


CR 2016/33 - Income tax: off-market takeover of Sedgman Limited and payment of Interim and Special Dividends

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Class Ruling

Income tax: off-market takeover of Sedgman Limited and payment of Interim and Special Dividends

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

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

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

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

What this Ruling is about

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

Relevant provisions

2. The relevant provisions dealt with in this Ruling are:

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

- Division 115 of the ITAA 1997
- section 116-20 of the ITAA 1997
- section 204-30 of the ITAA 1997
- Division 207 of the ITAA 1997, and
- section 208-195 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies are the holders of ordinary shares in Sedgman Limited (Sedgman) who:

- (a) were entitled to participate in the off-market takeover offer under which CIMIC Group Investments Pty Limited (CGI) acquired Sedgman's shares (the Offer) and:
 - (i) received or were entitled to receive the Interim Dividend and Special Dividend (the Dividends) and the holder:
 - (1) accepted the Offer; or
 - (2) did not accept the Offer and had their Sedgman shares compulsorily acquired; or
 - (ii) did not receive or were not entitled to receive the Dividends and accepted the Offer; and
 - (b) held their Sedgman shares on capital account
 - (c) are not subject to the Investment Manager Regime under Subdivision 842-I in respect of their Sedgman shares
 - (d) are not non-residents who carry on a business at or through a permanent establishment in Australia
 - (e) did not acquire their shares pursuant to the vesting of Long Term Incentive Share Plan (LTIP) performance rights on 25 February 2016 and
 - (f) are not subject to the Taxation of Financial Arrangements rules under Division 230 in respect of their Sedgman shares
- (Note:** Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them)

In this Ruling, an entity belonging to this class of entities is referred to as a Sedgman shareholder.

Qualifications

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

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

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

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

Date of effect

7. This Ruling applies from 1 July 2015 to 30 June 2016. The Ruling continues to apply after this date 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 the following information:

- The application for a Class Ruling received on 23 March 2016
- Public announcements by CGI and Sedgman
- Correspondence and documents provided by the Applicant between 2 February to 23 March 2016

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

Relevant entities

Sedgman

9. Sedgman is an Australian incorporated, publically listed company that provides mineral processing and associated infrastructure solutions to the global resources industry.
10. Sedgman was established in 1979 and listed on the Australian Stock Exchange (ASX) in 2006. As at 31 December 2015 Sedgman had 227,059,277 ordinary shares on issue.
11. On 25 February 2016 Sedgman issued 9,694,683 additional ordinary shares as a result of the vesting of rights under its Long Term Incentive Share Plan (LTIP) (refer to paragraph 27).
12. Each Sedgman share carries the same rights in relation to voting power, rights to dividends and rights to capital distributions.
13. As at 31 December 2015 approximately 4.37% of Sedgman shares were identified as held by non-resident entities and approximately 78.76% of Sedgman shares were identified as held by Australian resident entities. Approximately 16.87% was unanalysed.

CGI

14. CGI is a wholly owned subsidiary of CIMIC Group Limited (CIMIC) and is the largest shareholder in Sedgman. Before the Offer, CGI held 36.99% of the shares in Sedgman.
15. CIMIC is a public company incorporated in Australia and listed on the Australian Stock Exchange.

The Offer

16. On 13 January 2016, CIMIC through its wholly owned subsidiary CGI, announced its intention to make an unconditional off market offer to acquire all of the shares in Sedgman.
17. On 8 February 2016 CGI released its final Bidder Statement to make a formal Offer of \$1.07 per share (Offer Consideration) to acquire all Sedgman shares.
18. The Offer was open for acceptance from 8 February 2016 until 7:00pm (AEDT) 9 March 2016 (Offer Period), unless withdrawn or the Offer Period extended in accordance with the *Corporations Act 2001* (Cth). The Offer Period was extended until 18 March 2016.
19. On 11 February 2016 Sedgman declared the payment of a fully franked Interim Dividend of \$0.035 and a fully franked Special Dividend of \$0.088.
20. On 22 February 2016 CGI announced that the Offer Price would be reduced by the amount of the Interim Dividend and the Special Dividend to \$0.947 for any acceptances of the Offer received on or after 23 February 2016.

The Interim Dividend and Special Dividend

21. The Interim Dividend and Special Dividend were paid out of Sedgman's retained profits derived from its trading activities.
22. The Record Date for both the Interim and Special Dividend was 25 February 2016.
23. The Interim Dividend and the Special Dividend were paid on 7 March 2016.
24. The Interim Dividend and Special Dividend reflected a distribution of profits that had accrued prior to the Offer being implemented. The Interim Dividend and Special Dividend were debited against Sedgman's retained profits.
25. No financial support was provided by CGI in relation to the Dividend payments.
26. Sedgman's past distribution pattern and dividend policy was such that a dividend was generally paid twice a year. Additionally, under changes announced on 27 August 2015 to Sedgman's dividend policy and capital management plan, Sedgman proposed to pay dividends in respect of each half year period equal to 100% of accounting net profit after tax together with a Special Dividend of \$0.022 per ordinary dividend.

Other relevant facts

27. On 25 February 2016, Sedgman issued 9,694,683 ordinary shares in relation to the vested performance rights under the LTIP to 16 eligible participants. Each of these participants in receipt of these shares accepted the Offer before the close of business on 25 February 2016.
28. On 11 March 2016 CGI announced it had acquired a relevant interest in more than 90% of all Sedgman's shares and decided to exercise the right to compulsorily acquire the remaining shares in Sedgman on the same terms as those that applied to the Offer at Offer Consideration of \$0.947 per share.
29. On 15 April 2016, Sedgman was delisted from the ASX following confirmation that the compulsory acquisition of all Sedgman's shares by CGI had completed.
30. Sedgman was not an exempting entity or former exempting entity for the purposes of section 208-20 at the time of payment of the Interim Dividend and the Special Dividend.

Ruling

The Interim Dividend and Special Dividend

31. The Interim Dividend of \$0.035 and the Special Dividend of \$0.088 paid to the Sedgman shareholders are each a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Assessability of the Interim Dividend and Special Dividend

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

33. A Sedgman shareholder who received the fully franked Interim Dividend and Special Dividend and is a non-resident is not required to include the Dividends as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and is not liable for Australian withholding tax in respect of the dividend (paragraph 128B(3)(ga) of the ITAA 1936).

Gross-up and tax offset

34. The Interim Dividend and the Special Dividend are each a frankable distribution under section 202-40.

35. A Sedgman shareholder who received the Interim Dividend and the Special Dividend directly and satisfies the residency requirement in section 207-75:

- must include the amount of the franking credit attached to the Interim Dividend and the Special Dividend in their assessable income; and
- is entitled to a tax offset equal to the franking credit;

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

36. A Sedgman shareholder (not being a corporate tax entity), who received the Interim Dividend and the Special Dividend as a trustee of a trust (not being a complying superannuation entity or a FHSA trust) or as a partnership, is required to include an amount equal to the franking credit attached to the Dividends in its assessable income under subsection 207-35(1), subject to the trustee or the partnership being a qualified person.

Qualified persons

37. The payment of the Interim Dividend and Special Dividend constitutes a related payment for the purposes of former section 160APHN of the ITAA 1936.

38. Accordingly, to be a 'qualified person' in relation to the Interim Dividend and the Special Dividend, a Sedgman shareholder must have held their Sedgman shares 'at risk' for a continuous period of at least 45 days in the secondary qualification period (former section 160APHO of the ITAA 1936) from 12 January 2016 to 11 April 2016 (inclusive).

39. In determining whether a Sedgman shareholder held the shares for at least 45 days in the secondary qualification period, the Sedgman shareholder does not count the day of acquisition of the shares or the day (if any) on which the shares were disposed of. The Sedgman shareholder must exclude any days on which they have materially diminished risks of loss or opportunities for gain in respect of the shares or interest.

40. Accordingly, a Sedgman shareholder who received the Dividends and who acquired their Sedgman shares on or before 11 January 2016 and held those shares 'at risk' for a continuous period from 11 January 2016 will be a qualified person in relation to the Dividends where the Offer was accepted on or after 26 February 2016.

41. A Sedgman shareholder who received the Dividends and did not accept the Offer but had their shares compulsorily acquired under the *Corporations Act 2001* will be a qualified person provided they held their Sedgman shares 'at risk' for a continuous period of at least 45 days from 12 January 2016 until the earlier of the day when the shares were compulsorily acquired by CGI or 11 April 2016 (excluding the day of acquisition of the shares and the day on which the shares were disposed of).

Refundable tax offset

42. The franking credit tax offset that an Australian resident Sedgman shareholder is entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, provided the Sedgman shareholder is not excluded by the operation of section 67-25.

43. As Sedgman was not an exempting entity or former exempting entity at the time of payment of the Interim Dividend and the Special Dividend, section 208-195 does not apply to deny the gross-up of a Sedgman shareholders' assessable income to exclude the franking credit, nor deny the tax offset to which a Sedgman shareholder would otherwise have been entitled to under Division 207 at the time when the Dividends were paid.

Capital gains tax consequences

CGT event A1

44. CGT event A1 happens when a Sedgman shareholder disposes of each of their Sedgman shares to CGI (subsections 104-10(1) and 104-10(2)).

45. The time of CGT event A1 is when a Sedgman shareholder enters into the contract to dispose of their Sedgman shares, or when the change of ownership occurs. Where a Sedgman shareholder accepted the Offer, CGT event A1 happened when a Sedgman shareholder entered into the contract to dispose of their Sedgman shares to CGI (paragraph 104-10(3)(a)).

46. Where a Sedgman shareholder did not accept the Offer and subsequently had their shares compulsorily acquired by CGI, CGT event A1 happens when CGI becomes the owner of the relevant Sedgman shares (subsection 104-10(6)).

47. A Sedgman shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Sedgman share exceed its cost base. A Sedgman shareholder makes a capital loss if those capital proceeds are less than the Sedgman share's reduced cost base (subsection 104-10(4)).

Capital proceeds

48. The capital proceeds for the disposal of a Sedgman share is the money that the Sedgman shareholder receives or is entitled to receive in respect of the event happening (subsection 116-20(1)).

49. The capital proceeds for each Sedgman share received by a Sedgman shareholder who did not receive the Dividends and who disposed of the Sedgman share under the Offer is \$1.07.

50. The capital proceeds for each Sedgman share received by a Sedgman shareholder who received the Dividends and who disposed of the Sedgman share under the Offer (whether they accepted the Offer or had their share compulsorily acquired) is \$0.947 per share (being \$1.07 reduced by the total of the Interim Dividend and the Special Dividend of \$0.123 paid on 7 March 2016).

Discount capital gain

51. If a Sedgman shareholder made a capital gain from the disposal of their Sedgman share, the Sedgman shareholder may be eligible to treat the capital gain as a discount capital gain provided all relevant requirements of Subdivision 115-A, and if applicable Subdivision 115-C are satisfied.

The anti-avoidance provisions

52. 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 Interim Dividend and the Special Dividend.

53. 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 respect of the Interim Dividend and the Special Dividend paid in relation to a Sedgman share.

Commissioner of Taxation25 May 2016

Appendix 1 – Explanation

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

The Interim Dividend and Special Dividend

54. 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.

55. The payment of the Interim Dividend and Special Dividend is a distribution of money by Sedgman to its shareholders.

56. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 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...

57. The Interim Dividend and Special Dividend was sourced from existing cash reserves and debited against Sedgman's retained profits. Sedgman did not debit the Dividends against its share capital account. Therefore, the exclusion in paragraph (d) does not apply and the Interim Dividend and Special Dividend constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the Interim Dividend and Special Dividend

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

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

59. As the Interim Dividend and Special Dividend were paid to Sedgman shareholders out of profits derived by Sedgman, Sedgman shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Interim Dividend and Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Non-resident shareholders

60. 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.

61. 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.

62. 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.

63. 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 Interim Dividend and Special Dividend are fully franked, they will not be subject to Australian withholding tax when derived by non-resident Sedgman shareholders.

64. Section 128D of the ITAA 1936 states that:

Income other than income to which section 128B applies by virtue of subsection (2A), (2C) or (9C) of that section upon which withholding tax is payable, or upon which withholding tax would, but for paragraph 128B(3)(ga) or (jb), section 128F, section 128FA or section 128GB, be payable, is not assessable income and is not exempt income of a person.

65. As the Interim Dividend and Special Dividend are income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936, it will not be assessable income and will not be exempt income of a non-resident Sedgman shareholder pursuant to section 128D of the ITAA 1936.

66. Accordingly, Sedgman shareholders who received the fully franked Interim Dividend and Special Dividend and are non-residents are not required to include the Dividends as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and are not liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

Gross up and tax offset

67. Section 207-20 provides:

- (1) If an entity makes a franked distribution to another entity, the assessable income of the receiving entity, for the income

year in which the distribution is made, includes the amount of the franking credit on the distribution. This is in addition to any other amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.

- (2) The receiving entity is entitled to a tax offset for the income year in which the distribution is made. The tax offset is equal to the franking credit on the distribution.

68. Therefore, subject to satisfying the qualified person rule, where the fully franked Interim Dividend and Special Dividend were received directly by a Sedgman shareholder, the Sedgman shareholder:

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

69. If the fully franked Interim Dividend and Special Dividend were received by a Sedgman 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 the 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.

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

Qualified person

71. Pursuant to 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 on a dividend.

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

73. Former Division 1A of Part IIIAA of the ITAA 1936 provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' in relation to a franked distribution they have received and thus be entitled to a tax offset for the franking credit on the distribution. Former Division 1A has effect via the express terms of section 207-145.

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

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

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

75. Broadly, if the Sedgman shareholders were not under an obligation to make a related payment in relation to a dividend or distribution, they would have to satisfy the holding period requirement within the primary qualification period. If the Sedgman shareholders were under an obligation to make a related payment in relation to a dividend or distribution, they would have to satisfy the holding period requirement within the secondary qualification period.

Related payment

76. In order to determine what the relevant qualification period is, it is necessary to determine whether, under the present arrangement, a Sedgman shareholder had made, or was under an obligation to make, or was likely to make, a related payment in respect of any of the Dividends they received.

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

78. 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.

79. Former subsection 160APHN(3) of the ITAA 1936 states:

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.

80. 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 the dividend or distribution.

81. Under the Offer, the Offer Consideration was reduced by the amount of the Interim Dividend and Special Dividend received by Sedgman shareholders who accepted Offer. This satisfies former

paragraphs 160APHN(3)(f) and 160APHN(4)(c) of the ITAA 1936. The reduction of the Offer Consideration has the effect of passing the benefit of the Dividends from a Sedgman shareholder to CGI.

82. A Sedgman shareholder, or a partner in a partnership, or a beneficiary of a trust that had an interest in Sedgman shares, is taken to have made, or to have been under an obligation to make, a related payment in respect of the Interim Dividend and the Special Dividend.

Holding period requirement

83. As the Sedgman shareholders are taken to have made or be likely to make a related payment in respect of the Interim Dividend and the Special Dividend, the relevant qualification period is the secondary qualification period under the former paragraph 160APHO(1)(b) of the ITAA 1936.

84. Former paragraph 160APHO(2)(a) of the ITAA 1936 provides that:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid satisfies this subsection in relation to a qualification period in relation to the shares or interest if, during the period:

- (a) where the taxpayer held the shares – the taxpayer held the shares for a continuous period (not counting the day on which the taxpayer acquired the shares or, if the taxpayer has disposed of the share, the day on which the disposal occurred) of not less than:
 - (i) if the shares are not preference shares – 45 days; or
 - (ii) if the shares are preference shares – 90 days.

85. As the Sedgman shares are not preference shares, Sedgman shareholders were required to hold their shares for at least 45 days during the secondary qualification period.

86. The former section 160APHD of the ITAA 1936 defines the 'secondary qualification period' which states:

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

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

87. The concept of 'ex dividend' is relevantly defined by former subsection 160APHE(1) of the ITAA 1936:

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.

88. The eligibility for both Dividends was determined on 25 February 2016 (Dividend Record Date). This was the last day on which acquisition by a person of a Sedgman share entitled the person to receive the Interim Dividend and the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 26 February 2016.

89. As per the definition in former section 160APHD of the ITAA 1936, the secondary qualification period begins 45 days before the ex-dividend date of 26 February 2016 and ends 45 days after that day. This means that the secondary qualification period would ordinarily run from 12 January 2016 to 11 April 2016 (45 days before and 45 days after 26 February 2016).

90. Pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which an entity had materially diminished risks of loss or opportunities for gain in respect of their Sedgman shares, or interest in Sedgman shares, are excluded from counting towards the 45 day holding period requirement. Subsection 160APHO(3) provides:

In calculating the number of days for which the taxpayer continuously held the shares or interest, any days on which the taxpayer has materially diminished risks of loss or opportunities for gain in respect of the shares or interest are to be excluded, but the exclusion of those days is not taken to break the continuity of the period for which the taxpayer held the shares or interest.

91. Sedgman shareholders who acquired their shares on or before 11 January 2016 and continued to hold the shares 'at risk' since that time, satisfied the holding period rule provided they accepted the Offer on or after 26 February 2016.

92. For Sedgman shareholders who had their shares compulsorily acquired, the secondary qualification period would run from 12 January 2016 to the date the shares were compulsorily acquired. Accordingly, during the secondary qualification period that is applicable to them, a Sedgman shareholder who received the Interim Dividend and Special Dividend must hold their shares 'at risk' for at least 45 days during the period from 12 January 2016 until the earlier of the day when the shares are compulsorily acquired or 11 April 2016 (excluding the day of acquisition of the shares and the day on which the shares were disposed of).

Refundable tax offset

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

94. Under section 67-25, there are a range of taxpayers who are specifically excluded from the operation of the refundable tax offset rules. This range of excluded entities includes:

- 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)).

95. Accordingly, a Sedgman shareholder is subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities 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.

Capital gains tax consequences

CGT event A1

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

97. Where a Sedgman shareholder accepted the Offer, CGT event A1 happened when the Sedgman shareholder entered into the contract to dispose of their Sedgman shares to CGI.

98. Where a Sedgman shareholder did not accept the Offer, but had their shares compulsorily acquired by CGI, CGT event A1 happens when CGI becomes the owner of those Sedgman shares (subsection 104-10(6)).

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

100. A Sedgman shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Sedgman share exceed its cost base. A Sedgman shareholder makes a capital loss if those capital proceeds are less than the Sedgman share's reduced cost base (subsection 104-10(4)).

Capital Proceeds

101. The capital proceeds received by a Sedgman shareholder 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)).

102. The phrase '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 or caused simply by temporal proximity. An amount is not 'capital proceeds' in respect of a CGT event merely because it is received in association with the CGT event.

103. In this case, the payment of the Interim Dividend and the Special Dividend has occurred independently of the CGI Offer. Neither Dividend was paid in respect of the disposal of Sedgman shares under the Offer. The capital proceeds from CGT event A1 happening in respect of each Sedgman share does not include the Interim Dividend or the Special Dividend.

104. The Offer Consideration for each Sedgman share under the Offer is \$1.07. The capital proceeds received by a Sedgman shareholder who disposed of Sedgman shares under the Offer and did not receive the Dividends is \$1.07 per Sedgman share.

105. The capital proceeds received by a Sedgman shareholder who disposed of Sedgman shares under the Offer and received the Dividends is \$0.947 (for each Sedgman share).

Discount capital gain

106. If a Sedgman shareholder made a capital gain from the disposal of their Sedgman share, the Sedgman shareholder may be eligible to treat the capital gain as a discount capital gain provided all relevant requirements of Division 115 are met.

107. 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)).

108. This means that a capital gain made by a Sedgman shareholder when they disposed of their Sedgman share is eligible to be treated as a discount capital gain if the shareholder acquired the Sedgman share at least 12 months before the date the Offer was accepted or the date when their shares have been compulsorily

acquired, and the other requirements in Subdivision 115-A and, if applicable, Subdivision 115-C are satisfied.

The anti-avoidance provisions

Section 204-30 (Dividend streaming)

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

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

110. Relevantly, if section 204-30 applies, the Commissioner has the discretionary powers under subsection 204-30(3) to make a written determination.

111. Subsection 204-30(3) provides:

The Commissioner may make one or more of these determinations:

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

A determination must be in writing.

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

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

114. Sedgman shareholders who received or were entitled to receive the Dividends received an imputation benefit when the Interim Dividend and the Special Dividend were paid. The imputation benefit for resident shareholders is in the form of a tax offset (paragraph 204-30(6)(a)), and for non-resident shareholders is in the form of not being liable to pay dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders may derive a greater benefit from franking credits than the non-resident shareholders.

115. However, the Interim Dividend and the Special Dividend were paid equally to all Sedgman shareholders who held their shares on the Dividend record date and were fully franked regardless of their tax profiles. Accordingly, it cannot be said that Sedgman selectively directed the flow of franked distributions to those members who could most benefit from the franking credits.

116. As the conditions in subsection 204-30(1) are 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 in relation to the Interim Dividend and the Special Dividend.

Section 177EA

117. 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.

118. 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 imputation benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

119. 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 the interest in 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, the 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.

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

- (a) the disposal of the ordinary shares in Sedgman (a corporate tax entity) pursuant to the CGI Offer is a scheme for the disposition of membership interests;
- (b) the Interim Dividend and the Special Dividend are frankable distributions that have been paid to Sedgman shareholders who held their shares on the Dividend record date in respect of their Sedgman shares;
- (c) the Interim Dividend and the Special Dividend are each a franked distribution; and
- (d) Sedgman shareholders could reasonably be expected to receive imputation benefits as a result of the Interim Dividend, and the Special Dividend.

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

122. 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 circumstances 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.

123. The Commissioner has concluded that section 177EA of the ITAA 1936 does not apply to the scheme. Having regard to the relevant circumstances of the scheme, and considering the manner, form and substance of the scheme, the Commissioner has concluded that the scheme was not entered into for the requisite purpose of enabling Sedgman shareholders to obtain an imputation benefit.

- The Interim Dividend and the Special Dividend were fully franked, which was a continuation of Sedgman's policy of paying fully franked dividends.
- The Interim Dividend and the Special Dividend were paid to all Sedgman shareholders on an equal basis in proportion to the number of shares that each Sedgman shareholder held on the relevant Record Date.

124. The relevant circumstances of the Scheme indicate that there is no requisite purpose of conferring an imputation benefit under the Scheme. Therefore, 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 Interim Dividend and the Special Dividend.

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