



Class Ruling

Income tax: scrip for scrip: exchange of shares in Aurecon Australia Group Limited for shares in Aurecon 37 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:

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 116-20 of the ITAA 1997; and
- Subdivision 124-M 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 shareholders of Aurecon Australia Group Limited (AAGL) who, on the Implementation Date of the scheme:

- (a) participated in the scheme and exchanged their AAGL shares for ordinary shares in Aurecon 37 Limited (Aurecon 37);
- (b) held AAGL shares which they acquired after 19 September 1985;
- (c) held their AAGL shares on capital account;
- (d) had their AAGL shares acquired by Aurecon 37 and were issued shares in Aurecon 37;
- (e) were residents of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* at the time of the scheme of arrangement;
- (f) were not temporary residents of Australia within the meaning of section 995-1;
- (g) were not 'significant stakeholders' or 'common stakeholders' in relation to the scheme within the meaning of these expressions in Subdivision 124-M; and
- (h) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their AAGL shares.

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

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 36 of this Ruling.

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

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- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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 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 19 December 2011;
- Global Group Umbrella Agreement dated 13 March 2009;
- Constitution of AAGL dated 27 August 2010 (amended 27 October 2011);
- Constitution of Aurecon 37 dated 7 March 2012 (amended 22 March 2012);
- Scheme Booklet – For a proposed restructure of Aurecon Australia Group Limited dated 14 April 2012;
- responses from AAGL dated between 21 February 2012 and 2 April 2012 to the Commissioner's requests for further information;
- Poll declaration dated 9 May 2012; and
- Court order dated 22 May 2012.

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

Background of AAGL

10. AAGL is an unlisted Australian Public company.
11. AAGL is the non-operating head company of a corporate group (the Aurecon Australia Group) consisting of various Australian and offshore subsidiaries. AAGL is also the head entity of an income tax consolidated group.
12. Through its operating subsidiaries, AAGL provides engineering, management and specialist technical services to government and private sector clients.
13. There were 461 AAGL shareholders as at 23 March 2012. All of the shareholders, other than 3 South African resident shareholders and the Connell Employee Share Scheme Trust, were employees of the Aurecon Australia Group and were residents of Australia, New Zealand, the United Arab Emirates, Indonesia, Thailand, Singapore, Vietnam and Hong Kong. The majority of AAGL shareholders were Australian residents.
14. The South African resident shareholders are referred to as the 'Continuing Shareholders' in this Ruling. All the other shareholders participated in the scheme and are referred to as the 'Participating Shareholders' in this Ruling.

The scheme

15. AAGL restructured its existing corporate structure through a 'top-hatting' scheme of arrangement entered into under Part 5.1 of the *Corporations Act 2001*. The scheme was approved by order of a Court made for the purposes of paragraph 411(4)(b) of the *Corporations Act 2001*.
16. Pursuant to the scheme, all Participating Shareholders exchanged all their shares in AAGL for shares in Aurecon 37 on a 1:1 basis. The Participating Shareholders did not receive any cash considerations under the scheme. The Implementation Date under the Scheme Booklet was 23 May 2012.
17. After the share exchange, Aurecon 37, a new non-operating unlisted public company, became the new holding company of AAGL, and consequently the new parent entity of the Aurecon Australia Group. Aurecon 37 acquired approximately 99 percent of the voting shares in AAGL under the scheme.
18. Following the restructure, AAGL will be converted into a private company.
19. As at 12 April 2012, AAGL had 4,252,000 fully paid ordinary shares on issue and each share carried the right to one vote.

20. On the Implementation Date, the Participating Shareholders exchanged a total number of 4,212,000 AAGL shares for shares of the same amount in Aurecon 37.

21. The AAGL shares held by the Continuing Shareholders were not exchanged for shares in Aurecon 37 under the scheme. The Continuing Shareholders did not participate in the scheme and maintained their direct holding of 40,000 AAGL shares. The Continuing Shareholders do not own any shares in Aurecon 37 as a result of the scheme.

22. The Continuing Shareholders voted as a separate class to the Participating Shareholders in relation to the prior approval of the scheme.

23. The scheme was approved by the relevant classes of AAGL shareholders on 9 May 2012.

Proposed merger with Aurecon Africa Group

24. In 2009, AAGL entered into a Global Group Umbrella Agreement with a South African engineering group (referred to in this Ruling as the 'Aurecon Africa Group') to pursue the following key objectives over a 3 year period:

- establish and market a global brand, known as 'Aurecon';
- integrate operational structures;
- obtain ownership parity and consistency; and
- implement a cross ownership model.

25. AAGL has since been exploring various options to merge the Aurecon Australia Group with the Aurecon Africa Group.

26. A reason for the scheme is to implement a corporate structure that will enable AAGL to better facilitate a proposed merger with the Aurecon Africa Group and any other future mergers.

27. The negotiation of a merger between AAGL and the Aurecon Africa Group is ongoing due to the complex regulatory and administrative considerations surrounding a merger between an Australia resident entity and a South African resident entity, including foreign exchange control issues.

28. Assuming that the proposed merger does proceed, the likely merger structure is that AAGL (or a subsidiary of AAGL) will acquire the Aurecon Africa Group operating entities in exchange for the issue of shares in AAGL to a South African incorporated company (SA Shareholder Co). This South African incorporated company will act as a shareholding vehicle for the owners of the Aurecon Africa Group.

29. Without the interposition of Aurecon 37, a significant proportion of the post merger AAGL shares will be held by SA Shareholder Co while the other shares will be held by a spread of individual Participating Shareholders.

30. This raises issues that SA Shareholder Co may be able to exercise control over the post merger AAGL that is disproportionate to the ownership interest that its owners would be entitled to had they held their shares directly in AAGL. This structure would be inconsistent with AAGL's desire to make sure that all owners have similar rights in respect of the post merger AAGL.

31. To overcome these issues, a matching shareholder company, being Aurecon 37, was created to act as the shareholding vehicle for the Participating Shareholders. This approach would mirror the likely structure in which SA Shareholder Co would own AAGL shares on behalf of the owners of the Aurecon Africa Group.

32. This new structure will allow negotiations to further progress in relation to a merger between the Aurecon Australia Group and the Aurecon Africa Group.

Why Aurecon 37 undertook not to acquire the AAGL Shares held by the Continuing Shareholders

33. The Continuing Shareholders are senior executives from the Aurecon Africa Group and have worked in global positions across 'Aurecon' since Aurecon Australia Group and Aurecon African Group began their relationship in 2009.

34. It is the current stated preference of the Continuing Shareholders and AAGL that the Continuing Shareholders hold their interest in the combined Aurecon Australia Group through SA Shareholder Co and not Aurecon 37 should the merger between the Aurecon Australia Group and Aurecon Africa Group proceed.

Other potential mergers

35. AAGL has also been exploring other potential merger opportunities with entities in North and South America.

36. The interposition of Aurecon 37 would provide AAGL with a flexible structure that enables AAGL to better facilitate future mergers in a manner similar to the proposed merger with Aurecon Africa Group.

Ruling

Capital gains tax

CGT event A1

37. CGT event A1 happened as a result of the disposal by a Participating Shareholder of their AAGL share to Aurecon 37 under the scheme described in the Ruling (subsection 104-10(1)).

38. The event happened when a contract to dispose of the asset was entered into or if there was no contract, when the change of ownership occurred (subsection 104-10(3)).

39. The time of the event was when the AAGL share was acquired by Aurecon 37 on the Implementation Date (paragraph 104-10(3)(b)).

Capital gain or capital loss

40. A Participating Shareholder made a capital gain if the capital proceeds from the disposal of their AAGL share exceeded its cost base. The capital gain is the amount of the excess (subsection 104-10(4)).

41. A Participating Shareholder made a capital loss if the capital proceeds from the disposal of their AAGL share were less than its reduced cost base. The capital loss is the amount of the difference (subsection 104-10(4)).

42. The capital proceeds for the disposal of each AAGL share was the market value of the Aurecon 37 share that was obtained for the disposal of the AAGL share on the Implementation Date (paragraph 116-20(1)(b)).

Availability of scrip for scrip roll-over if a capital gain is made

43. Subject to the qualifications in paragraph 44 of this Ruling, a Participating Shareholder who made a capital gain from the disposal of their AAGL share is eligible to choose scrip for scrip roll-over under Subdivision 124-M (section 124-780). Scrip for scrip roll-over is not available for a capital loss.

44. Scrip for scrip roll-over cannot be chosen if any capital gain a Participating Shareholder made from the replacement Aurecon 37 share would be disregarded except because of a roll-over (paragraph 124-795(2)(a)).

If scrip for scrip roll-over is chosen

45. If scrip for scrip roll-over is chosen, the capital gain a Participating Shareholder made on the disposal of their AAGL share is disregarded (subsection 124-785(1)).

46. If a Participating Shareholder does not choose scrip for scrip roll-over, any capital gain made from the disposal of an AAGL share is not disregarded.

Cost base of Aurecon 37 shares if scrip for scrip roll-over is chosen

47. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each replacement Aurecon 37 share is worked out by reasonably attributing to it a proportion of the cost base of the corresponding AAGL share (subsections 124-785(2) and 124-785(4)).

48. Accordingly, if scrip for scrip roll-over is chosen, the first element of the cost base (or reduced cost base) of each Aurecon 37 share received as a result of the scrip for scrip transaction will be equal to the cost base of the AAGL share exchanged for the relevant Aurecon 37 share.

Acquisition date of Aurecon 37 shares

49. A Participating Shareholder acquired their Aurecon 37 share on the date the share was issued to each Participating Shareholder, that is, the Implementation Date (item 2 of the table in section 109-10).

50. However, for the purposes of determining whether a capital gain made from any later disposal of their Aurecon 37 shares is eligible to be treated as a discount capital gain, a Participating Shareholder who chooses scrip for scrip roll-over is taken to have acquired their Aurecon 37 share when they acquired the corresponding AAGL share (item 2 of the table in subsection 115-30(1)).

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.*

Capital gains tax

51. The Ruling section details the tax consequences and the relevant legislative provisions that relate to this scheme.

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

53. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main conditions that are relevant to this scheme are:

- (a) shares in a company are exchanged for shares in another company;
- (b) the exchange occurs as part of a single arrangement;
- (c) conditions for roll-over are satisfied;
- (d) further conditions are not applicable or are satisfied; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

54. The Continuing Shareholders undertook to not participate in the scheme. Therefore the scheme did not satisfy the conditions of paragraphs 124-780(2)(b) and 124-780(2)(c) which require that the scheme be one in which at least all owners of voting shares in the original entity can participate and that participation be available on substantially the same terms.

55. However, subsection 124-780(2A) was introduced by the *Tax Laws Amendment (2010 Measures No. 4) Act 2010* as an alternative to satisfying all the conditions of subsection 124-780(2). Those amendments carved-out arrangements from having to meet the roll-over requirements in paragraphs 124-780(2)(b) and 124-780(2)(c) if the arrangement includes:

- a takeover bid that does not contravene key provisions in Chapter 6 of the *Corporations Act 2001*; and/or
- a compromise or arrangement approved by a court under Part 5.1 of the *Corporations Act 2001* (scheme of arrangement).

56. Since the scheme was entered into by AAGL under Part 5.1 of the *Corporations Act 2001* and was approved by order of a court made for the purposes of paragraph 411(4)(b) of the *Corporations Act 2001*, the conditions contained in subsection 124-780(2A) of the ITAA 1997 are satisfied.

57. Under the scheme, the conditions for a Participating Shareholder to be eligible to choose roll-over under Subdivision 124-M are satisfied.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

- ordinary shares
- securities
- securities transactions

Related Rulings/Determinations:

TR 2006/10

Legislative references:

Subject references:

- acquisition of securities
 - acquisition of shares
 - CGT capital proceeds
 - CGT event A1
 - company tax
 - financial instruments
- ITAA 1997
 - ITAA 1997 104-10
 - ITAA 1997 116-20
 - ITAA 1997 Subdiv 124-M
 - TAA 1953
 - Copyright Act 1968

ATO references

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Income Tax ~~ Capital Gains Tax ~~ roll-overs – scrip for scrip