



Class Ruling

Income tax: demerger of Macquarie Atlas Roads International Limited by Intoll International Limited

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

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

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

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

What this Ruling is about

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

Relevant provision(s)

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45B of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- subsection 115-30(1) of the ITAA 1997;
- Division 125 of the ITAA 1997; and
- Division 855 of the ITAA 1997.

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

Class of entities

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

- (a) were listed on the security register of IIL as at 1 February 2010 (the Record Date for the demerger);
- (b) held their IIL shares on capital account on that date;
- (c) for shareholders that were Australian resident companies, did not hold their IIL shares as part of a business conducted through a permanent establishment in a foreign country; and
- (d) were not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their IIL shares.

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

In this Ruling, a person belonging to this class of entities is referred to as an 'IIL shareholder'.

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out was carried out in accordance with the scheme described in paragraphs 9 to 27 of this Ruling.

6. If the scheme actually carried out was 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

8. This Ruling applies from 1 July 2009 to 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

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

- Class Ruling application dated 12 April 2010;
- Macquarie Infrastructure Group (MIG) (now known as Intoll Group): Restructure Proposal Explanatory Memorandum and Notices of Meeting dated 18 December 2009;
- Macquarie Atlas Roads Prospectus dated 18 December 2009;
- MIG 2009 Annual Report; and
- correspondence received in relation to the Class Ruling application.

Note: where certain information has been provided by the Applicant on a commercial-in-confidence basis, it will not be disclosed or released under the Freedom of Information legislation.

Intoll Group

10. Intoll Trust (I), formerly Macquarie Infrastructure Trust (I), is an Australian resident unit trust taxed under Division 6 of Part III of the ITAA 1936.

11. Intoll Trust (II), formerly Macquarie Infrastructure Trust (II), is an Australian resident public trading trust which is taxed under Division 6C of Part III of the ITAA 1936. Intoll Trust (II) has made a choice, under section 713-130 of the ITAA 1997, to form a tax consolidated group with itself as the head company. Generally, for income tax purposes, Intoll Trust (II) is treated as if it were a company.

12. IIL, formerly Macquarie Infrastructure Group International Limited, is a company incorporated in, and a resident of, Bermuda.

13. Units in Intoll Trust (I) and Intoll Trust (II), and shares in IIL, are stapled together and listed on the Australian Securities Exchange (ASX) as Intoll Group stapled securities. The effect of stapling is that the three interests comprising each Intoll Group stapled security may only be dealt with together. In this Ruling, Intoll Trust (I), Intoll Trust (II) and IIL and their subsidiaries are together referred to as the 'Intoll Group'.

14. As at 2 February 2010, there were 2,261,732,048 Intoll Group stapled securities on issue, reflecting the same number of units in Intoll Trust (I) and Intoll Trust (II) and ordinary shares in IIL.

15. There were no other relevant ownership interests (as defined in subsection 125-60(1)) in IIL just before the demerger.

16. The principal activity of the Intoll Group is the development and operation of toll roads, bridges and tunnels and investment in entities in the same industry sector.

17. Before 2 February 2010, the Intoll Group owned interests in nine toll roads (407 ETR, M6 Toll, APRR, Westlink M7, Dulles Greenway, Indiana Toll Road, Chicago Skyway, South Bay Expressway and Warnow Tunnel) in Australia and in other countries.

Restructure of the Intoll Group

18. At separate general meetings of Intoll Trust (I), Intoll Trust (II) and IIL on 22 January 2010, Intoll Group stapled security holders approved ordinary resolutions authorising the implementation of the restructure to separate its toll road assets based on their maturity and risk profile.

19. The restructure involved:

- the transfer of interests in M6 Toll, APRR, Dulles Greenway, South Bay Expressway and Warnow Tunnel to a group headed by Macquarie Atlas Roads International Limited (MQA Bermuda). MQA Bermuda, a then wholly-owned subsidiary of IIL, is an exempt mutual fund corporation incorporated in Bermuda on 15 December 2009. Except for the M6 Toll, interests in these toll roads were transferred at their carrying values for accounting purposes;
- the transfer of interests in Dulles Greenway, Indiana Toll Road and Chicago Skyway to a group headed by Macquarie Atlas Roads Limited (MQA Australia). MQA Australia, then wholly-owned by Intoll Trust (II), is an Australian resident company incorporated on 16 December 2009. All interests in the toll roads were transferred at their carrying values for accounting purposes;

- the acquisition by Intoll Trust (II) of Intoll Management Limited, formerly Macquarie Infrastructure Investment Management Limited, the responsible entity and manager of Intoll Trust (I) and Intoll Trust (II), resulting in the internalisation of the management of those two trusts;
- a distribution, on 2 February 2010, by IIL of 100% of its shares in MQA Bermuda to holders of IIL ordinary shares listed on the security register as at the Record Date, and Intoll Trust (II) distributing 100% of its shares in MQA Australia to holders of units in Intoll Trust (II) listed on the security register as at the Record Date. The holders received one share in MQA Bermuda for every five shares they held in IIL, and one share in MQA Australia for every five units they held in Intoll Trust (II); and
- the payment by Intoll Trust (II) of a Special Distribution of 10 cents per unit (comprising an unfranked dividend of 5.9 cents and a return of capital of 4.1 cents) on 12 February 2010 to holders of units in Intoll Trust (II) listed on the security register as at the Record Date.

20. The shares in MQA Australia and MQA Bermuda are stapled together, with effect from 2 February 2010, and are listed on the ASX as Macquarie Atlas Roads Group (MQA) stapled securities. The effect of stapling is that the two interests comprising each MQA stapled security may only be dealt with together. In this Ruling, MQA Australia and MQA Bermuda and their subsidiaries are together referred to as the 'MQA Group'.

21. IIL made the following entry in its accounts in relation to the distribution of 100% of its shares in MQA Bermuda to holders of IIL ordinary shares:

DR Share Premium Account	\$1,316,673,985
CR Investment in MQA Bermuda	\$1,316,673,985

The distribution equates to 58.22 cents per IIL share.

22. The demerger of MQA Bermuda was thus effected by reducing the share premium of IIL by an amount equal to the value of 100% of its shares in MQA Bermuda (the capital reduction amount). For the purposes of debiting IIL's share premium account, the value of each share in MQA Bermuda was \$2.911 (58.22 cents multiplied by 5). The capital reduction amount was satisfied by an *in specie* distribution of 100% of the shares owned by IIL in MQA Bermuda.

Purpose of the restructure of the Intoll Group

23. The purpose of the separation of the toll roads under the restructure of the Intoll Group was to increase business efficiencies by:

- promoting the more effective and targeted management of the toll roads. The mature toll roads (Westlink M7 and 407 ETR), having stable capital structures and mature cash flows, and therefore requiring less active management, have remained with the Intoll Group. The less stable toll roads (M6 Toll, APRR, Dulles Greenway, South Bay Expressway, Warnow Tunnel, Indiana Toll Road and Chicago Skyway), having higher levels of debt and less mature cash flows, and therefore requiring more active management, were transferred to the MQA Group;
- reducing management costs. The internalisation of the management of the toll roads of Intoll Trust (I) and Intoll Trust (II), together with the new management arrangements for the less stable toll roads of the MQA Group, are expected to result in an overall reduction in the management costs of the toll roads;
- providing greater financial flexibility (for example, access to debt and equity funding). The toll road portfolios of the Intoll Group and the MQA Group have distinct risk/return profiles which would assist each group to attract funding from investors; and
- increasing the combined market rating and market price of the Intoll Group and the MQA Group compared to the market rating and market price of the Intoll Group alone.

Distributions by IIL

24. The Intoll Group's distribution policy is that distributions will reflect payments more in line with the free cash flow of their assets (after taking into account holding entity operating expenses). IIL paid dividends to its shareholders in respect of the income years ended 30 June 2005 to 2010, inclusive. In addition, IIL has returned capital in the income year ended 30 June 2005 by way of a capital reduction, and in the income years ended 30 June 2007 to 2009, inclusive, through on-market share buy-backs.

Other matters

25. IIL shareholders acquired all of their IIL shares after 19 September 1985.

26. Just after the demerger of MQA Bermuda, at least 50% of the market value of the CGT assets owned by each of MQA Bermuda and its demerger subsidiaries were used in carrying on a business by those entities.

27. No shareholder in IIL owned more than 20% of the ownership interests in IIL just before 2 February 2010.

Ruling

The demerger of MQA Bermuda

CGT event G1

28. CGT event G1 happened in relation to each of the IIL shares owned by the IIL shareholders at the time IIL made the payment of the capital reduction amount (satisfied by the *in specie* distribution of shares in MQA Bermuda) (section 104-135).

Capital gain

29. IIL shareholders will make a capital gain from CGT event G1 happening if the capital reduction amount (58.22 cents per IIL share) exceeds the cost base of the IIL share. The capital gain is equal to the amount of the excess. No capital loss can be made from CGT event G1 (subsection 104-135(3)).

Demerger roll-over

30. A demerger, as defined under section 125-70, happened to the IIL demerger group under the scheme.

31. An IIL shareholder can choose demerger roll-over under subsection 125-55(1) for their IIL shares.

CGT consequences of choosing roll-over

32. An IIL shareholder who chooses demerger roll-over will disregard any capital gain made when CGT event G1 happened in relation to each of their IIL shares under the demerger (subsection 125-80(1)).

Other consequences of choosing roll-over

33. If an IIL shareholder chooses demerger roll-over, they must also recalculate the cost base and reduced cost base of their IIL shares and calculate the cost base and reduced cost base of their new MQA Bermuda shares.

34. The first element of the cost base and reduced cost base of each IIL share and corresponding MQA Bermuda share received under the demerger is worked out as follows:

- total the cost bases of the IIL shares (just before the demerger); and
- apportion that sum over the IIL shares and corresponding new MQA Bermuda shares received under the demerger.

35. The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the IIL shares and MQA Bermuda shares, or a reasonable approximation of those market values (subsections 125-80(2) and (3)).

IIL shareholders who do not choose demerger roll-over

36. An IIL shareholder who does not choose demerger roll-over will not disregard any capital gain made when CGT event G1 happened in relation to an IIL share under the demerger.

37. The first element of the cost base and reduced cost base of each IIL share and corresponding MQA Bermuda share is calculated as described in paragraphs 34 and 35 of this Ruling (subsections 125-85(1) and (2)).

Acquisition date of the MQA Bermuda shares for the purpose of a discount capital gain

38. For the purpose of determining eligibility to a discount capital gain, an MQA Bermuda share received by an IIL shareholder will be taken to have been acquired on the date the shareholder acquired, for CGT purposes, the corresponding IIL shares (item 2 of the table in subsection 115-30(1)). This will be the case whether or not the shareholder chooses demerger roll-over.

Division 855 – foreign resident IIL shareholders

39. IIL shareholders will disregard a capital gain from CGT event G1 happening in relation to each of their IIL shares if:

- they were a foreign resident just before the CGT event happened, and
- their IIL shares were not taxable Australian property (section 855-10).

40. IIL shareholders who are foreign residents cannot choose demerger roll-over under subsection 125-55(1) for their IIL shares if the MQA Bermuda shares they acquired under the demerger are not taxable Australian property just after they acquired them (subsection 125-55(2)).

Distribution is not a dividend for income tax purposes

41. The *in specie* distribution to IIL shareholders of shares in MQA Bermuda under the scheme is not a 'dividend' as defined in subsection 6(1) of the ITAA 1936.¹

The application of section 45B

42. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45BA or section 45C of the ITAA 1936 applies to the whole, or any part, of the *in specie* distribution of shares in MQA Bermuda to IIL shareholders. Therefore, the distribution will not be taken to be a dividend.

Commissioner of Taxation13 October 2010

¹ This refers to the definition of 'dividend' in subsection 6(1) of the ITAA 1936 before it was amended by the *Taxation Laws Amendment (Company Law Review) Act 1998*.

Appendix 1 – Explanation

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

The demerger of MQA Bermuda

43. The capital gains tax consequences of the demerger of MQA Bermuda are described in paragraphs 28 to 40 of this Ruling.

44. The demerger roll-over provisions in Division 125 contain a number of conditions for eligibility to choose roll-over. The main conditions that are relevant to the scheme are:

- (a) a person owns a share in a company, or a unit or other interest in a trust (the original interest);
- (b) the company or trust is the head entity of a demerger group;
- (c) a demerger happens to the demerger group; and
- (d) under the demerger, a CGT event happens to the original interest and the person acquires a new or replacement interest in the demerged entity and nothing else.

45. Under the scheme, the conditions for choosing demerger roll-over under Division 125 were satisfied in respect of the demerger of MQA Bermuda. As a consequence, demerger relief in Division 125 is available to the IIL shareholders in respect of the demerger of MQA Bermuda.

Distribution is not a dividend for income tax purposes

46. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends, as defined in subsection 6(1) of the ITAA 1936, paid to the shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident).

47. The term 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) excludes a distribution from the meaning of 'dividend' if the amount of a distribution is debited against an amount standing to the credit of the company's share premium account.

48. The *in specie* distribution to IIL shareholders of shares in MQA Bermuda was recorded as a debit to IIL's share premium account. Therefore, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies. Accordingly, the *in specie* distribution to IIL shareholders of shares in MQA Bermuda is not a 'dividend' as defined in subsection 6(1).

The application of section 45B

49. Section 45B of the ITAA 1936 applies to ensure that relevant amounts are treated as dividends for tax purposes if:

- (a) components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger; or
- (b) certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

50. Specifically, section 45B of the ITAA 1936 applies where:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- (b) under the scheme a person (the relevant taxpayer), who may or may not be the person provided with the demerger benefit or the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- (c) 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 (other than an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

Scheme

51. The restructure of IIL, including the *in specie* distribution of MQA Bermuda shares by IIL to IIL shareholders, constitutes a scheme for the purposes of paragraph 45B(2)(a) of the ITAA 1936.

Demerger benefit and capital benefit

52. The provision of ownership interests to a shareholder under a demerger constitutes the shareholder being provided with a demerger benefit (subsection 45B(4) of the ITAA 1936) and a capital benefit to the extent that the provision of ownership interests does not involve the shareholder receiving a demerger dividend (subsections 45B(5) and 45B(6) of the ITAA 1936).

53. In the present case, therefore, the provision of the MQA Bermuda shares constitutes the IIL shareholders receiving a demerger benefit and a capital benefit.

Tax benefit

54. A relevant taxpayer 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B of the ITAA 1936:

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the demerger benefit or the capital benefit had instead been an assessable dividend.

55. The relevant taxpayer under the scheme is each IIL shareholder.

56. For most IIL shareholders, the tax payable on the demerger benefit and the capital benefit is less than it would be if they had been an assessable dividend. Resident IIL shareholders are eligible for capital gains tax roll-over relief under Division 125. By contrast, a dividend would generally be included in the assessable income of a resident shareholder. Therefore, the provision of those benefits constitutes the IIL shareholders obtaining a tax benefit (subsection 45B(9) of the ITAA 1936).

Requisite purpose

57. In this case, while the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 are met, the requisite purpose of enabling the IIL shareholders to obtain a tax benefit by way of a demerger benefit or a capital benefit is not present. In other words, having regard to the relevant circumstances of the scheme, set out in subsection 45B(8) of the ITAA 1936, it would not be concluded that any of the parties to the restructure entered into or carried out the scheme to obtain a tax benefit in the form of a demerger benefit or a capital benefit.

58. The relevant circumstances listed in subsection 45B(8) of the ITAA 1936 include the tax and non-tax implications of the scheme, the latter covered, in the main, by the matters in paragraph 177D(b) of the ITAA 1936 which are included in subsection 45B(8) by paragraph (k). Having regard to the relevant circumstances in subsection 45B(8), some of the factors point towards a conclusion that the requisite purpose exists and others point against such a conclusion. However, it is apparent from the circumstances of the restructure that the treatment of the distribution as capital is consistent with the commercial circumstances of the transaction. Furthermore, the factors also indicate that the substantial purpose of the *in specie* distribution of MQA Bermuda shares, which formed part of the overall restructure of the Intoll Group, was to reorganise the business of the Intoll Group into two businesses characterised by their different asset and risk profiles, their separate management requirements, their different business strategies and their discrete commercial objectives.

59. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45BA² or 45C of the ITAA 1936 applies to the whole, or any part, of the *in specie* distribution of shares in MQA Bermuda by IIL to IIL shareholders.

² It is noted that if all the conditions in subsection 45B(2) of the ITAA 1936 had been satisfied (and they were not satisfied in this case), although the Commissioner is empowered to make a determination in respect of the demerger benefit under section 45BA of the ITAA 1936, any such determination would be ineffective in this case as no part of the demerger benefit is a demerger dividend.

Appendix 2 – Detailed contents list

60. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- capital benefit
- capital gains
- CGT capital proceeds
- CGT events G1-G3 - shares
- cost base adjustments
- demerger
- return of capital on shares

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 45B
- ITAA 1936 45B(1)
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(4)
- ITAA 1936 45B(5)
- ITAA 1936 45B(6)
- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(k)

- ITAA 1936 45B(9)
- ITAA 1936 45BA
- ITAA 1936 45C
- ITAA 1936 Pt III Div 6
- ITAA 1936 Pt III Div 6C
- ITAA 1936 177D(b)
- ITAA 1997
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 115-30(1)
- ITAA 1997 Div 125
- ITAA 1997 125-55(1)
- ITAA 1997 125-55(2)
- ITAA 1997 125-60(1)
- ITAA 1997 125-70
- ITAA 1997 125-80(1)
- ITAA 1997 125-80(2)
- ITAA 1997 125-80(3)
- ITAA 1997 125-85(1)
- ITAA 1997 125-85(2)
- ITAA 1997 Div 230
- ITAA 1997 713-130
- ITAA 1997 Div 855
- ITAA 1997 855-10
- TAA 1953
- Copyright Act 1968

Other references:

- Taxation Laws Amendment (Company Law Review) Act 1998

ATO references

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