


CR 2013/95 - Income tax: The Trust Company Limited Scheme of Arrangement and Special Dividend

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Class Ruling

Income tax: The Trust Company Limited Scheme of Arrangement and Special Dividend

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

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

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

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

What this Ruling is about

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

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - subsection 44(1) of the ITAA 1936;
 - section 128B of the ITAA 1936;
 - section 128D of the ITAA 1936;
 - former section 160APHM of the ITAA 1936;
 - former section 160APHN of the ITAA 1936;
 - Division 1A of former Part IIIAA of the ITAA 1936;
 - section 177EA of the ITAA 1936;

- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997;
- subsection 110-25(2) of the ITAA 1997;
- subsection 110-55(2) of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- subsection 207-35(1) of the ITAA 1997;
- section 207-75 of the ITAA 1997;
- section 207-145 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is the ordinary shareholders of The Trust Company Limited (TTC) at the time of the Scheme of Arrangement who:

- (a) hold their shares in TTC (TTC shares) on capital account;
- (b) participate in the scheme and receive the Scheme Consideration for the disposal of their TTC shares to Perpetual Limited (Perpetual);
- (c) acquired their TTC shares on, or after, 20 September 1985;
- (d) are not 'temporary residents' of Australia within the meaning of section 995-1 at that time;
- (e) in respect of foreign resident shareholders – have not used their TTC Shares at any time in carrying on a business through a permanent establishment in Australia;
- (f) are not 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of these expressions in Subdivision 124-M; and

- (g) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their TTC Shares.

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

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 38 of this Ruling.

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

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

Date of effect

7. This Ruling applies from 7 May 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

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

- the application for a Class Ruling received on 6 June 2013;
- Scheme Implementation Agreement dated 7 May 2013, as amended by deed dated 9 September 2013;
- draft Scheme Booklet of the Trust Company Limited;

- Amending deed – Scheme Implementation Agreement;
- Summary of amendments to the Scheme Implementation Agreement; and
- other information and documents 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

TTC

9. TTC is a resident of Australia for income tax purposes. It is listed on the Australian Securities Exchange (ASX).
10. TTC is a professional trustee company that provides services to individuals, corporates and the philanthropic sector.
11. TTC's clients include major financial institutions, listed property groups and public sector pension funds, across Australia, Asia, Europe and North America.
12. At the date of the Scheme Booklet, TTC have 33,657,334 ordinary shares on issue.

Perpetual

13. Perpetual is an Australian entity listed on the ASX.
14. Perpetual is an independent and diversified financial services group providing specialised investment management, wealth advice and corporate fiduciary services to individuals, families, financial advisers and institutions.
15. The wholly owned subsidiary of Perpetual (Perpetual Sub) that will acquire all of the TTC shares is also an Australian public company limited by shares.

Disposal of TTC shares

The Scheme of Arrangement

16. On 7 May 2013, Perpetual and TTC entered into the Scheme Implementation Agreement (SIA) under which Perpetual proposed to acquire all the issued shares in TTC by way of a Scheme of Arrangement under Part 5.1 of the *Corporations Act 2001* (Cth).
17. Perpetual Sub will acquire all of the TTC shares from TTC shareholders under the Scheme.

18. For the Scheme to be approved, votes in favour of the Scheme must be received from:

- more than 50% of TTC shareholders present and voting at the Scheme Meeting on 28 November 2013; and
- TTC shareholders who together hold at least 75% of the total number of votes cast on the resolution.

The Scheme Consideration

19. Under the Scheme of Arrangement, TTC shareholders who sell their shares to Perpetual will be entitled to receive the Scheme Consideration in the form of Share Consideration, Cash Consideration of an equivalent amount, or a mix of both (at the election of the TTC shareholder).

20. The Share Consideration is 0.182 Perpetual Share for every TTC share held by TTC shareholders.

21. The Cash Consideration is the amount of the Perpetual volume weighted average price (VWAP) multiplied by 0.182 (reflecting the offer ratio for the Share Consideration).

22. TTC shareholders who elect to receive all or part of their Scheme Consideration as Cash Consideration will receive at least \$6.29 per TTC share, or a greater amount determined in accordance with the Perpetual VWAP.

23. If the aggregate amount of Cash Consideration required to be paid exceeds \$110 million, then there will be a proportional scale back and TTC shareholders will receive the balance of the Scheme Consideration in Perpetual shares.

Non-resident shareholders

24. TTC foreign resident shareholders (Foreign Shareholders) are ineligible to receive New Perpetual Shares under the Scheme of Arrangement. The New Perpetual Shares to which Foreign Shareholders will otherwise be entitled will be issued to a sale agent who will sell those shares on-market and remit the net sale proceeds to the Foreign Shareholders.

The Special Dividend

25. Subject to the Scheme approval, TTC will pay TTC shareholders a Special Dividend of \$0.22 per TTC Share.

26. The Special Dividend is a frankable distribution within the meaning of section 202-40 and it will be fully franked.

27. The Special Dividend will be debited against retained earnings of TTC. The Special Dividend will not be debited against its share capital account.
28. The Special Dividend will not be funded by Perpetual, Perpetual Sub or their related entities.
29. Neither TTC shareholders nor the parties to the transaction documents effecting the Scheme have bargained for the payment of the Special Dividend in return for TTC shareholders giving up their TTC shares.
30. The Special Dividend Record Date is 11 December 2013.

Other Matters

31. All performance rights will be converted into ordinary shares or cancelled prior to the Effective Date of the Scheme.
32. There are no Foreign Shareholders, either alone or together with any associates, who beneficially hold more than 10 percent of the shares in TTC.
33. Perpetual will pay a final dividend of \$0.80 per Perpetual share for the 2013 financial year (the excluded dividend) and there will be no corresponding adjustment to the Scheme Consideration.
34. No current TTC shareholders will receive the excluded dividend.
35. TTC's interim dividend for the 2014 financial year will be paid before the Implementation Date (18 December 2013) and it will not be more than \$0.17 per TTC share.
36. The Effective Date of the Scheme is 4 December 2013.
37. The Scheme's Record Date is 13 December 2013.

Assumptions

38. Perpetual will not make a choice under subsection 124-795(4) to the effect that TTC shareholders cannot obtain roll-over under Subdivision 124-M.

Ruling

CGT consequences

CGT event A1

39. CGT event A1 happens as a result of the disposal by a TTC shareholder of their TTC shares to Perpetual (subsections 104-10(1) and 104-10(2)).

40. The time of the event is when the TTC shares are transferred to Perpetual on the Implementation Date (paragraph 104-10(3)(b)).

Capital gain or capital loss

41. A TTC shareholder makes a capital gain when CGT event A1 happens if the capital proceeds from the disposal of a TTC share exceed its cost base. A TTC shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the TTC share (subsection 104-10(4)).

Capital proceeds

42. The capital proceeds from the disposal of each TTC share is the total of the market value of the Share Consideration and/or the amount of Cash Consideration received (worked out as at the time when CGT event A1 happens) as is reasonably attributable to the disposal of the TTC share (subsection 116-20(1)).

43. The Special Dividend does not form part of the capital proceeds received by a TTC shareholder from the disposal of a TTC share.

Foreign resident shareholders

44. A foreign resident TTC shareholder who participates in the Scheme may disregard any capital gain or capital loss made when CGT event A1 happens if their share is not 'taxable Australian property' (section 855-10).

Availability of scrip for scrip roll-over – Share Consideration

45. Subject to the qualification in paragraph 46 of this Ruling, a TTC shareholder who receives Share Consideration and makes a capital gain from the disposal of their TTC shares may choose partial scrip for scrip roll-over (section 124-790).

46. Scrip for scrip roll-over cannot be chosen if any capital gain the TTC shareholder makes from the replacement Perpetual share would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

If scrip for scrip roll-over is chosen

47. If a TTC shareholder chooses scrip for scrip roll-over, that part of the capital gain that is referable to the receipt of the replacement Perpetual share is disregarded.

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

48. If a TTC shareholder does not, or cannot, choose scrip for scrip roll-over, any capital gain made from the disposal of a TTC share is not disregarded.

Discount capital gain

49. A TTC shareholder who makes a capital gain where scrip for scrip roll-over is not chosen or cannot be chosen will be eligible to treat the gain as a discount capital gain provided they satisfy the requirements of Subdivision 115-A.

Cost base of Perpetual shares

If scrip for scrip roll-over is chosen

50. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each Perpetual share is worked out by reasonably attributing to it the sum of the part(s) of the cost bases of the TTC shares exchanged for the replacement Perpetual share (subsections 124-785(2) and 124-785(4)). However, the cost base of the TTC shares must first be reduced by so much of it that is reasonably attributable to the Cash Consideration (subsection 124-785(3)).

51. In working out the amount of the cost base of a TTC share that is reasonably attributable to the Cash Consideration, the Commissioner accepts the following method:

$$\text{Cost base of TTC shares exchanged} \times \frac{\text{Cash Consideration}}{\text{Market value of Share Consideration} + \text{Cash Consideration}}$$

52. The remaining portion of the cost base of the TTC shares is used to determine the first element of the cost base or reduced cost base for the replacement Perpetual shares received for the transfer of the TTC shares (subsections 124-785(2), 124-785(3) and 124-785(4)). The Commissioner accepts that the cost base of the Perpetual shares can be worked out using the following method:

$$\text{Cost base of TTC shares exchanged} \times \frac{\text{Market value of Share Consideration}}{\text{Market value of Share Consideration} + \text{Cash Consideration}}$$

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

53. 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 Perpetual share received is equal to the market value of the part(s) of the TTC shares given in exchange for the Perpetual Share

(subsections 110-25(2) and 110-55(2)). The Commissioner accepts the following method for working out the relevant part of the TTC shares given in exchange for Perpetual Shares:

$$\text{Market value of TTC shares exchanged} \times \frac{\text{Market value of Share Consideration}}{\text{Market value of Share Consideration} + \text{Cash Consideration}}$$

Acquisition date of Perpetual shares

54. TTC shareholders will acquire their Perpetual shares on the date those shares are allotted or issued to each TTC shareholder.

55. However, for the purposes of determining eligibility to a discount capital gain, TTC shareholders who choose scrip for scrip roll-over are taken to have acquired their Perpetual shares when they acquired the corresponding TTC shares (item 2 of the table in subsection 115-30(1)).

The Special Dividend

56. The Special Dividend of \$0.22 per TTC share paid to a TTC shareholder constitutes a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

57. A TTC shareholder who receives the fully franked Special Dividend and is a resident of Australia, as defined in subsection 6(1) of the ITAA 1936, is required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross up and tax offset

58. A TTC shareholder who receives the fully franked Special Dividend and who satisfies the residency requirements in section 207-75:

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

under section 207-20, subject to the shareholder being a qualified person.

59. Where the fully franked Special Dividend is received by a TTC shareholder (not being an entity taxed as a corporate tax entity) who is a trustee of a trust (not being a complying superannuation fund) or a partnership, the trustee of the trust or the partnership is required to include an amount equal to the franking credit attached to the Special Dividend as assessable income under subsection 207-35(1), subject to the trustee or the partnership being a qualified person.

Qualified persons

60. The payment of the Special Dividend as part of the Scheme will constitute a related payment within the meaning of former section 160APHN of the ITAA 1936.

61. Accordingly, each TTC shareholder will need to hold their TTC shares 'at risk' for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person in respect of the Special Dividend.

62. Each TTC shareholder will no longer be considered to hold their TTC shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 as from the Scheme Record Date of 13 December 2013.

63. Therefore, a TTC shareholder will be a qualified person in relation to the Special Dividend if, from 28 October 2013 to 12 December 2013 inclusive, the TTC shareholder continues to hold their TTC shares and do not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of their TTC shares.

Refundable tax offset

64. The franking credit allocated to the Special Dividend is subject to the refundable tax offset rules in Division 67, provided the TTC shareholder is not excluded by the operation of section 67-25.

Non-resident shareholders

65. A TTC shareholder who receives the Special Dividend and is a non-resident (other than those carrying on business in Australia at or through a permanent establishment in Australia) is not required to include the Special 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).

The anti-avoidance provisions

66. 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 paid in relation to a TTC share.

67. Section 207-145 will not apply to the whole, or any part, of the Special Dividend received by TTC shareholders.

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

Commissioner of Taxation4 December 2013

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.*

CGT consequences

69. The Ruling section details the tax consequences and the relevant legislative provisions that relate to this Scheme.

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

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

- (a) shares in a company are exchanged for shares in another company;
- (b) the exchange occurs as part of a single arrangement;
- (c) conditions for roll-over are satisfied;
- (d) further conditions are not applicable or are satisfied;
and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

72. Under the Scheme, the conditions for roll-over under Subdivision 124-M are satisfied. Therefore, a TTC shareholder who receives Share Consideration is able to choose partial scrip for scrip roll-over for the Perpetual shares they receive in exchange for their TTC shares. There is no roll-over available for the cash proceeds (section 124-790).

CGT event A1

73. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10). This 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)).

74. CGT event A1 happens when a TTC shareholder disposes of their TTC shares to Perpetual under the Scheme (subsections 104-10(1) and 104-10(2)). The disposal occurs on the Scheme Implementation Date of 18 December 2013 when the shares are disposed of by TTC shareholders (paragraph 104-10(3)(b)).

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

76. A TTC shareholder makes a capital gain when CGT event A1 happens if the capital proceeds from the disposal of their TTC share exceeds its cost base. A TTC shareholder makes a capital loss if those capital proceeds are less than the reduced cost base of the TTC share (subsection 104-10(4)).

Capital proceeds

77. The capital proceeds include the money and property received or entitled to be received by a TTC shareholder in respect of the event happening (subsection 116-20(1)).

78. 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' of a CGT event merely because it is received in association with the event.

79. The Special Dividend will be debited against retained earnings of TTC. Neither TTC shareholders nor the parties to the transaction documents effecting the Scheme have bargained for the payment of the Special Dividend in return for TTC shareholders giving up their TTC shares.

80. Although the payment of the Special Dividend of \$0.22 per TTC share is contingent on the Scheme proceeding, the Special Dividend will be funded exclusively by TTC and not funded directly or indirectly by the prospective acquirer Perpetual, Perpetual Sub or their related entities. The prospective acquirer did not influence TTC's decision to pay the Special Dividend.

81. Therefore, the Special Dividend does not form part of the capital proceeds which a TTC shareholder receives as a result of CGT event A1 happening. The Scheme Consideration received per share constitutes the capital proceeds.

Discount capital gain

82. If a TTC shareholder makes a capital gain from the disposal of their TTC shares, the shareholder may be eligible to treat the capital gain as a discount capital gain provided that all relevant requirements of Division 115 are met.

83. One of those requirements is that the capital gain must result from a CGT event happening to a CGT asset that was acquired by the entity making the capital gain at least 12 months before the CGT event (subsection 115-25(1)).

84. This means that TTC shares will have to be acquired by TTC shareholders at least 12 months before the date of disposal under the Scheme, being the Scheme Implementation Date.

Foreign resident shareholders

85. 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'.

86. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these 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; and
- Item 5 a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

87. Items 1, 3, 4 and 5 are not relevant in this case and only item 2 is considered.

88. Item 2 of the table in section 855-15 defines taxable Australian property to include an indirect Australian real property interest. An indirect Australian real property interest under section 855-25 is an interest held by an entity in another entity if it passes:

- the non-portfolio interest test under section 960-195; and
- the principal asset test in section 855-30.

89. The non-portfolio interest test under section 960-195 is as follows:

An interest held by an entity (the holding entity) in another entity (the test entity) passes the non-portfolio interest test at a time if the sum of the direct participation interests held by the

holding entity and its associates in the test entity at that time is 10% or more.

90. A foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event A1 happens under the Scheme, cannot disregard under subsection 855-10(1) a capital gain or capital loss from CGT event A1 happening if their shares in TTC are indirect Australian real property interests (item 2 of the table in section 855-15).

91. TTC has advised that, just before the Scheme was implemented, there were no foreign residents, either alone or together with any associates, who beneficially hold more than 10% of the shares in TTC. Accordingly, none of the TTC shares disposed of as a part of the Scheme passes the non-portfolio interest test. Consequently, TTC shares held by non-residents do not constitute indirect Australian real property interests.

92. Since the first condition of an indirect Australian real property interest under section 855-25 is not satisfied, it is not necessary to consider the application of the principal asset test. The TTC shares do not constitute 'taxable Australian property' of foreign resident shareholders.

The Special Dividend

93. 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.

94. The Special Dividend is a distribution in money made by TTC to its ordinary shareholders.

95. Paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 however excludes from the definition of 'dividend' any:

Moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company...

96. The Special Dividend will be sourced entirely from TTC's retained earnings and TTC will not debit the Special Dividend to its share capital account. Therefore, the exclusion in paragraph (d) does not apply and the Special Dividend will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Special Dividend

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

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

Gross up and tax offset

99. Subject to the TTC shareholder being a qualified person where the Special Dividend is received directly by a TTC shareholder, and the TTC shareholder satisfies the residency requirement in section 207-25, the TTC shareholder:

- is required to include in their assessable income an amount equal to the franking credit received in relation to the Special Dividend under subsection 207-20(1); and
- will be entitled to a tax offset equal to the amount of the franking credit under subsection 207-20(2).

100. Where the Special Dividend is received by a TTC shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

If:

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

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

101. Therefore, subject to satisfying the qualified person rule, a TTC shareholder that is a trust or a partnership is required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1).

Qualified persons

102. Under paragraph 207-145(1)(a), 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 allocated to the dividend.

103. Division 1A of former Part IIIAA of the ITAA 1936 (former Division 1A) contains the holding period rule and the related payments rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' in respect of a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

104. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) of the ITAA 1936 as follows:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a qualified person in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of a taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification period in relation to the dividend.

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

Related payment rule

106. In order to determine the relevant qualification period, it is necessary to determine whether, under the present arrangement, the TTC shareholders are considered to be under an obligation to make a related payment.

107. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A. Former subsection 160APHN(2) of the ITAA 1936 states:

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

108. Former subsection 160APHN(3) of the ITAA 1936 explains:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other persons:

- (a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or
- (b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or the other persons; or
- (c) causing services to be provided to, or in accordance with the directions of, the other person or other persons; or
- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or
- (e) allowing any property or money to be used by the other person or other persons or by someone nominated by the other person or other persons; or
- (f) 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; or
- (g) agreeing to treat an amount or amounts owed to the other person or other persons by the taxpayer or associate as having been increased.

109. Former subsection 160APHN(4) of the ITAA 1936 states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or

- (f) is calculated by reference to;
the amount of dividend or distribution.

110. In the current case, an integral part of the Scheme is the payment of the Special Dividend of \$0.22 per share. The payment of the Special Dividend is conditional on the Scheme proceeding tying the payment of the Special Dividend to the disposal of the TTC shares.

111. Therefore, having regard to the relevant circumstances of the Scheme, it is considered that TTC shareholders are doing something, are under an obligation to do something, or are likely to do something that has the effect of passing the benefit of the Special Dividend to another person for the purposes of former subsection 160APHN(3) of the ITAA 1936.

Holding period rule

112. As TTC shareholders are taken, for the purposes of former Division 1A, to have made or be likely to make a related payment in respect of the Special Dividend, the relevant holding period is the secondary qualification period under former paragraph 160APHO(1)(b) of the ITAA 1936.

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

In relation to a taxpayer in relation to shares or an interest in shares, means:

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

114. 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.

115. The ex-dividend date of the Special Dividend for tax purposes is 12 December 2013 under former section 160APHE of the ITAA 1936.

116. The secondary qualification period thus runs from 45 days before the ex dividend date of 12 December 2013 and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 28 October 2013 to 26 January 2014.

117. However, former subsection 160APHO(3) of the ITAA 1936 also provides that any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of their shares are to be excluded.

118. A TTC shareholder's entitlement to participate in the Scheme is determined on the Scheme Record Date of 13 December 2013. It is considered that once a TTC shareholder is identified as a TTC shareholder on the Scheme Record Date, that TTC shareholder would no longer be considered to hold their shares.

119. Accordingly, for a TTC shareholder who disposes of their TTC shares under the Scheme, the secondary qualification period runs from 28 October 2013 to 26 January 2014 (inclusive). A TTC shareholder who receives the Special Dividend will need to hold their shares at risk for at least 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A.

Refundable tax offset

120. TTC shareholders who are entitled to a tax offset under subsection 207-20(2), in respect of the franking credit received, are also subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

121. Under 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))
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the company on behalf of its shareholders (subsections 67-25(1C) and 67-25(1D)); and
- foreign resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

122. Accordingly, a holder of TTC shares is subject to the refundable tax offset rules unless they are specifically excluded under section 67-25. Generally, corporate tax entities (including companies, corporate limited partnerships, corporate unit trusts, and public trading trusts) will be excluded from the operation of the refundable tax offset rules.

Non-resident shareholders

123. 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.

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

125. 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.

126. 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 non-resident TTC shareholders.

The anti-avoidance provisions***Section 204-30***

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

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

128. If section 204-30 applies, the Commissioner may make a determination in writing:

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

129. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

130. Under the Scheme, all TTC shareholders will receive an imputation benefit as a result of the Special Dividend. Subject to being 'qualified persons', Australian resident TTC shareholders will receive an imputation benefit in the form of a tax offset (paragraph 204-30(6)(a)). Non-resident TTC shareholders will receive an imputation benefit in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). Resident TTC shareholders will derive a greater benefit from franking credits than the non-resident shareholders.

131. However, the Special Dividend will be paid to all TTC shareholders identified at the Record Date and it is fully franked. Accordingly, it cannot be concluded that TTC intends to direct the flow of distributions in such a manner as to stream the imputation benefits to members that derive a greater benefit from the franking credits attached to the Special Dividend, while other members receive lesser or no imputation benefits.

132. As the conditions in subsection 204-30(1) are not met in respect of the Special Dividend, 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 respect of the Special Dividend.

Section 207-145

133. Paragraph 207-145(1)(d) applies where a franked distribution is made as part of a dividend stripping operation. Section 207-155 defines a dividend stripping operation as being a scheme that:

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

134. Having regard to the purpose of the scheme under which the TTC shareholders dispose of their TTC shares to Perpetual, the Scheme is not considered to be a scheme by way of, or in the nature of, dividend stripping, or a scheme having substantially the effect of a scheme by way of, or in the nature of, dividend stripping to which subsection 207-145(1) is applicable.

Section 177EA of the ITAA 1936

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

136. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA of the ITAA 1936 applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, a person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

137. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a) of the ITAA 1936) or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

138. TTC is a corporate tax entity. The disposal of the ordinary shares in TTC under the Scheme is a scheme for the disposition of membership interests. The fully franked Special Dividend is a frankable distribution that is paid to TTC shareholders (the relevant taxpayers) as a part of this Scheme and who could, therefore, reasonably be expected to receive imputation benefits.

139. Consequently, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(17) of the ITAA 1936), it would be concluded that, on the part of TTC, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the Scheme.

140. 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 there encompass a range of situations which, taken individually or collectively, could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may not be present at any one time in any one scheme.

141. The relevant circumstances of the Scheme include the fact that the disposition of the ordinary shares in TTC is made pursuant to a transfer of shares to Perpetual by way of a Scheme of Arrangement under the *Corporations Act 2001* voted upon by TTC's existing shareholders.

142. The Special Dividend is fully franked and is paid to the existing TTC shareholders in proportion to their shareholding, and irrespective of their ability to utilise the relevant franking credits. The Special Dividend allows TTC shareholders to share in the accumulated profits of TTC.

143. In considering the manner, form and substance of the Scheme, it is considered that the Scheme was not entered into by TTC or TTC shareholders for more than an incidental purpose of enabling participating shareholders to obtain imputation benefits.

144. Having regard to the relevant circumstances of the Scheme, the Commissioner has come to the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

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