

# ***CR 2022/109 - Virtus Health Limited - takeover and special dividend***



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Status: **legally binding**

## Class Ruling

# Virtus Health Limited – takeover and special dividend

### **❶ Relying on this Ruling**

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

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

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### **What this Ruling is about**

1. This Ruling sets out the income tax consequences for shareholders of Virtus Health Limited (Virtus) in relation to the:
  - payment of a fully franked special dividend by Virtus on 1 July 2022 (Special Dividend), and
  - disposal of the ordinary shares in Virtus (Virtus Shares) under the off-market takeover by Oceania Equity Investments Pty Ltd as trustee of Oceania Trust and Viney BidCo Pty Ltd (BGH Bidders) under Chapter 6 of the *Corporations Act 2001* (Takeover).
2. Details of this scheme are set out in paragraphs 29 to 43 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if you:
  - held Virtus Shares on 20 June 2022 (Record Date) and received the Special Dividend
  - were entitled to participate in the BGH Bidders' off-market takeover offer to acquire Virtus Shares (BGH Offer)
  - either sold or had your Virtus Shares compulsorily acquired as part of the Takeover

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- held your Virtus Shares on capital account – that is, your Virtus Shares were neither held as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1))
- are a ‘resident of Australia’ or a ‘non-resident’ (other than a non-resident who used their Virtus Shares at any time in carrying on a business at or through a ‘permanent establishment’ in Australia) as the terms are defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- did not acquire your Virtus Shares under an employee share scheme, and
- are not subject to the investment manager regime in Subdivision 842-I in relation to your Virtus Shares.

5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 29 to 43 of this Ruling.

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

#### **When this Ruling applies**

6. This Ruling applies from 1 July 2021 to 30 June 2023.

## **Ruling**

#### **Special Dividend**

7. The Special Dividend is a ‘dividend’ as defined in subsection 6(1) of the ITAA 1936 and a frankable distribution under section 202-40.

#### **Assessability of the Special Dividend and franking credit tax offset**

##### ***Resident shareholders***

8. If you are a resident of Australia, you include the Special Dividend in your assessable income (subparagraph 44(1)(a)(i) of the ITAA 1936).

9. If you satisfy the residency requirement in section 207-75, you include the franking credits on the Special Dividend in your assessable income, and you are entitled to a tax offset equal to the amount of those franking credits (section 207-20), provided you are a ‘qualified person’ as defined in Division 1A of former Part IIIA of the ITAA 1936 (Qualified Person).

10. If you received the Special Dividend as a trustee of a trust (not being a complying superannuation entity) or as a partnership, and you are not a corporate tax entity, the franking credits on the Special Dividend are included in your assessable income, provided you are a Qualified Person (subsection 207-35(1)).

11. If you are a partner in a partnership or a beneficiary of a trust, and the Special Dividend flows indirectly through the partnership or trust to you, you include your share of the Special Dividend in your assessable income and you are entitled to a tax offset equal to your share of the franking credits on the Special Dividend, provided both you and the partnership or trust (as relevant) are each a Qualified Person (section 207-45 and former subsection 160APHU(1) of the ITAA 1936).

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12. The franking credit tax offset is refundable if you satisfy the requirements of the refundable tax offset rules in Division 67.

### ***Non-resident shareholders***

13. If you are a non-resident and the Special Dividend is not attributable to a permanent establishment in Australia, the Special Dividend is not included in your assessable income (section 128D of the ITAA 1936) and you are not liable to withholding tax in respect of the Special Dividend (paragraph 128B(3)(ga) of the ITAA 1936).

14. You do not include the amount of the franking credits on the Special Dividend in your assessable income and you are not entitled to a tax offset for those franking credits (sections 207-20 and 207-70).

### ***Qualified person***

15. Paragraph 207-145(1)(a) refers to Division 1A of former Part IIIA of the ITAA 1936, which contains the conditions you must satisfy to be a Qualified Person in relation to a franked distribution you have received. The main way in which you can be a Qualified Person is by satisfying the holding period rule.

16. The Special Dividend constitutes a 'related payment' for the purposes of former section 160APHN of the ITAA 1936. As the consideration paid by the BGH Bidders for acquiring the Virtus Shares was reduced by the amount of the Special Dividend, this reduction has the effect of passing the benefit of the Special Dividend from the shareholders of Virtus to the BGH Bidders (former subsection 160APHN(2), former paragraph 160APHN(3)(f) and former paragraphs 160APHN(4)(c) and (d) of the ITAA 1936).

17. Therefore, you are taken to have made a related payment in respect of the Special Dividend.

18. You will satisfy the holding period rule in relation to the Special Dividend only if you held your Virtus Shares for a continuous period of at least 45 days during the secondary qualification period for the Special Dividend (former paragraphs 160APHO(1)(b) and (2)(a) of the ITAA 1936).

19. The secondary qualification period begins on the 45th day before, and ends on the 45th day after, the day on which the shares became ex dividend (former section 160APHD of the ITAA 1936).

20. Former subsection 160APHE(1) of the ITAA 1936 states that a share in respect of which a dividend is to be paid 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.

21. In relation to the Special Dividend, you must have held each of your Virtus Shares for a continuous period of at least 45 days (not counting the day on which you acquired the Virtus Share or the day on which you disposed of the Virtus Share, and not counting the days, if any, on which you had 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of the Virtus Share).

22. The secondary qualification period for Virtus shareholders is from 7 May 2022 to 5 August 2022. However, if you accepted the BGH Offer, which became unconditional and closed on 27 June 2022, the days on which your shares were subject to acquisition under the BGH Offer are excluded such that the relevant period for you began on 7 May 2022 and ended on 26 June 2022.

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23. The small shareholder exception in former section 160APHT of the ITAA 1936 does not apply as the Special Dividend is a related payment (former subsection 160APHT(2) of the ITAA 1936). Therefore, a Virtus shareholder who is an individual and who has total franking credit tax offsets which do not exceed \$5,000 for the income year ended 30 June 2023 must still satisfy the holding period rule in relation to the Special Dividend.

#### ***Integrity rules relating to franking credits***

24. The Commissioner will not make a determination to deny the whole, or any part, of the imputation benefits you received in relation to the Special Dividend under:

- paragraph 177EA(5)(b) of the ITAA 1936 because the purpose condition in paragraph 177EA(3)(e) of the ITAA 1936 is not satisfied, and
- paragraph 204-30(3)(c) because there is no streaming of distributions.

#### **Capital gains tax consequences**

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

25. CGT event A1 happened when you disposed of each of your Virtus Shares to the BGH Bidders under the Takeover (section 104-10).

#### ***Resident shareholders***

26. If you are a resident of Australia, the capital proceeds you received in respect of CGT event A1 happening to your Virtus Shares is the money you received for each Virtus Share (subsection 116-20(1)). This amount does not include the Special Dividend.

27. You made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Virtus Share exceeded the cost base of that Virtus Share (subsection 104-10(4)). You made a capital loss if the capital proceeds from the disposal of a Virtus Share were less than the reduced cost base of that Virtus Share (subsection 104-10(4)).

#### ***Non-resident shareholders***

28. If you are a non-resident, or the trustee of a 'foreign trust for CGT purposes', as defined in subsection 995-1(1), just before CGT event A1 happened to your Virtus Shares, you disregard any capital gain or capital loss made as a result of CGT event A1 happening, pursuant to section 855-10, unless you are an individual and your Virtus Shares were covered by subsection 104-165(3) (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident) (table item 5 of section 855-15).

## **Scheme**

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

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**Virtus Health Limited**

30. Virtus is a company incorporated in Australia on 11 February 2008 and was listed on the Australian Securities Exchange (ASX) from 11 June 2013 to 4 August 2022.
31. Virtus has a history of paying fully franked dividends since its listing on the ASX.
32. When the BGH Offer became unconditional and closed on 27 June 2022, Virtus had 87,177,539 ordinary shares on issue.

**Acquisition of Virtus Health Limited under the Takeover**

33. On 20 April 2022, the BGH Bidders made an off-market takeover offer to acquire all Virtus Shares that were not owned by the BGH Bidders.
34. The successful BGH Offer was effective from 13 June 2022 and comprised of cash equal to \$8.155 per Virtus Share reduced by any Special Dividend paid.
35. The BGH Offer was declared unconditional and closed on 27 June 2022.
36. As at 30 June 2022, the BGH Bidders had acquired a relevant interest in more than 90% of the shares in Virtus. As a result, a compulsory acquisition process, as set out in Part 6A.1 of the *Corporations Act 2001*, was commenced by the BGH Bidders to acquire shares in Virtus that had not been acquired under the BGH Offer.
37. The notice of compulsory acquisition was submitted to the Australian Securities & Investments Commission on 25 July 2022. The compulsory acquisition process completed on 7 September 2022, at which time the BGH Bidders acquired all remaining shares in Virtus.

**Special Dividend**

38. On 14 June 2022, Virtus announced that it had declared payment of the Special Dividend, being a fully franked special dividend of \$0.30 per Virtus Share.
39. The Record Date for the Special Dividend was 20 June 2022. The Special Dividend was paid to Virtus shareholders on 1 July 2022.
40. Virtus funded the Special Dividend from money borrowed under its existing financing facility. No funding was provided by the BGH Bidders as part of the Takeover.
41. The entire amount of the Special Dividend totalling \$26,134,152 was debited to Virtus' retained earnings account.

**Other matters**

42. At all times, the sum of the market values of the assets of Virtus that were 'taxable Australian real property' (as defined in section 855-20) did not exceed the sum of the market values of the assets of Virtus that were not taxable Australian real property.
43. Non-resident shareholders have never owned 95% or more of the shares in Virtus.

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**Commissioner of Taxation**

7 December 2022

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Status: **not legally binding**


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## References

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### *Legislative references:*

- ITAA 1936 6(1)
  - ITAA 1936 44(1)(a)(i)
  - ITAA 1936 128B(3)(ga)
  - ITAA 1936 128D
  - ITAA 1936 former Pt IIIAA Div 1A
  - ITAA 1936 former 160APHD
  - ITAA 1936 former 160APHE(1)
  - ITAA 1936 former 160APHM
  - ITAA 1936 former 160APHN
  - ITAA 1936 former 160APHN(2)
  - ITAA 1936 former 160APHN(3)(f)
  - ITAA 1936 former 160APHN(4)(c)
  - ITAA 1936 former 160APHN(4)(d)
  - ITAA 1936 former 160APHO(1)(b)
  - ITAA 1936 former 160APHO(2)(a)
  - ITAA 1936 former 160APHT
  - ITAA 1936 former 160APHT(2)
  - ITAA 1936 former 160APHU(1)
  - ITAA 1936 177EA(5)(b)
  - ITAA 1936 177EA(3)(e)
  - ITAA 1997 Div 67
  - ITAA 1997 104-10
  - ITAA 1997 104-10(4)
  - ITAA 1997 104-165(3)
  - ITAA 1997 116-20(1)
  - ITAA 1997 202-40
  - ITAA 1997 204-30(3)(c)
  - ITAA 1997 207-20
  - ITAA 1997 207-35(1)
  - ITAA 1997 207-45
  - ITAA 1997 207-70
  - ITAA 1997 207-75
  - ITAA 1997 207-145(1)(a)
  - ITAA 1997 Div 230
  - ITAA 1997 855-10
  - ITAA 1997 Subdiv 842-I
  - ITAA 1997 855-15
  - ITAA 1997 855-20
  - ITAA 1997 977-50
  - ITAA 1997 995-1(1)
  - Corporations Act 2001 Ch 6
  - Corporations Act 2001 Pt 6A.1
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### ATO references

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