



Class Ruling

Income tax: ABB Grain Ltd Scheme of Arrangement and Proposed Special Dividend

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

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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 provision(s)

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

- Division 1A of the former Part IIIA of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 177E of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-30 of the ITAA 1997;

- Subdivision 115-A of the ITAA 1997;
- Subdivision 115-C of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997; and
- section 204-30 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies, in relation to Part 3-1 and Part 3-3 of the ITAA 1997, (referred to as participating ABB Grain Shareholders) consists of the registered holders of fully paid ordinary shares in the capital of ABB Grain Ltd (ABB Grain) who:

- (a) are residents of Australia within the meaning of subsection 6(1) of the ITAA 1936;
- (b) participate in the scheme;
- (c) hold their shares on capital account;
- (d) are not employees of the ABB Grain group, or are employees of the ABB Grain group who did not receive an option or right in Viterro Inc. (Viterro) that will be treated as a continuing right for the purposes of Division 13A of Part III of the ITAA 1936;
- (e) are not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions in Subdivision 124-M of the ITAA 1997; and
- (f) do not have shares dealt with under the Cash Out Facility.

4. The class of entities to which this Ruling applies for the other listed relevant provisions of the ITAA 1936 and ITAA 1997 consists of all of the registered holders of fully paid ordinary shares in the capital of ABB Grain (referred to as ABB Grain Shareholders).

Qualifications

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

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 40 of this Ruling.

7. 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.

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Date of effect

9. This Ruling applies to the income years ending 30 June 2009 and 30 June 2010. The Ruling continues to apply after 30 June 2010 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

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

- the application for a Class Ruling, dated 4 June 2009 from Deloitte Touche Tohmatsu Ltd (Deloitte);
- the Implementation Agreement, together with its annexures, between ABB Grain and Viterra, dated 19 May 2009;
- the Scheme Booklet issued by ABB Grain to its shareholders, dated 30 July 2009; and
- the letter from Deloitte dated 30 July 2009.

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

ABB Grain

11. ABB Grain is an Australian resident company listed for quotation on the Australian Securities Exchange (ASX). It is a leading Australian agribusiness with widely diversified operations.

12. ABB Grain has a single class share capital structure consisting solely of ordinary shares. Before the implementation of this Scheme, ABB Grain's constitution prevents any one shareholder acquiring or owning more than 15% of ABB Grain's ordinary share capital.

13. At the date of the Scheme Booklet, ABB Grain had 172,802,130 ordinary shares on issue. It also had issued 936,740 ABB Grain Options under its Executive Share Option Plan.

14. At the time of the implementation of the Scheme, ABB Grain will have more than 300 members.

Viterra

15. Viterra is a Canadian resident corporation listed for quotation on the Toronto Stock Exchange. It is a leading Canadian agribusiness with widely diversified operations.

16. Viterra does not currently have a dividend policy in place and does not currently pay a dividend given it has been focusing on growth opportunities.

17. Viterra Australia Pty Ltd (Viterra Australia) is an Australian resident company that is a wholly owned subsidiary of Viterra.

The Scheme of Arrangement

18. On 19 May 2009, ABB Grain and Viterra announced that they had signed the Implementation Agreement under which Viterra proposed to acquire all the issued shares in ABB Grain by way of a Scheme of Arrangement under the *Corporations Act 2001*. Viterra Australia has been incorporated by Viterra as the purchaser of the ABB Grain shares under the Scheme.

19. As at the date of the Implementation Agreement, neither Viterra nor Viterra Australia held any shares in ABB Grain, either directly or indirectly.

20. The Scheme Meeting of ABB Grain Shareholders, as ordered by the Federal Court of Australia, will be held on 9 September 2009 at which a resolution will be put seeking their agreement to implement the Scheme of Arrangement.

21. Immediately following the Scheme Meeting, a Constitutional Amendment Meeting will be held on or around 9 September 2009 at which a resolution will be put to the ABB Grain Shareholders to amend ABB Grain's constitution to remove the restriction that limits any one shareholding to a maximum of 15% of the ABB Grain ordinary share capital.

22. If both resolutions are passed, ABB Grain will apply to the Federal Court for orders under section 411 of the *Corporations Act 2001* to give effect to the Scheme of Arrangement. The orders will then be lodged with the Australian Securities and Investment Commission.

23. The Record Date for the Scheme of Arrangement is 18 September 2009 and the Implementation Date is 23 September 2009.

The Scheme Consideration

24. Under the Scheme of Arrangement, participating ABB Grain Shareholders who sell their shares to Viterra Australia have the choice of three options as to the form in which they will receive consideration for their ABB Grain shares:

- a Standard Consideration of cash and shares;
- a Maximum Cash Consideration; or
- a Maximum Scrip Consideration.

Both the Maximum Cash Consideration and the Maximum Scrip Consideration are subject to aggregated limits (the Available Cash Consideration and the Available Scrip Consideration as defined in the Scheme of Arrangement annexed to the Implementation Agreement).

Standard Consideration

25. The Standard Consideration consists of:

- \$4.35 in cash and 0.4531 new shares in Viterra or Viterra CHESS Depository Interests (CDIs) per ABB Grain share held at the Record Date for the Scheme of Arrangement.

The cash and shares received under this option are not adjusted for the maximum cash and scrip limits.

Maximum Cash Consideration

26. The Maximum Cash Consideration consists of:

- \$8.70 in cash per ABB Grain share held at the Record Date for the Scheme of Arrangement.

Where shareholders who choose the maximum cash consideration request more than the Available Cash Consideration in aggregate, the number of ABB Grain shares for which they receive \$8.70 in cash will be pro-rated down. To the extent that such pro-rating is applied, the relevant shareholders will be entitled to receive 0.9062 new Viterra shares or Viterra CDIs per remaining ABB Grain share.

Maximum Scrip Consideration

27. The Maximum Scrip Consideration consists of:
- 0.9062 new Viterra shares or Viterra CDIs per ABB Grain share held at the Record Date for the Scheme of Arrangement.

Where shareholders who choose the maximum scrip consideration request more than the Available Scrip Consideration in aggregate, the number of ABB Grain shares for which they receive 0.9062 new Viterra shares or CDIs will be pro-rated down. To the extent that such pro-rating is applied, the relevant shareholders will receive cash consideration of \$8.70 per remaining ABB Grain share.

28. Each participating ABB Grain Shareholder who chooses to receive either the Standard Consideration or the Maximum Scrip Consideration is entitled to hold their new Viterra shares either directly or in the form of CDIs. The applicant has advised that the CDIs constitute CHESS Units of Foreign Securities (CUFS) within the meaning of the Note to subsection 124-780(6) of the ITAA 1997.

29. A participating ABB Grain Shareholder who does not make a choice about the form of consideration will be deemed to have chosen to receive the Standard Consideration and will receive CDIs.

Escrow Agent

30. On the Implementation Date, the instruments of transfer in respect of all the ABB Grain shares will be delivered to an escrow agent appointed by ABB Grain for the purposes of this Scheme.

31. The escrow agent will deliver the instruments of transfer to Viterra Australia on the date by which the Viterra shares have been issued under the Scheme and the aggregate of the cash consideration under the Scheme has been paid by Viterra Australia.

Ineligible Foreign ABB Grain Shareholders

32. Certain non-resident shareholders of ABB Grain will not be eligible to receive Viterra shares where foreign regulatory requirements make it impractical or unlawful to do so (Ineligible Foreign ABB Grain Shareholders). These shareholders will be deemed to have elected to receive the Standard Consideration in respect of the ABB Grain shares they hold. The share component of the Standard Consideration will not be issued to them but instead will be dealt with under the Cash Out Facility.

Cash Out Facility

33. A participating ABB Grain Shareholder who chooses to receive the Maximum Cash Consideration is entitled to elect that any Viterra shares they would have otherwise been entitled to receive as a result of pro-rating be sold under the Cash Out Facility. If an election is not made to either participate in the Cash Out Facility or receive Viterra shares or Viterra CDIs, the relevant shareholder will be deemed to have elected to participate in the Cash Out Facility.

34. Any shares that are to be dealt with under the Cash Out Facility, including those which would otherwise have been issued to Ineligible Foreign ABB Grain Shareholders, will be issued to a Nominee appointed by Viterra in consultation with ABB Grain.

35. The Nominee will sell the shares and the proceeds, net of any taxes and brokerage charges (where applicable), will be distributed to those participating ABB Grain Shareholders and Ineligible Foreign ABB Grain Shareholders who have chosen to use the Cash Out Facility, in proportion to their respective entitlements.

The Dividends

36. ABB Grain declared an Interim Dividend of \$0.10 per ABB Grain share for the income half year ended 31 March 2009. The dividend represented the ordinary interim dividend payable to all shareholders of ABB Grain shares from profits of the income half year ended 31 March 2009. The Record Date for the Interim Dividend was 16 June 2009 and the ex-dividend date was 17 June 2009. The dividend was paid on 30 June 2009.

37. ABB Grain also intends to pay a Special Dividend of \$0.41 per ABB Grain share. The payment of the Special Dividend is conditional on the Scheme of Arrangement and the Constitutional Amendments being approved and implemented. The value that ABB Grain Shareholders are considered to receive under the Scheme, according to the Scheme Booklet and the Independent Expert report, includes both the Scheme Consideration and the Special Dividend. The proposed Record Date for the Special Dividend is 17 September 2009 and therefore the ex-dividend date will be 18 September 2009. The Special Dividend is proposed to be paid on 28 September 2009.

38. Both the Interim and Special Dividends will be fully franked and debited against ABB Grain's retained profits account. The dividends will be funded from ABB Grain's existing cash reserves or, if necessary, by drawing down on ABB Grain's existing loan facilities. ABB Grain will not fund the dividends through loans from Viterra or Viterra Australia or receive any other financial assistance from Viterra or Viterra Australia to pay the dividends.

39. Neither Viterra nor Viterra Australia is required to consent to the payment of the Special Dividend or any aspect relating to its funding.

40. ABB Grain had a franking account balance as at 21 April 2009 of \$48,893,957. The allocation of franking credits to the Interim and Special Dividends will use approximately \$37,769,608 of the available franking credits.

Ruling

CGT event A1 happens on the disposal of ABB Grain shares

41. CGT event A1 will happen when a participating ABB Grain Shareholder disposes of each of their ABB Grain shares to Viterra Australia pursuant to the Scheme (subsections 104-10(1) and (2) of the ITAA 1997).

42. The time of the CGT event will be when the change of ownership occurs after the Viterra shares or Viterra CDIs have been issued under the Scheme and the required amount of aggregate cash consideration has been paid by Viterra Australia into a trust account operated by ABB Grain.

Capital gain or capital loss

43. A participating ABB Grain Shareholder will make a capital gain when CGT event A1 happens if the capital proceeds in respect of the disposal of an ABB Grain share exceed its cost base. A participating ABB Grain Shareholder will make a capital loss if the capital proceeds in respect of the disposal of an ABB Grain share are less than its reduced cost base (subsection 104-10(4) of the ITAA 1997).

Capital proceeds

44. The capital proceeds from the disposal will be the total of any cash consideration and the market value (worked out as at the time of CGT event A1) of any Viterra shares or Viterra CDIs received or entitled to be received by participating ABB Grain Shareholders for each of their ABB Grain shares (subsection 116-20(1) of the ITAA 1997). The capital proceeds will not include the Interim Dividend or Special Dividend.

If a capital gain is made

Capital gain referable to ABB Grain shares – full or partial scrip for scrip roll-over

45. Subject to the qualification in paragraph 46 of this Ruling, a participating ABB Grain Shareholder who made a capital gain from the disposal of their ABB Grain share and received all or part of their proceeds in the form of Viterra shares or Viterra CDIs may choose scrip for scrip roll-over for that part of the capital gain that is referable to the receipt of Viterra shares or Viterra CDIs (sections 124-780 and 124-790 of the ITAA 1997).

46. However, scrip for scrip roll-over cannot be chosen if any capital gain the participating ABB Grain Shareholder might make from the replacement Viterra shares or Viterra CDIs would be disregarded, except because of a roll-over (subsection 124-795(2) of the ITAA 1997).

47. If scrip for scrip roll-over is chosen, that part of the capital gain that is referable to the receipt of Viterra shares or Viterra CDIs is disregarded (subsections 124-785(1) and 124-790(1) of the ITAA 1997). Any part of the capital gain that is referable to the receipt of cash is not disregarded because it is ineligible proceeds for which roll-over is not available (subsection 124-790(1)).

Discount capital gain

48. If a participating ABB Grain Shareholder makes a capital gain from the disposal and roll-over is not chosen, or cannot be chosen, for all or part of the gain, they will be eligible to treat that part as a 'discount capital gain' provided that:

- the participating ABB grain Shareholder is an individual, complying superannuation entity or, subject to the rules in Subdivision 115-C of the ITAA 1997, a trust (section 115-10 of the ITAA 1997);
- the capital gain has been worked out using a cost base that has been calculated without reference to indexation (subsection 115-20(1) of the ITAA 1997); and
- the ABB Grain share was acquired at least 12 months prior to CGT event A1 happening (subsection 115-25(1) of the ITAA 1997).

Cost base of Viterra shares or Viterra CDIs

49. The cost base and reduced cost base of any Viterra shares or Viterra CDIs acquired by a participating ABB Grain Shareholder in exchange for all or part of their ABB Grain shares, is affected by whether the shareholder chooses scrip for scrip roll-over.

Scrip for scrip roll-over is not chosen

50. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each Viterra share or Viterra CDI is equal to the market value of that part of the ABB Grain shares given in exchange for the acquisition of the Viterra share or Viterra CDI (subsections 110-25(2), 110-55(2) and 112-30(1) of the ITAA 1997). The market value is worked out as at the time of the acquisition (subsection 110-25(2)). The market value of that part of the ABB Grain shares given by the participating ABB Grain Shareholder for the receipt of the cash consideration is not included (subsection 112-30(1)).

Scrip for scrip roll-over is chosen

51. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of a replacement Viterra share or Viterra CDI is worked out by reasonably attributing to it the part(s) of the cost base of the ABB Grain shares for which it was exchanged and for which the roll-over was obtained (subsections 124-785(2) and 124-785(4) of the ITAA 1997). Any part(s) of the cost base of the ABB Grain shares exchanged by the participating ABB Grain Shareholder that relates to the receipt of cash consideration is not included (subsection 124-785(3)).

Acquisition date of Viterra shares or Viterra CDIs

52. The acquisition date of the Viterra shares or Viterra CDIs will be the date when the shares or CDIs are issued or allotted (Item 2 of the table in section 109-10 of the ITAA 1997).

53. For the purpose of determining whether a capital gain made from any later disposal of their Viterra shares or Viterra CDIs is a discount capital gain, participating ABB Grain Shareholders who choose scrip for scrip roll-over are taken to have acquired their Viterra shares or Viterra CDIs when they acquired the corresponding ABB Grain shares involved in the roll-over (Item 2 of the table in subsection 115-30(1) of the ITAA 1997).

Qualified person rule

Interim Dividend

54. Having regard to the relevant circumstances of the Scheme, nothing in the Scheme documents indicates that an ABB Grain Shareholder has made, is under an obligation to make, or is likely to make a related payment in respect of the Interim Dividend.

55. Accordingly, each ABB Grain Shareholder will need to hold their ABB Grain shares at risk for a continuous period of at least 45 days in the primary qualification period in order to be a qualified person in respect of the Interim Dividend.

56. Each ABB Grain Shareholder that has not previously satisfied the primary qualification period, for the purposes of Division 1A of the former Part IIIA of the ITAA 1936, will be considered to have satisfied the holding period rule under former section 160APHO of the ITAA 1936 and therefore be a qualified person in relation to the Interim Dividend if:

- (a) the ABB Grain Shareholder acquired the ABB Grain share or interest in the share on or before 16 June 2009; and
- (b) during the period when the ABB Grain Share or interest in the share was held, the ABB Grain Shareholder did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) for a continuous period of at least 45 days.

Special Dividend

57. Having regard to the relevant circumstances of the Scheme, the ABB Grain Shareholders are considered to have made, or to be likely to make a related payment in respect of the Special Dividend.

58. Accordingly, each ABB Grain Shareholder will need to hold their ABB Grain shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person in respect of the Special Dividend.

59. Each ABB Grain Shareholder will be considered to be a qualified person in respect of the secondary qualification period for the purposes of Division 1A of the former Part IIIAA of the ITAA 1936 in relation to the Special Dividend if:

- (a) the ABB Grain Shareholder acquired the ABB Grain share or interest in the share on or before 3 August 2009; and
- (b) from 4 August 2009 until 17 September, the ABB Grain Shareholder continued to hold the ABB Grain share and did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) in respect of the ABB Grain share for a continuous period of at least 45 days.

The anti-avoidance provisions

60. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in relation to either the Interim Dividend or the Special Dividend.

61. The Scheme is not a scheme, or a scheme having substantially the effect of a scheme, by way of, or in the nature of dividend stripping within the meaning of section 177E of the ITAA 1936 and the Commissioner will not make a determination under subsection 177F(1) of the ITAA 1936 to include any amount in the assessable income of ABB Grain Shareholders.

62. 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 either the Interim Dividend or the Special Dividend.

Appendix 1 – Explanation

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

CGT event A1 happens on the disposal of ABB Grain shares

63. CGT event A1 (section 104-10 of the ITAA 1997) 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)).

64. The Addendum to Taxation Determination TD 2002/4 indicates that a takeover or merger effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract.

65. CGT event A1 will therefore happen to participating ABB Grain shareholders when the change of ownership occurs.

66. The delivery of instruments of transfer in respect of ABB Grain shares to the escrow agent appointed for the purposes of this Scheme will not constitute a change of ownership of the ABB Grain shares. A change of ownership will only occur pursuant to the Scheme following the provision of the Scheme Consideration by Viterra and Viterra Australia. This will occur once the Viterra shares and CDIs have been issued under the Scheme and the required amount of aggregate cash consideration has been paid by Viterra Australia into a trust account operated by ABB Grain.

Scrip for scrip roll-over – Subdivision 124-M

67. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M of the ITAA 1997. It enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

68. Subdivision 124-M of the ITAA 1997 contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the scheme that is the subject of this Ruling are:

- shares are exchanged for shares in another company;
- the exchange is in consequence of a single arrangement;
- conditions for the roll-over are satisfied;
- further conditions, if applicable, are satisfied; and
- exceptions to obtaining scrip for scrip roll-over are not applicable.

CHES unit of foreign security

69. The participating ABB Grain Shareholders may elect to receive Viterra shares directly, or in the form of CDIs.

70. Holders of CUFS are eligible to obtain roll-over relief just as if the holder held the underlying asset to which the CUFS refers (subsection 124-780(6) of the ITAA 1997). CUFS is an interest, traded on the stock market operated by the ASX, in a foreign share, unit or interest.

71. As the Viterra CDIs will constitute CUFS within the meaning of the Note to subsection 124-780(6) of the ITAA 1997 roll-over relief will be available to participating ABB Grain Shareholders who elect to receive Viterra CDIs as consideration for their ABB Grain shares.

72. Under the Scheme, all of the conditions for roll-over under Subdivision 124-M of the ITAA 1997 are satisfied for ABB Grain shares that are exchanged for Viterra shares or Viterra CDIs. No further explanation of the application of those laws beyond that contained in the Ruling part of the document is necessary.

Qualified persons

73. Pursuant to paragraph 207-145(1)(a) of the ITAA 1997, an entity must be a 'qualified person' in relation to a dividend in order to be entitled to a tax offset in respect of the franking credit allocated to the dividend.

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

75. The test of what constitutes a 'qualified person' is provided in former section 160APHO of the ITAA 1936 as follows:

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

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

76. Former subsection 160APHO(2) of the ITAA 1936, referred to in paragraph 75 of this Ruling, sets out the holding period requirement. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer makes or is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

77. In order to determine which is the relevant qualification period, it is necessary to determine whether, under the present arrangement, the ABB Grain Shareholders are considered to have made or be likely to make a related payment in respect of the Interim Dividend and the Special Dividend.

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

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 dividend or distribution.

81. Where a shareholder is not taken to pass the benefit of the dividend to another person in the circumstances set out above, the shareholder will need to satisfy the holding period requirement in respect of the primary qualification period in order to be entitled to the franking credit on the dividend. However, where a shareholder is taken to pass the benefit of the dividend to another person in the circumstances set out above, the shareholder will need to satisfy the holding period requirement in respect of the secondary qualification period in order to be entitled to a tax offset in respect of the franking credit allocated to the dividend.

Holding period requirement

82. The holding period requirement requires a shareholder to hold the shares, or the interest in the shares, on which a dividend is paid, at risk for a continuous period of at least 45 days during the relevant qualification period.

83. The primary qualification period as provided in the former section 160APHD of the ITAA 1936 begins from the day after the date of acquisition of the share and ends on the 45th day after the day on which the share becomes ex-dividend. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the share are not counted.

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

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

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

85. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

86. For the purposes of satisfying the 'at risk' requirement, former subsection 160APHM(2) of the ITAA 1936 provides that a shareholder is taken to have materially diminished risks of loss and opportunities for gain with respect to shares or interests in shares if the 'net position' of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares.

87. It is considered that until the Record Date for the Scheme of Arrangement, ABB Grain Shareholders will not, by reason of the Scheme, have done anything to materially diminish their risks of loss or opportunities for gain in respect of their ABB Grain Shares.

88. It should be noted that no days after the Record Date for the Scheme of Arrangement will be capable of being counted to satisfy the at risk requirements, nor will the ABB Grain shares be considered to be held at risk on the Record Date of the Scheme of Arrangement. Further, the day of acquisition of the ABB Grain shares is not to be counted towards the 45 days.

Interim Dividend

89. Having regard to the relevant circumstances of the Scheme, it cannot be said that the Scheme documents indicate that an ABB Grain Shareholder, or an associate, does anything that has the effect of passing the benefit of the dividend to another person in respect of the Interim Dividend. The Interim Dividend was paid regardless of whether or not the Scheme proceeded. As the ABB Grain Shareholders are not taken, for the purposes of the former Division 1A, to have made a related payment in respect of the Interim Dividend as a result of the Scheme, and provided no individual circumstances exist which would result in the related payment rule applying, the relevant holding period for the Interim Dividend is the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

90. In respect of the Interim Dividend, there are 45 clear days between 16 June 2009 (being the Record Date for the Interim Dividend) and 1 August 2009 (being the 45th day after the ex-dividend date for the Interim Dividend). As such, any ABB Grain Shareholder who acquired their ABB Grain share on or before 16 June 2009 will be capable of being a qualified person in respect of the Interim Dividend provided they hold their ABB Grain shares at risk for at least 45 continuous days.

Special Dividend

91. In the current circumstances, an integral part of the Scheme is the planned payment of the Special Dividend. Whilst the payment of the Special Dividend is not specifically provided for in the Implementation Agreement, the payment of the Special Dividend is conditional on the Scheme of Arrangement and Constitutional Amendment proceeding. Therefore, having regard to the relevant circumstances of the Scheme, it is considered that ABB Grain Shareholders will be doing something, be under an obligation to do something, or be likely to do something that has the effect of passing the benefit of the Special Dividend to another person for the purposes of former subsection 160APHN(3) of the ITAA 1936.

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

93. In respect of the Special Dividend, there are 45 clear days between 3 August 2009 and 18 September 2009 (being the Record Date for the Scheme of Arrangement). Accordingly, ABB Grain Shareholders must have acquired their ABB Grain shares at least 45 days before the Record Date for the Scheme of Arrangement in order to be capable of being a qualified person. ABB Grain Shareholders who acquired their ABB Grain shares on or after 4 August 2009 will not satisfy the holding period rule. ABB Grain Shareholders who purchased their ABB Grain shares on or before 3 August 2009 will be capable of being qualified persons in respect of the Special Dividend provided they hold their ABB Grain shares at risk for at least 45 continuous days prior to the Record Date for the Scheme of Arrangement.

The anti-avoidance provisions

Section 204-30

94. Section 204-30 of the ITAA 1997 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)).

95. Relevantly, if section 204-30 of the ITAA 1997 applies, the Commissioner is vested with a discretion under subsection 204-30(3) to make a determination in writing either:

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

96. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

97. Under the current Scheme for the payment of both the Interim Dividend and Special Dividend (the dividends), all ABB Grain Shareholders will receive an imputation benefit as a result of the dividends; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a) of the ITAA 1997) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e) of the ITAA 1997). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders.

98. However, the dividends will be paid to all ABB Grain Shareholders at the respective Record Dates and will be fully franked with Australian franking credits. Accordingly, it cannot be argued that ABB Grain will direct the flow of distributions in such a manner as to stream the imputation benefits such that one class of members will derive a greater benefit from the franking credits attached to the dividends, while the other members will receive lesser or no imputation benefits.

99. As the conditions in subsection 204-30(1) of the ITAA 1997 for the provision to apply will not be met, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in relation to either of the dividends.

Section 177E

100. Section 177E of the ITAA 1936 deals with situations where any property of a company is disposed of as a result of a scheme entered into after 27 May 1981, whether in Australia or outside Australia:

- by way of or in the nature of dividend stripping; or
- having substantially the effect of a scheme by way of or in the nature of a dividend stripping.

101. Having regard to the purpose of the Scheme under which the shareholders will dispose of their ABB Grain shares to Viterra Australia, the Scheme will not be a scheme by way of or in the nature of dividend stripping, or a scheme having substantially the effect of a scheme by way of or in the nature of dividend stripping to which section 177E of the ITAA 1936 is applicable.

Section 177EA

102. 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. Subsection 177EA(3) provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or

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

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

104. ABB Grain is a corporate tax entity. The disposal of the ordinary shares in ABB Grain pursuant to the Scheme is a scheme for the disposition of membership interests. Both the fully franked Interim Dividend and Special Dividend are frankable distributions that will be paid to ABB Grain Shareholders as a part of this Scheme who could, therefore, reasonably be expected to receive imputation benefits.

105. In the present case, the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of ABB Grain or its shareholders, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the Scheme.

106. 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.

107. The relevant circumstances of the Scheme indicate that there is no requisite purpose of conferring an imputation benefit under the Scheme. The dividends have been and will be fully franked, which is a continuation of ABB Grain's dividend policy to pay fully franked dividends. ABB Grain has only ordinary shares on issue and the dividends have been and will be paid to all ABB Grain Shareholders on a pro-rata basis in proportion to the number of shares that each ABB Grain shareholder holds on the relevant Record Dates for the dividends. The amount of the Interim Dividend is largely consistent with dividends previously paid out by ABB Grain and allowed ABB Grain shareholders to share in the current profits of ABB Grain for the income half year ended 31 March 2009. The amount of the Special Dividend allows ABB Grain shareholders to share in the accumulated profits of ABB Grain and which may not otherwise be available if the Scheme proceeds as Viterra does not pay dividends currently.

108. In considering the manner, form and substance of the Scheme, it is considered that the Scheme is not being entered into for the purpose of enabling participating members to obtain an imputation benefit. Having regard to the relevant circumstances of the Scheme, the Commissioner has come to the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the dividends.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TD 2002/4

Subject references:

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- CGT event A1 – disposal of a CGT asset
- dividend streaming arrangement
- dividend stripping
- frankable dividends
- franking credits
- holding period rule
- imputation system
- ordinary shares
- qualified person
- related payment rule
- scrip for scrip roll-over

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