILK Laser Australia Limited – scheme of arrangement and special dividend

❶ Relying on this Ruling

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

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

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What this Ruling is about

1. This Ruling sets out the income tax consequences of the special dividend paid by SILK Laser Australia Limited (SILK) on 28 November 2023 (Special Dividend) and the scheme of arrangement whereby Australian Pharmaceutical Industries Pty Ltd (API) acquired all the ordinary shares on issue in SILK on 29 November 2023 (Scheme of Arrangement).
2. Details of this scheme are set out in paragraphs 34 to 62 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* (ITAA 1936) or the *Income Tax Assessment Act 1997* (ITAA 1997) (as detailed in the table in Appendix 2 of this Ruling), unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you were a SILK shareholder who:
 - held your SILK shares on
 - 21 November 2023 (Special Dividend Record Date) and received the Special Dividend on 28 November 2023 (Special Dividend Payment Date)
 - 22 November 2023 (Scheme Record Date) and participated in the Scheme of Arrangement, and

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- held your SILK shares on capital account – that is, you did not hold your SILK shares as ‘revenue assets’ (as defined in section 977-50) or as ‘trading stock’ (as defined in subsection 995-1(1)).
5. This Ruling does not apply to you if you:
- are an ‘exempt entity’ (as defined in subsection 995-1(1))
 - acquired your SILK shares under a SILK employee share, option or rights plan
 - are subject to the investment manager regime in Subdivision 842-I in relation to your SILK shares, or
 - are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 34 to 62 of this Ruling.

Note: Division 230 will not apply to individuals unless they have made an election for it to apply.

When this Ruling applies

6. This Ruling applies from 1 July 2023 to 30 June 2024.

Ruling

Dividend and frankable distribution

7. The Special Dividend is a ‘dividend’ as defined in subsection 6(1).
8. The Special Dividend is a frankable distribution pursuant to section 202-40.

Assessability of the Special Dividend, franking credit and tax offset

Resident shareholders

9. If you are a resident of Australia as defined in subsection 6(1) who is an individual or a ‘corporate tax entity’ as defined in section 960-115, and you:

- satisfy the residency requirement in section 207-75, and
- are a ‘qualified person’ as defined in Division 1A of former Part IIIAA,

then you include the Special Dividend and the franking credit attached to the Special Dividend in your assessable income and are entitled to a tax offset equal to the amount of that credit (subparagraph 44(1)(a)(i) and sections 207-20, 207-70 and 207-145).

10. If you are a resident of Australia who received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, and you:

- are not a corporate tax entity, and
- are a qualified person,

then you include the franking credit attached to the Special Dividend in your assessable income (subsection 207-35(1)).

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11. If you are an Australian resident partner in a partnership or beneficiary of a trust, and:

- the Special Dividend flows indirectly through the partnership or trust to you, and
- both you and the partnership or trust, as is relevant, are each a qualified person,

then you include your share of the Special Dividend in your assessable income and are entitled to a tax offset equal to your share of the franking credit attached to the Special Dividend (subparagraph 44(1)(a)(i), section 207-45 and former subsection 160APHU(1)).

12. The tax offset is refundable (table item 40 of section 63-10), unless you are a:

- trustee of a non-complying superannuation fund or non-complying approved deposit fund (subsection 67-25(1A))
- trustee of a trust who is liable to be assessed under sections 98 or 99A (subsection 67-25(1B)), or
- corporate tax entity (unless you are an exempt institution that is eligible for a refund or a life insurance company that has received the Special Dividend on the SILK shares which were not held by you on behalf of your shareholders) (subsections 67-25(1C) and (1D)).

Non-resident shareholders

Special Dividend attributable to a permanent establishment in Australia

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

14. If you are also a qualified person, you include the amount of the franking credit attached to the Special Dividend in your assessable income and are entitled to a tax offset equal to the amount of that franking credit (sections 207-20 and 207-70 and subsection 207-75(2)).

15. The tax offset is not refundable (subsection 67-25(1DA)).

Special Dividend not attributable to a permanent establishment in Australia

16. If you are a non-resident and the Special Dividend is not attributable to a permanent establishment in Australia, the Special Dividend is not included in your assessable income (subparagraph 44(1)(b)(i) and section 128D) and you are not liable for withholding tax in respect of the dividend (paragraph 128B(3)(ga)).

17. You do not include the amount of the franking credit that is attached to the Special Dividend in your assessable income and are not entitled to a tax offset for that franking credit (sections 207-20 and 207-70)).

Status: **legally binding**

Related payment and qualified persons

18. You have made a related payment in respect of the Special Dividend (former section 160APHN), and therefore the secondary qualification period applies (former paragraph 160APHO(1)(b)).

19. You will be a qualified person in relation to the Special Dividend if you held your SILK shares from 8 October 2023 to 21 November 2023 (inclusive) for a continuous period during which you did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM) in respect of the shares.

20. You will not be a qualified person if you acquired your SILK shares on 8 October 2023 (former paragraph 160APHO(2)(a)).

Exempting entity

21. SILK was not an exempting entity when the Special Dividend was paid to you (section 208-20 and subsection 208-25(1)), nor was it a former exempting entity at that time (section 208-50).

22. Therefore, section 208-195 will not apply to deny the gross-up of your assessable income by the amount of the franking credit attached to the Special Dividend, nor to deny the tax offset to which you are otherwise entitled to under Division 207.

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

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

Section 204-30

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

Dividend stripping operation, distribution washing, foreign income tax deduction

25. Paragraphs 207-145(1)(d) (about dividend stripping operation) and 207-145(1)(da) (about distribution washing) will not apply to deny the gross-up of your assessable income by the amount of the franking credit attached to the Special Dividend, nor to deny the tax offset to which you are otherwise entitled to under Division 207.

26. If you are entitled to a foreign income tax deduction in relation to the Special Dividend, the amount of the franking credit attached to the Special Dividend is not included in your assessable income and you will not be entitled to a tax offset under Division 207 (paragraphs 207-145(1)(db), 207-145(1)(e) and 207-145(1)(f)).

Status: **legally binding**

Capital gains tax consequences

CGT event A1

27. CGT event A1 happened to you on 29 November 2023 (Scheme Implementation Date) when you disposed of each of your SILK shares to API in accordance with the Scheme of Arrangement (section 104-10).

Capital proceeds

28. The capital proceeds from CGT event A1 happening to your SILK share are \$3.25 per share you received on the disposal of each SILK share, being the amount of \$3.35 per share you received under the Scheme of Arrangement less the amount of \$0.10 per share you received as the Special Dividend (subsection 116-20(1)).

Capital gain or capital loss

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

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

Discount capital gain

31. If you made a capital gain from the disposal of a SILK share, you are eligible to treat the capital gain as a discount capital gain provided you:

- are an individual, a complying superannuation entity or a trust subject to the rules in Subdivision 115-C (section 115-10), and
- acquired, or are taken to have acquired, your SILK share on or before 28 November 2022 (subsection 115-25(1)).

Foreign-resident shareholders

32. Your SILK shares were not taxable Australian property on the Scheme Implementation Date (section 855-15).

33. If you were a 'foreign resident' or the trustee of a 'foreign trust for CGT purposes' (as defined in subsection 995-1(1)) just before the Scheme Implementation Date, any capital gain or capital loss made as a result of CGT event A1 happening is disregarded, provided your SILK shares:

- had not been used at any time by you in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- was not covered by subsection 104-165(3) about individuals choosing to disregard capital gains upon ceasing to be Australian residents (table item 5 of section 855-15).

Status: **legally binding**

Scheme

34. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Background

SILK Laser Australia Limited

35. SILK is an Australian company limited by shares.

36. SILK listed on the Australian Securities Exchange (ASX) on 15 December 2020 and remained publicly listed on the ASX until it was delisted as a result of the Scheme of Arrangement.

37. SILK is an Australian resident for tax purposes and was the head company of the SILK tax consolidated group.

38. SILK carries on the business of the provision of non-surgical aesthetic services and sale of owned brand skincare products with 145 clinics, either as wholly owned corporate stores or through a franchised arrangement, across Australia and New Zealand.

39. As at 30 June 2023, SILK had:

- 53,121,177 ordinary shares on issue (the only class of shares on issue)
- \$17.173 million in retained profits, and
- a franking account balance of \$15,451,347.

40. At the Special Dividend Payment Date, non-resident SILK shareholders owned less than 95% of SILK's ordinary shares.

41. At the Scheme Implementation Date (immediately prior to the transfer of shares to API), no non-resident SILK shareholder owned, individually or together with associates, more than 10% of SILK's ordinary shares.

Australian Pharmaceutical Industries Pty Ltd

42. API is a wholly owned subsidiary of Wesfarmers Limited (WES).

43. WES is an Australian-resident public company that is listed on the ASX. WES has operations in, among other things, the health, beauty and wellbeing sector.

44. Prior to the implementation of the Scheme of Arrangement, API did not own any of the ordinary shares in SILK.

Scheme of Arrangement

45. On 26 June 2023, SILK entered into a Scheme Implementation Deed with API, subject to shareholder and court approval in accordance with Part 5.1 of the *Corporations Act 2001*.

46. Under the Scheme of Arrangement, each SILK share held by a SILK shareholder was transferred to API, resulting in SILK becoming a wholly owned subsidiary of API and WES. In exchange, SILK shareholders received \$3.25 per share, being \$3.35 per share received under the Scheme of Arrangement (Scheme Consideration) less the amount of \$0.10 per share received by the SILK shareholders in respect of the Special Dividend.

Status: **legally binding**

47. The Scheme Consideration was considered fair according to the Independent Expert's Report prepared by Lonergan Edwards & Associates Limited.
48. On 10 November 2023, SILK shareholders approved the Scheme of Arrangement at a shareholder meeting.
49. On 15 November 2023, the Scheme of Arrangement was approved by the Federal Court of Australia. SILK shares were suspended from trading on the ASX from close of trading on 16 November 2023.
50. On the Scheme Record Date, each SILK shareholder's entitlement to the Scheme Consideration was determined.
51. On 29 November 2023, the Scheme Consideration was paid to SILK shareholders and their SILK shares were transferred to API.

Special dividend

52. On 6 November 2023, SILK declared a fully franked Special Dividend of \$0.10 per share. SILK shareholders who held their shares on the Special Dividend Record Date were paid the Special Dividend on 28 November 2023.
53. The Special Dividend was SILK's first dividend payment since its listing on the ASX.
54. The Special Dividend was debited from SILK's retained profits reserve and funded by existing cash reserves and debt facilities. The Special Dividend was not debited against SILK's share capital account.
55. The Special Dividend was subject to the Scheme of Arrangement becoming effective.

Dividend policy

56. At the time of its listing on the ASX, SILK did not intend, nor expect, to declare nor pay any dividends in the immediately foreseeable future. It was SILK's intention to reinvest all cash flows into the SILK business to maximise its growth and expand its clinic network to approximately 150 clinics.
57. During the 2023 income year, SILK had expanded to 145 clinics and was reviewing its capital management strategy with several initiatives considered.

Other matters

58. Neither API, WES, nor any of their associates, had any influence or control over the declaration and payment of the Special Dividend.
59. Neither API, WES, nor any of their associates, facilitated or financed the payment of the Special Dividend.
60. The Scheme of Arrangement was not conditional on the Special Dividend being declared and API did not have any right to terminate the Scheme Implementation Deed if SILK did not declare and pay the Special Dividend.
61. On the Scheme Implementation Date, the sum of the market values of SILK's assets that were taxable Australian real property did not exceed the sum of the market values of its other assets for the purposes of section 855-30.

Status: **legally binding**

Key dates

62. The following table is a summary of the key dates for the Scheme of Arrangement and the Special Dividend:

Table 1: Summary of the key dates for the Scheme of Arrangement and Special Dividend

Date	Event
26 June 2023	Scheme Implementation Deed executed and Announcement date
4 October 2023	First Court hearing and release of Scheme Booklet
10 November 2023	Scheme meeting
15 November 2023	Second Court hearing
16 November 2023	Effective date
21 November 2023	Special Dividend Record date
22 November 2023	Scheme Record date
28 November 2023	Special Dividend Payment date
29 November 2023	Scheme Implementation date

Commissioner of Taxation

13 December 2023

Status: **not legally binding**

Appendix 1 – Explanation

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

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Dividend and frankable distribution

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

64. The Special Dividend is a dividend under subsection 6(1) as it was a distribution of money made by SILK to its shareholders and was not debited against its share capital account.

Status: **not legally binding**

65. 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.

66. The Special Dividend is a frankable distribution under section 202-40 as none of the circumstances in section 202-45 apply.

Assessability of the Special Dividend

Resident shareholders

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

68. As the special dividend was paid by SILK to its resident shareholders out of profits derived by SILK, resident shareholders are required to include the dividend in their assessable income.

Non-resident shareholders

Special Dividend attributable to a permanent establishment in Australia

69. The assessable income of a non-resident shareholder includes dividends paid by a company out of profits derived from sources in Australia (subparagraph 44(1)(b)(i)).

70. To the extent that the dividends are paid out of profits derived from sources outside Australia, subparagraph 44(1)(c)(i) includes dividends in the assessable income of a non-resident shareholder that is carrying on business in Australia at or through a permanent establishment where the dividends are attributable to the permanent establishment.

71. Subsection 128B(1) imposes withholding tax on income which consists of a dividend paid by a resident company to a non-resident on or after 1 January 1968.

72. Subsection 128B(3E) states that section 128B does not apply to dividend income that is:

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

73. Accordingly, if you are a non-resident SILK shareholder carrying on a business in Australia at or through a permanent establishment who received the Special Dividend (otherwise than in your capacity as trustee), you include the dividend in your assessable income, to the extent to which the dividend was attributable to the permanent establishment (subparagraphs 44(1)(b)(i) and (c)(i)) and you will not be liable for Australian withholding tax in relation to the dividend (subsection 128B(3E)).

Special Dividend not attributable to a permanent establishment in Australia

74. Where the Special Dividend is not attributable to a permanent establishment in Australia, subparagraph 44(1)(b)(i) includes the dividend in a non-resident shareholder's assessable income to the extent that the dividend is paid by the company out of profits derived from sources in Australia.

Status: **not legally binding**

75. However, subsection 44(1) does not apply to a dividend to the extent to which it is included in, or excluded from, assessable income by another provision that expressly deals with dividends in the ITAA 1936 or the ITAA 1997.

76. Where a dividend would have been subject to withholding tax but for paragraph 128B(3)(ga), section 128D operates to treat the dividend as non-assessable non-exempt income. Subparagraph 128B(3)(ga)(i) excludes from subsection 128B(1) income derived by a non-resident that consists of the franked part of a dividend.

77. As the Special Dividend was fully franked, it will not be subject to Australian withholding tax, and because paragraph 128B(3)(ga) applies, the Special Dividend will be treated as non-assessable non-exempt income.

78. Accordingly, a non-resident SILK shareholder, who received the fully franked Special Dividend that is not attributable to a permanent establishment in Australia, is not required to include the dividend as assessable income (subparagraph 44(1)(b)(i) and section 128D) and is not liable to Australian withholding tax in relation to the dividend (subparagraph 128B(3)(ga)(i)).

Gross-up and tax offset

79. Where a shareholder receives a franked distribution directly, satisfies the residency requirement in section 207-75, and is a qualified person in relation to the franked distribution, the assessable income of the shareholder includes the amount of the franking credit (subsection 207-20(1) and sections 207-70 and 207-145). The shareholder will also be entitled to a tax offset equal to the franking credit on the distribution (subsection 207-20(2)).

80. Subject to satisfying the qualified person rule, the assessable income of a shareholder (not being a corporate tax entity) that is a partnership or a trustee of a trust (not being a complying superannuation fund) includes their share of the amount of the franking credit attached to the franked dividend (subsection 207-35(1)).

81. Subject to satisfying the qualified person rule, a partner in a partnership or beneficiary of a trust who receives a franked distribution indirectly through the partnership or trust will be entitled to a tax offset equal to their share of the franking credit on the distribution (section 207-45 and former subsection 160APHU(1)).

Qualified person, related payment rule and holding period rule

Qualified person

82. An entity must be a qualified person in relation to a dividend in order to be entitled to a tax offset in respect of the franking credit on the dividend (subsection 207-145(1)).

83. The test of what constitutes a qualified person is set out in former subsection 160APHO(1) (paragraph 207-145(1)(a)). Broadly, you will be a qualified person in relation to a dividend if:

- where you were not under an obligation to make a related payment in relation to the dividend – you satisfy the holding period rule in relation to the primary qualification period, or
- where you were under an obligation to make a related payment in relation to the dividend – you satisfy the holding period rule in relation to the secondary qualification period.

Status: **not legally binding**

84. 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 (former section 160APHU).

Related payment rule

85. In order to determine the relevant qualification period, it is necessary to determine whether, under the Scheme of Arrangement, you or an associate have made, were under an obligation to make, or are likely to make, a related payment in respect of the Special Dividend (former subsection 160APHN(2)).

86. Examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA are set out in former section 160APHN. Broadly, a related payment is where a scheme shareholder has done, or is obliged to do, anything which has the effect of passing the benefit of the dividend to one or more other persons.

87. Under the terms of the Scheme Implementation Deed, the Scheme Consideration was reduced by the amount of the Special Dividend which SILK paid to its shareholders. The reduction of the Scheme Consideration payable by API, calculated with reference to the amount of the Special Dividend, has the effect of passing the benefit of the dividend from a SILK shareholder to API.

88. Therefore, you (or a partner in a partnership or a beneficiary of a trust that has an interest in SILK shares) are taken to have made a related payment in respect of the Special Dividend.

89. The relevant qualification period is thus the secondary qualification period (former paragraph 160APHO(1)(b)).

Secondary qualification period

90. The secondary qualification period is the period beginning 45 days before, and ending 45 days after, the day on which a share becomes ex dividend (former section 160APHD).

91. A share becomes ex dividend on the day after the last day on which the acquisition by a person of the share entitles them to receive the dividend (former subsection 160APHE(1)).

92. In respect of the Special Dividend, the last day on which a person who held a SILK share was entitled to receive the Special Dividend was the Special Dividend Record Date (21 November 2023). It follows that the SILK shares became ex dividend (for the purposes of former subsection 160APHE(1)) on 22 November 2023.

93. Accordingly, the secondary qualification period is the period beginning 45 days before, and ending 45 days after 22 November 2023, namely 8 October 2023 to 6 January 2024.

Holding period rule

94. The holding period rule requires that you hold your SILK shares, on which the Special Dividend was paid, at risk for a continuous period of at least 45 days during the relevant qualification period (former paragraph 160APHO(2)(a)).

Status: **not legally binding**

95. Any days on which you have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM) in respect of your SILK shares are excluded, but the exclusion is not taken to break the continuity period during which you held the shares (former subsection 160APHO(3)). You are taken to have materially diminished risks of loss or opportunities for gain on a particular day with respect to your SILK shares if your net position on that day in relation to the shares has less than 30% of those risks and opportunities (former subsection 160APHM(2)).

96. Under the Scheme of Arrangement, you ceased to hold your SILK shares at risk on the Scheme Record Date of 22 November 2023, because on that day you became committed to dispose of your SILK shares in exchange for the Scheme Consideration.

97. Therefore, you will be a qualified person in relation to the Special Dividend if you held your SILK shares at risk from 8 October 2023 to 21 November 2023 (inclusive) for a continuous period. You will need to determine, having regard to your personal circumstances, whether during that period there were any days where you had materially diminished risks of loss or opportunities for gain in respect of your SILK shares, resulting in the holding period rule not being satisfied.

98. The period of 45 days does not include the day on which your SILK shares were acquired or the day of disposal (former paragraph 160APHO(2)(a)). Therefore, you will not be a qualified person in relation to the Special Dividend if you acquired your SILK shares on 8 October 2023.

99. The small shareholder exception in former section 160APHT does not apply as you are taken to have made a related payment in respect of the Special Dividend.

Exempting entity

100. You are not entitled to a tax offset in respect of the franking credit on the dividend if the Special Dividend was a distribution by an exempting entity (section 208-195).

101. SILK was not an exempting entity at the Special Dividend Payment Date as less than 95% of the accountable membership interests or accountable partial interests held in SILK were held by foreign residents at that date (section 208-20 and subsection 208-25(1)) nor was SILK a former exempting entity at the Special Dividend Payment Date as SILK had never been an exempting entity before that date (section 208-50).

102. Accordingly, section 208-195 will not apply to deny the gross up of your assessable income by the amount of the franking credits attached to the Special Dividend, nor to deny the tax offset to which you may otherwise be entitled.

Refundable tax offset

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

104. Under section 67-25, the following entities are excluded from the operation of the refundable tax offset rules:

- trustees of non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A))
- trustees of a trust who are liable to be assessed under sections 98 or 99A (subsection 67-25(1B))

Status: **not legally binding**

- corporate tax entities, unless you are an exempt institution that is eligible for a refund, or a life insurance company that has received the Special Dividend on the SILK shares which were not held by you on behalf of your shareholders (subsections 67-25(1C) and (1D)), and
- non-resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

105. Where a tax offset that is subject to the refundable tax offset rules in Division 67 exceeds your income tax liability, you are entitled to a refund of the difference (table item 40 in subsection 63-10(1)). Division 63 sets out the rules on how, and in what order, tax offsets are applied against income tax liability.

Anti-avoidance and integrity provisions

Section 177EA

106. Section 177EA is a general anti-avoidance provision that applies if one of the purposes (other than an incidental purpose) of a particular scheme is to enable a taxpayer to obtain an imputation benefit (paragraph 177EA(3)(e)).

107. It is considered that the conditions for applying section 177EA are not satisfied in relation to SILK's payment of the Special Dividend. In particular, having regard to the relevant circumstances of the scheme (as prescribed by subsection 177EA(17)), it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling SILK shareholders to obtain an imputation benefit.

108. Therefore, the Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits received by SILK shareholders in relation to the Special Dividend.

Section 204-30

109. Section 204-30 applies where a corporate tax entity streams the payment of dividends to its members in such a way that members to whom distributions are streamed derive a greater benefit from franking credits than another member entity. The term 'derive a greater benefit from franking credits' is defined in subsection 204-30(8) by reference to the ability of the members to fully use imputation benefits.

110. Under the scheme, you received an imputation benefit when the Special Dividend was paid to you. The dividend was paid equally to all SILK shareholders and was fully franked regardless of the tax profiles of SILK's shareholders. Accordingly, it cannot be said that SILK selectively directed the flow of franked dividends to certain members.

111. 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 you as a SILK shareholder in relation to the Special Dividend.

Status: **not legally binding**

Capital gains tax consequences

CGT event A1

112. 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)).

113. The acquisition of your SILK shares under a court-approved Scheme of Arrangement does not involve a disposal of shares under a contract (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?*).

114. Therefore, CGT event A1 happened when there was a change of ownership in your SILK shares to API under the Scheme Implementation Deed (subsections 104-10(1) and (2)). The change of ownership occurred on the Scheme Implementation Date of 29 November 2023 (paragraph 104-10(3)(b)).

115. A shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a SILK share are more than the cost base of the share. A shareholder makes a capital loss if the capital proceeds are less than the reduced cost base of the SILK share (subsection 104-10(4)).

Capital proceeds

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

117. 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 (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*).

118. The Special Dividend was not paid in respect of the disposal of SILK shares under the Scheme of Arrangement. The Scheme of Arrangement was not conditional on the declaration of the dividend. The Special Dividend was not dependent on API or a third party financing or facilitating payment of the dividend, or API or a third party being obliged to bring about the result that the dividend would be paid to existing shareholders.

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

120. Therefore, the capital proceeds that you received from CGT event A1 happening on the disposal of each SILK share is the Scheme Consideration of \$3.35 per SILK share less the Special Dividend of \$0.10 per SILK share, being \$3.25 per SILK share.

Status: **not legally binding**

Foreign-resident shareholders

121. If you are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens, you disregard a capital gain or capital loss you make from the CGT event provided the CGT event happens in relation to a CGT asset that is not taxable Australian property (subsection 855-10(1)).

122. The term 'taxable Australian property' is defined to include an indirect Australian real property interest (section 855-15). A membership interest held by an entity in another entity at a time is an indirect Australian real property interest at the time if the interest passes the non-portfolio interest test and the principal asset test (subsection 855-25(1)).

123. At the Scheme Implementation Date, no non-resident SILK shareholder owned, individually or together with associates, more than 10% of SILK's ordinary shares. Therefore, the non-portfolio interest test is not satisfied (section 960-195).

124. As the sum of the market values of SILK's taxable Australian real property assets did not exceed the sum of the market value of its non-taxable Australian real property assets at the time the CGT event occurred, the principal asset test is not satisfied (section 855-30).

125. As the non-portfolio interest test and the principal asset test are not met, your SILK share is not an indirect Australian real property interest, and therefore not taxable Australian property.

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

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

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

127. This paragraph sets out the details of the provisions of the Income Tax Assessment Acts ruled upon or referenced in this Ruling.

Table 2: Provisions of the Income Tax Assessment Act 1936 and the Income Tax Assessment Act 1997 ruled upon or referenced in this Ruling

<i>Income Tax Assessment Act 1936</i>	subsection 6(1)
<i>Income Tax Assessment Act 1936</i>	subsection 44(1)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(a)(i)
<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(b)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(b)(i)
<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(c)
<i>Income Tax Assessment Act 1936</i>	subparagraph 44(1)(c)(i)
<i>Income Tax Assessment Act 1936</i>	section 98
<i>Income Tax Assessment Act 1936</i>	section 99A
<i>Income Tax Assessment Act 1936</i>	section 128B
<i>Income Tax Assessment Act 1936</i>	subsection 128B(1)
<i>Income Tax Assessment Act 1936</i>	paragraph 128B(3)(ga)
<i>Income Tax Assessment Act 1936</i>	subparagraph 128B(3)(ga)(i)
<i>Income Tax Assessment Act 1936</i>	subsection 128B(3E)
<i>Income Tax Assessment Act 1936</i>	section 128D
<i>Income Tax Assessment Act 1936</i>	Division 1A of former Part IIIA
<i>Income Tax Assessment Act 1936</i>	former section 160APHD
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHE(1)
<i>Income Tax Assessment Act 1936</i>	former section 160APHM
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHM(2)
<i>Income Tax Assessment Act 1936</i>	former section 160APHN
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHN(2)
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHO(1)
<i>Income Tax Assessment Act 1936</i>	former paragraph 160APHO(1)(b)
<i>Income Tax Assessment Act 1936</i>	former paragraph 160APHO(2)(a)
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHO(3)
<i>Income Tax Assessment Act 1936</i>	former section 160APHT
<i>Income Tax Assessment Act 1936</i>	former section 160APHU
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHU(1)
<i>Income Tax Assessment Act 1936</i>	section 177EA
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(3)(e)

Status: **not legally binding**

<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 177EA(17)
<i>Income Tax Assessment Act 1997</i>	Division 63
<i>Income Tax Assessment Act 1997</i>	section 63-10
<i>Income Tax Assessment Act 1997</i>	subsection 63-10(1)
<i>Income Tax Assessment Act 1997</i>	Division 67
<i>Income Tax Assessment Act 1997</i>	section 67-25
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1A)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1B)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1C)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1DA)
<i>Income Tax Assessment Act 1997</i>	section 104-10
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(1)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(2)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(3)
<i>Income Tax Assessment Act 1997</i>	paragraph 104-10(3)(b)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(4)
<i>Income Tax Assessment Act 1997</i>	subsection 104-165(3)
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-C
<i>Income Tax Assessment Act 1997</i>	section 115-10
<i>Income Tax Assessment Act 1997</i>	subsection 115-25(1)
<i>Income Tax Assessment Act 1997</i>	subsection 116-20(1)
<i>Income Tax Assessment Act 1997</i>	section 202-40
<i>Income Tax Assessment Act 1997</i>	section 202-45
<i>Income Tax Assessment Act 1997</i>	section 204-30
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(3)(c)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(8)
<i>Income Tax Assessment Act 1997</i>	Division 207
<i>Income Tax Assessment Act 1997</i>	section 207-20
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(1)
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(2)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(1)
<i>Income Tax Assessment Act 1997</i>	section 207-45
<i>Income Tax Assessment Act 1997</i>	subsection 207-45(1)
<i>Income Tax Assessment Act 1997</i>	section 207-70

Status: **not legally binding**

<i>Income Tax Assessment Act 1997</i>	section 207-75
<i>Income Tax Assessment Act 1997</i>	subsection 207-75(2)
<i>Income Tax Assessment Act 1997</i>	section 207-145
<i>Income Tax Assessment Act 1997</i>	subsection 207-145(1)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(a)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(d)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(da)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(db)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(e)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(f)
<i>Income Tax Assessment Act 1997</i>	section 208-20
<i>Income Tax Assessment Act 1997</i>	subsection 208-25(1)
<i>Income Tax Assessment Act 1997</i>	section 208-50
<i>Income Tax Assessment Act 1997</i>	section 208-195
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	Subdivision 842-I
<i>Income Tax Assessment Act 1997</i>	subsection 855-10(1)
<i>Income Tax Assessment Act 1997</i>	section 855-15
<i>Income Tax Assessment Act 1997</i>	subsection 855-25(1)
<i>Income Tax Assessment Act 1997</i>	section 855-30
<i>Income Tax Assessment Act 1997</i>	section 960-115
<i>Income Tax Assessment Act 1997</i>	section 960-195
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)

Status: **not legally binding**

References

Related Rulings/Determinations:

TR 2010/4; TD 2002/4

Legislative references:

- Corporations Act 2001 Pt 5.1

ATO references

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