



Class Ruling

Bendigo and Adelaide Bank Limited – Capital Notes

① Relying on this Ruling

This publication (excluding appendix) 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 how the relevant tax provisions apply to specified entities who subscribed for and acquired Capital Notes issued by Bendigo and Adelaide Bank Limited (BEN).
2. The scheme is set out in paragraphs 43 to 73 of this Ruling.
3. In this Ruling, unless otherwise defined, capitalised terms have the meanings specified in the Terms of Capital Notes (the Terms). The Terms are contained in Appendix A of the Capital Notes Prospectus and CPS2 Reinvestment Offer Information dated 5 November 2020 (the Prospectus) and have been amended as set out in the Amendment to Capital Notes Terms Australian Securities Exchange (ASX) announcement dated 21 December 2020.
4. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

5. This Ruling applies to you if you:
 - acquired your Capital Notes by initial application under the Prospectus
 - are a resident of Australia (as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)) during the period you hold your Capital Notes, and

- hold your Capital Notes on capital account, that is, you do not hold your Capital Notes as revenue assets (as defined in section 977-50) or as trading stock (as defined in subsection 995-1(1)).

6. 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 this Ruling.

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

What this Ruling does not consider

7. This Ruling does not consider:

- the tax implications of the CPS2 Reinvestment Offer
- the tax implications for a Nominated Purchaser who acquires Capital Notes under a Resale Notice, and
- how the gross-up and tax offset rules in Division 207 apply to a partnership or trustee investors (other than a partnership or trustee that is a corporate tax entity, or a trustee of a trust that is a complying superannuation entity), or indirect distributions to partners in a partnership or beneficiaries or trustees of a trust.

When this Ruling applies

8. This Ruling applies from 1 July 2020 to 30 June 2029.

Ruling

Consequences of acquiring Capital Notes

Acquisition time

9. You acquired your Capital Notes on 30 November 2020 (the Issue Date) under table item 2 of section 109-10.

Cost base and reduced cost base of Capital Notes

10. The first element of the cost base and reduced cost base of each Capital Note is A\$100, being the money you paid to acquire your Capital Note (subsections 110-25(2) and 110-55(2)).

Consequences of holding Capital Notes

Inclusion of Distributions and franking credits in assessable income and entitlement to a tax offset

11. A Distribution on your Capital Note is a non-share dividend under section 974-120 and is included in your assessable income (subparagraph 44(1)(a)(ii) of the ITAA 1936).

12. If a Distribution is franked, your assessable income includes the amount of the franking credit on the Distribution (subsection 207-20(1)) and you are entitled to a tax offset equal to the amount of the franking credit (subsection 207-20(2)), provided you are a qualified person (refer to paragraphs 17 to 18 of this Ruling).

13. To the extent that a Distribution is exempt income or non-assessable non-exempt income in your hands (and none of the rules in Subdivision 207-E apply), the amount of any franking credit on the Distribution is not included in your assessable income, and you are not entitled to a tax offset under Division 207 (Subdivision 207-D).

14. A tax offset you are entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, unless it is specifically excluded under section 67-25.

Determination under paragraph 177EA(5)(b) of the ITAA 1936

15. 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 benefits you receive in relation to a Distribution.

Determination under paragraph 204-30(3)(c)

16. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits you receive in relation to a Distribution.

Gross-up and tax offset cancelled in certain circumstances

17. Paragraph 207-145(1)(a) will not apply to cancel the effect of the gross-up and tax offset in respect of a franked Distribution if you are a qualified person in respect of that Distribution.

18. You will be a qualified person in relation to a Distribution if, during the primary qualification period, you held your Capital Note for a continuous period of at least 90 days during which you did not have 'materially diminished risks or loss of opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of your Capital Note.

19. The Resale and Exchange features of the Capital Notes will not affect your risks of loss or opportunities for gain in respect of your Capital Notes as neither the Resale nor the Exchange mechanism constitutes a separate position (former sections 160APHM and 160APHJ of the ITAA 1936).

20. Paragraphs 207-145(1)(b) to (1)(db) and subsection 207-145(2) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution.

Consequences of disposing of your Capital Notes

Capital Notes are not traditional securities

21. Your Capital Notes are not traditional securities as defined in section 26BB of the ITAA 1936.

22. Section 26BB of the ITAA 1936 will not apply to include any gain on the disposal or redemption of your Capital Notes in your assessable income.

23. Section 70B of the ITAA 1936 will not apply to allow any loss on the disposal or redemption of your Capital Notes as a deduction to you.

Exchange of Capital Notes for Ordinary Shares

24. Each Capital Note is a convertible interest as defined in subsection 995-1(1) and table item 4 of subsection 974-75(1).

25. CGT event C2 happens on Exchange of each of your Capital Notes for Ordinary Shares (section 104-25). Exchange is constituted by the Capital Notes being converted into Ordinary Shares.
26. A capital gain or capital loss you make from CGT event C2 happening on Exchange will be disregarded (subsection 130-60(3)).
27. Ordinary Shares you acquire on Exchange of the Capital Notes will be taken to have been acquired when the Exchange happens on the relevant Exchange Date (subsection 130-60(2)).
28. The first element of the cost base and reduced cost base of each Ordinary Share you acquire on Exchange will be a pro rata portion of the cost base and reduced cost base of your relevant Capital Note at the time of Exchange (table item 2 of subsection 130-60(1)).
29. As you hold your Capital Notes on capital account, no amount will be included in your assessable income on Exchange of a Capital Note under section 6-5. Similarly, you will not incur a deductible loss under section 8-1 as a consequence of the Exchange of a Capital Note.
30. The Exchange of a Capital Note for Ordinary Shares will not constitute your receipt of a dividend or non-share dividend.

Resale of Capital Notes

31. CGT event A1 happens on the Resale of a Capital Note (section 104-10). The Resale Price of a Capital Note will be its Face Value (A\$100, unless reduced).
32. If the Resale Price does not exceed the cost base of the Capital Note, you will not make a capital gain as a result of the Resale.
33. If the Resale Price is reduced below A\$100, you will make a capital loss as a result of the Resale.
34. As you hold your Capital Notes on capital account, no amount will be included in your assessable income under section 6-5 and you will not incur a deductible loss under section 8-1 as a consequence of a Resale.

Redemption of Capital Notes

35. CGT event C2 will happen on the Redemption of the Capital Notes, where the Redemption is constituted by the redemption of all or some of the Capital Notes for their Face Value (section 104-25).
36. The capital proceeds you receive on Redemption of the Capital Notes will be replaced by the market value of the Capital Notes on the Redemption Date, worked out as if the Redemption had not occurred and was never proposed to occur, if the capital proceeds, being the Face Value, are more or less than the market value of the Capital Note (subparagraph 116-30(2)(b)(ii)).
37. You will make a capital gain if the capital proceeds you receive on Redemption of a Capital Note exceed the cost base of the Capital Note (subsection 104-10(4)).
38. You will make a capital loss if the capital proceeds you receive on Redemption of a Capital Note are less than the reduced cost base of the Capital Note (subsection 104-10(4)).

39. As you hold Capital Notes on capital account, no amount will be included in your assessable income under section 6-5 and you will not incur a deductible loss under section 8-1 as a consequence of the Redemption of your Capital Notes.

Other integrity provisions

Section 45 of the ITAA 1936

40. Section 45 of the ITAA 1936 will not apply to treat the value of Ordinary Shares issued to you on Exchange as an unfrankable dividend.

Subsection 45A(2) of the ITAA 1936

41. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole, or a part, of the capital benefit provided to you on Exchange or Redemption of your Capital Notes as an unfranked dividend.

Section 45B of the ITAA 1936

42. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole, or a part, of the capital benefit provided to you on Exchange or Redemption of your Capital Notes as an unfranked dividend.

Scheme

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

Background

44. BEN is listed on the ASX.

45. BEN is regulated by the Australian Prudential Regulation Authority (APRA). BEN is an authorised deposit-taking institution for the purposes of the *Banking Act 1959*.

46. For Australian income taxation purposes, BEN is the head company of the BEN income tax consolidated group.

47. BEN carries on business in Australia.

48. Under the Prospectus, BEN offered to undertake capital raising by the issue of Capital Notes for an Issue Price of A\$100 each to raise A\$450 million (subject to market conditions and capital needs at the time of issue) (the Offer).

49. Capital Notes were issued on 30 November 2020.

50. Capital Notes were issued in Australia by BEN. Capital Notes were not issued at or through an offshore permanent establishment or subsidiary of BEN.

51. The Offer was made as part of BEN's ongoing capital management strategy within the regulatory capital requirements prescribed by APRA. The issue of Capital Notes was a new capital raising and the proceeds from the issue were to be used for general corporate funding and capital management purposes.

Main features of the Capital Notes

52. The Capital Notes are Australian Dollar (A\$) denominated, fully paid, unsecured, subordinated, non-cumulative, mandatorily convertible notes issued by BEN.
53. The Capital Notes are listed on the ASX and trade under the code BENPH.

Issue price

54. The Issue Price of each Capital Note was A\$100. Capital Notes were fully paid on the Issue Date.

Distributions

55. BEN will pay in arrears, quarterly-cash floating rate Distributions in respect of each Capital Note on a Distribution Payment Date (each a Distribution Payment Date) in accordance with the Terms.
56. The Distribution payable is calculated on the Face Value of each Capital Note using a Distribution Rate which is equal to the Market Rate (broadly being the three months' Bank Bill Swap Reference Rate) plus a Margin adjusted by the corporate tax rate and based on the number of days in the relevant Distribution Period. The Margin was determined under the Bookbuild.
57. Distributions are expected to be fully franked at the same rate as the dividends on Ordinary Shares. The franking percentage of the Distributions may vary over time in line with the franking percentage that applies to Ordinary Shares. If Distributions are not fully franked, the Distribution payable will be increased to compensate for the reduction in franking credits.
58. The payment of a Distribution is subject to the absolute discretion of BEN and can also only be paid if certain Distribution Payment Conditions are met, including that payment will not breach certain APRA conditions or make BEN insolvent.
59. Distributions are non-cumulative. To the extent that all or part of a Distribution is not paid on a scheduled Distribution Payment Date, Holders will have no claim or entitlement in respect of the non-payment of the Distribution. A Distribution that is not paid on a Distribution Payment Date for any reason does not accrue interest for the period during which it remains unpaid.
60. Subject to certain exceptions, if any Distribution is not paid in full on the relevant Distribution Payment Date or within five Business Days, this will restrict BEN from determining, declaring or paying any Ordinary Share dividend, or returning any capital or undertaking any buy-backs or repurchases in relation to any Ordinary Shares.

Mandatory Exchange

61. Holders will receive Ordinary Shares when the Capital Notes are Exchanged on the date that is the earlier of (each a Mandatory Exchange Date):
- 15 June 2029 (Scheduled Mandatory Exchange Date) subject to the satisfaction of the relevant Mandatory Exchange Conditions, or
 - the first Distribution Payment Date after the Scheduled Mandatory Exchange Date on which the relevant Mandatory Exchange Conditions are satisfied,

unless the Capital Notes have been or will be Redeemed, Resold or Exchanged before that date.

Early Exchange

62. Some or all of the Capital Notes must be Exchanged for Ordinary Shares before a Mandatory Exchange Date if a Capital Trigger Event or Non-Viability Trigger Event occurs.

63. Where Exchange of any Capital Notes is required on account of a Capital Trigger Event or Non-Viability Trigger Event and Exchange fails to take effect within five Business Days after the date of the occurrence of the Capital Trigger Event or Non-Viability Trigger Event for any reason, then Exchange will not occur and the relevant Capital Notes will be immediately and irrevocably terminated with effect on and from the date of the occurrence of the Capital Trigger Event or Non-Viability Trigger Event.

Optional Exchange

64. Some or all of the Capital Notes may be Exchanged for Ordinary Shares before a Mandatory Exchange Date if BEN elects to do so on the Call Date or on an Optional Exchange Date following the occurrence of a Franking Event, a Tax Event or a Regulatory Event.

Change of Control Event Exchange

65. Subject to certain conditions, all of the Capital Notes must be Exchanged for Ordinary Shares before a Mandatory Exchange Date if a Change of Control Event occurs.

Exchange mechanics

66. Upon Exchange:

- BEN will allot and issue the Exchange Number of Ordinary Shares to the Holders for each Capital Note held by the Holder, and
- each Holder's rights in relation to each Capital Note that is being Exchanged will be terminated for an amount equal to the Face Value. BEN will apply the Face Value of each Capital Note by way of payment for the subscription for the Ordinary Shares to be allotted and issued.

Early Redemption

67. BEN may elect to Redeem all or some of the Capital Notes:

- on the Call Date, or
- following the occurrence of a Franking Event, Tax Event or Regulatory Event.

68. BEN may only Redeem if APRA has given its prior written approval to the Redemption and either:

- BEN replaces the Capital Notes with a capital instrument which is the same or better quality (for the purposes of APRA's prudential standards) than the Capital Notes and the replacement of the Capital Notes is done under conditions that are sustainable for the income capacity of BEN, or

- BEN obtains confirmation from APRA that it is satisfied, having regard to the capital position of the BEN Level 1 Group and BEN Level 2 Group, that BEN does not have to replace the Capital Notes.

69. Each Capital Note will be Redeemed by payment of the Face Value to the relevant Holder and payment of any Distribution BEN has determined is payable on that date.

Resale

70. BEN may elect that all or some of the Holder's holding of the Capital Notes will be transferred to one or more Nominated Purchasers:

- on the Call Date, or
- following the occurrence of a Franking Event, Tax Event or Regulatory Event (Resale).

71. The Nominated Purchaser or Nominated Purchasers will be one or more third parties selected by BEN and cannot be BEN itself or a Related Body Corporate.

72. Under a Resale, each Holder on the Resale Date is taken to irrevocably offer to sell the Capital Notes that are subject to the Resale Notice to the Nominated Purchaser on the Resale Date for a purchase price equal to the Face Value of that Capital Note. Each Capital Note which is to be Resold will be transferred to the Nominated Party free from any encumbrance.

Other matters

73. This Ruling is made on the basis that:

- (a) During the term of the scheme, BEN is a resident of Australia under the income tax laws of Australia and of no other jurisdiction.
- (b) The Capital Notes are equity interests in BEN under Division 974 and are non-share equity interests in BEN as defined in subsection 995-1(1).
- (c) The Capital Notes form part of BEN's Additional Tier 1 Capital for the purposes of the prudential standards determined by APRA and in force under section 11AF of the *Banking Act 1959*.
- (d) The Distributions are frankable distributions under section 202-40.
- (e) BEN expects to frank each Distribution in accordance with the franking policy that applies to ordinary shares in BEN (as such time as Distributions are made), and in a manner that satisfies the benchmark rule in Division 203 for the franking period in which a Distribution is made. The policy of BEN in relation to the franking of dividends on the ordinary shares of BEN is not expected to change as a result of the issuance of the Capital Notes.
- (f) BEN will not differentially frank Distributions to different Holders according to their tax status or on any other basis.
- (g) Immediately before payment of a Distribution on the Capital Notes, BEN will have available frankable profits (worked out under section 215-20) at least equal to the Distribution.
- (h) Distributions on Capital Notes will not be sourced directly or indirectly from BEN's share capital account or non-share capital account.

- (i) Distributions on Capital Notes will not be debited to any extent against BEN's non-share capital account or share capital account.
- (j) On the issue of Capital Notes or the issue of Ordinary Shares on Exchange, BEN's share capital account will not become tainted (within the meaning of Division 197).
- (k) On Exchange or Redemption, BEN will debit the Face Value of the Capital Notes to its non-share capital account (within the meaning of section 164-10).
- (l) Any Ordinary Shares issued on Exchange will be equity interests in BEN as defined in Subdivision 974-C.
- (m) BEN does not currently have on issue any non-share equity interests that constitute Tier-1 Capital issued at or through a permanent establishment which pays distributions that are unfrankable pursuant to section 215-10.
- (n) You (or an associate) will not make, be under an obligation to make, or be likely to make, a 'related payment' (as defined under former section 160APHN of the ITAA 1936) in relation to a Distribution.
- (o) You will hold your Capital Notes for a continuous period of at least 90 days (excluding the day of acquisition and disposal (if relevant)), during the 'primary qualification period' (as defined in former section 160APHD of the ITAA 1936) in relation to a Distribution.
- (p) You will not take any 'positions' as defined in former section 160APHJ of the ITAA 1936) at any time in relation to your Capital Notes apart from holding your Capital Notes.
- (q) You (or your connected entities) will not engage in distribution washing (as outlined in section 207-157) in relation to a Distribution (unless entitled to the exception under subsection 207-157(4)).
- (r) All parties to the transaction are dealing with each other on arm's length terms and fair value consideration was provided by Holders to acquire Capital Notes.

Appendix – Explanation

① *This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

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Section 177EA of the ITAA 1936

74. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of a scheme is to enable a taxpayer to obtain an imputation benefit.

75. The conditions in paragraphs 177EA(3)(a) to (d) of the ITAA 1936 will be satisfied, therefore the relevant circumstances of the scheme must be considered to establish whether any person who entered into or carried out the scheme, or any part of the scheme, did so for a more than incidental purpose of enabling a Holder to obtain an imputation benefit (paragraph 177EA(3)(e) of the ITAA 1936).

76. The Commissioner considers that the relevant circumstances of the scheme do not, on balance, lead to a conclusion that the purpose of enabling Holders to obtain imputation benefits is more than incidental to BEN's primary purpose of raising Additional Tier 1 Capital for general corporate funding and capital management purposes.

Section 204-30

77. Subsection 204-30(1) empowers the Commissioner to make a determination under paragraph 204-30(3)(c) if an entity streams distributions in such a way that imputation benefits are received by a member who would derive a greater benefit from franking credits than another member of the entity who will receive lesser or no imputation benefits.

78. In the present case, there is no evidence of streaming as Distributions will be received by all Holders by reason of their proportionate holding of Capital Notes and not by reference to their tax profiles or individual tax positions. There is nothing in the Terms that

allows BEN to treat Holders differently in respect of their entitlement to a franked Distribution.

Gross-up and tax offset cancelled in certain circumstances

79. Subdivision 207-F may cancel the effect of the gross-up and tax offset rules where the entity concerned has manipulated the imputation system in a manner that is not permitted under the income tax law.

80. Under subsection 207-145(1), this adjustment will occur where a franked distribution is made to an entity in one or more of the following circumstances:

- the entity is not a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 (paragraph 207-145(1)(a))
- the Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(b))
- the Commissioner has made a determination under paragraph 204-30(3)(c) that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(c))
- the distribution is made as part of a dividend stripping operation (paragraph 207-145(1)(d))
- the distribution is one to which section 207-157 (which is about distribution washing) applies (paragraph 207-145(1)(da)), or
- the distribution is one to which section 207-158 (which is about distributions entitled to a foreign income tax deductions) applies (paragraph 207-145(1)(db)).

81. Paragraphs 207-145(1)(a) to (1)(db) will not apply to franked Distributions paid to Holders as explained in paragraphs 83 to 92 of this Ruling.

82. Subsection 207-145(2) will not apply as the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 (refer to paragraph 15 of this Ruling).

Paragraph 207-145(1)(a)

83. Paragraph 207-145(1)(a) will not apply to cancel the effect of the gross-up and tax offset rules for a franked Distribution provided you are a qualified person.

84. As this Ruling is made on the basis that you have not made a related payment in respect of a Distribution, the relevant qualification period for working out if you are a qualified person is the 'primary qualification period' (as defined in former section 160APHD of the ITAA 1936). The primary qualification period begins on the day after you acquire your Capital Note and ends on the 90th day after the day the Capital Note becomes ex-distribution.

85. You generally need to have held a Capital Note 'at risk' for a continuous period of 90 days (excluding the days of acquisition and disposal, if relevant) during the primary qualification period in order to be a qualified person. Any days you had materially diminished risks of loss or opportunities for gain in respect of your holding are also excluded (former subsection 160APHO(3) of the ITAA 1936).

86. Under former subsection 160APHM(2) of the ITAA 1936, you are taken to have materially diminished the risks of loss and opportunities for gain on a particular day with respect to your Capital Note if your net position on that day does not retain 30% or more of the risks and opportunities associated with holding the Capital Note.

87. Embedded options such as the Resale and Exchange mechanisms do not represent separate positions in relation to the Capital Notes (see also Taxation Determination TD 2007/29 *Income tax: holding period rule: is an embedded share option a position in relation to the share if it is exercisable by or against a party other than the issuer of the share?*). Under the Resale mechanism, you will only be taken to have made an offer to sell your Capital Notes if BEN issues a Resale Notice. As BEN is the only party entitled to make an election to exercise the Resale option, it is not a separate position that you have taken in relation to your Capital Notes. Similarly, under the Exchange mechanism you do not have the right to elect Exchange of your Capital Notes.

88. Therefore, the Resale and Exchange mechanisms will not, of themselves, affect your risks of loss or opportunities for gain in respect of your Capital Notes.

Paragraphs 207-145(1)(b) and (c)

89. Paragraphs 207-145(1)(b) and (c) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution as the Commissioner will not make determinations under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) (refer to paragraphs 15 and 16 of this Ruling).

Paragraph 207-145(1)(d)

90. Paragraph 207-145(1)(d) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution as there is no evidence that the Distributions will be made as part of a dividend stripping operation.

Paragraph 207-145(1)(da)

91. Paragraph 207-145(1)(da) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution as this Ruling is made on the basis the distribution washing provision does not apply (refer to paragraph 73(q) of this Ruling).

Paragraph 207-145(1)(db)

92. Paragraph 207-145(1)(db) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution as the Capital Notes are equity interests which form part of BEN's Additional Tier 1 Capital under APRA prudential standards (refer to paragraph 73(c) of this Ruling).

Ordinary Shares received on Exchange not a dividend or a non-share dividend

93. The Exchange of Capital Notes for Ordinary Shares will not result in Holders being taken to have received a dividend or a non-share dividend.

94. Holders are not shareholders of BEN in respect of their Capital Notes holdings. Accordingly, Holders will not receive a dividend as defined in subsection 6(1) of the ITAA 1936.

95. The application of the Face Value to subscribe for Ordinary Shares on Exchange of the Capital Notes is a crediting of that amount to the Holder and, therefore, a non-share distribution under section 974-115. All non-share distributions are non-share dividends unless they are debited against the distributing company's share capital account (section 974-120). The issue of Ordinary Shares to Holders on Exchange of the Capital Notes will not be a non-share dividend as defined in section 974-120, as the Face Value of the Capital Notes will be debited against BEN's non-share capital account.

Section 45 of the ITAA 1936

96. Section 45 of the ITAA 1936 applies where a company streams the provision of shares and the payment of minimally franked dividends to its shareholders in such a way that:

- the shares are received by some shareholders but not all shareholders, and
- some or all of the shareholders who do not receive the shares receive, or will receive, minimally franked dividends.

97. BEN expects to pay fully franked dividends to all its shareholders and fully franked distributions to all holders of non-equity interests consistently. Further, BEN has a history of fully franking its frankable distributions at a rate above 10%, which is also not expected to change.

98. The Terms do not provide for the issue of shares to all or some Holders in satisfaction of their Distribution entitlement. The issue of Ordinary Shares on Exchange merely reflects a change in the type of equity interests held by Holders.

99. Based on the information provided and having regard to the circumstances of the scheme, section 45 of the ITAA 1936 will not apply to treat the issue of Ordinary Shares on Exchange as an unfranked dividend in the hands of the Holders.

Section 45A of the ITAA 1936

100. Section 45A of the ITAA 1936 applies where a company streams capital benefits and the payment of dividends to shareholders in such a way that capital benefits are received by shareholders who would derive a greater benefit from receiving the capital benefits (the advantaged shareholders), and it is reasonable to assume that other shareholders (the disadvantaged shareholders) have received, or will receive, dividends.

101. Both the issue of Ordinary Shares on Exchange and the Redemption of Capital Notes will constitute the provision of a capital benefit to Holders (paragraph 45A(3)(a) of the ITAA 1936 for an Exchange, and paragraph 45A(3)(b) of the ITAA 1936 as affected by subsection 45A(3A) of the ITAA 1936 for a Redemption).

102. However, the issue of Ordinary Shares on Exchange and the Redemption of Capital Notes will not constitute the streaming of capital benefits because under an Exchange or Redemption BEN will not selectively direct the flow of capital benefits to Holders who are advantaged shareholders. Accordingly, as this requirement does not apply to the Exchange or Redemption of Capital Notes, the Commissioner will not make a determination to treat the whole, or a part, of the capital benefit received by Holders as an unfranked dividend.

Section 45B of the ITAA 1936

103. Section 45B of the ITAA 1936 applies where, having regard to the relevant circumstances of the scheme as set out in subsection 45B(8), a company provided certain capital payments to its shareholders for more than an incidental purpose of enabling the taxpayer to obtain a tax benefit.

104. The issue of Ordinary Shares to Holders on Exchange and the Redemption of Capital Notes (a Redemption being a non-share capital return) will each constitute a scheme under which Holders are provided with a capital benefit by BEN (paragraphs 45B(5)(a) and (5)(b) and subsection 45B(7) of the ITAA 1936). As a result, paragraph 45B(2)(a) of the ITAA 1936 will be satisfied.

105. At least some Holders will obtain a tax benefit as defined in subsection 45B(9) of the ITAA 1936 as a result of an Exchange or Redemption. As a result, paragraph 45B(2)(b) of the ITAA 1936 will be satisfied.

106. Therefore, whether section 45B of the ITAA 1936 will apply to an Exchange or Redemption turns on whether paragraph 45B(2)(c) of the ITAA 1936 will be satisfied. This involves considering the relevant circumstances, including but not limited to those listed in subsection 45B(8) of the ITAA 1936, of the Exchange and Redemption schemes to establish whether one of the persons who will enter into or carry out the schemes will do so for a more than incidental purpose of enabling the Holder to obtain a tax benefit.

107. Having regard to the relevant circumstances, it could not be concluded that the Exchange or Redemption of Capital Notes will be entered into for a more than incidental purpose of enabling Holders to obtain a tax benefit. Accordingly, paragraph 45B(2)(c) of the ITAA 1936 would not be satisfied and the Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or a part, of the capital benefit provided to Holders on Exchange or Redemption.

References*Previous draft:*

Not previously issued as a draft

Related Rulings/Determinations:

TD 2007/29

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 26BB
- ITAA 1936 44(1)(a)(ii)
- ITAA 1936 45
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