



Class Ruling

Income tax: demerger of Orora Limited by Amcor Limited

Contents	Para
----------	------

LEGALLY BINDING SECTION:

What this Ruling is about	1
---------------------------	---

Date of effect	7
----------------	---

Scheme	8
--------	---

Ruling	31
--------	----

NOT LEGALLY BINDING SECTION:

Appendix 1:

<i>Explanation</i>	52
--------------------	----

Appendix 2:

<i>Detailed contents list</i>	81
-------------------------------	----

❶ 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 44 of the ITAA 1936;
- section 45 of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45BA of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;

- Division 110 of the ITAA 1997;
- section 115-30 of the ITAA 1997; and
- Division 125 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of Amcor Limited (Amcor) who:

- (a) participated in the scheme that is the subject of this Ruling;
- (b) were residents of Australia as defined in subsection 6(1) of the ITAA 1936 on the Implementation Date of the scheme;
- (c) owned ordinary shares in Amcor (Amcor shares) at the Scheme Record Date and held those on capital account at the time of the scheme; and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their Amcor 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 'Amcor 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 is carried out in accordance with the scheme described in paragraphs 8 to 30 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.

Date of effect

7. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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

8. The following description of the scheme is based on documents and information provided by the applicant.

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

9. On 1 August 2013, Amcor announced to the Australian Securities Exchange (ASX) its intention to demerge its Australasia and Packaging Distribution business by way of a capital reduction and scheme of arrangement.

10. At a Scheme Meeting and General Meeting held on 9 December 2013, Amcor shareholders approved the demerger of Orora Limited (Orora) from Amcor. The demerger was implemented on 31 December 2013.

Relevant Entities

Amcor

11. Amcor is an Australian resident public company listed on the ASX and the head company of an Australian consolidated tax group for the purposes of Part 3-90 of the ITAA 1997.

12. Prior to the demerger Amcor was a global packaging company, headquartered in Melbourne, which operated more than 300 manufacturing sites in over 40 countries through the following business segments:

- *Flexibles packaging:* One of the world's largest suppliers of flexible packaging for the food, beverage, healthcare and tobacco packaging end markets.

- *Rigids packaging:* One of the world's largest producers of polyethylene terephthalate (PET) used for a broad range of predominantly food and beverage, and personal care applications.
 - *Australasia and Packaging Distribution:* Packaging business focused on fibre, glass and beverage can packaging markets in Australia and New Zealand, and the packaging distribution segment in North America.
13. Immediately before the demerger, Amcor had on issue:
- 1,206,684,923 fully paid ordinary shares; and
 - 42,841,424 options, rights, performance shares and retention shares issued under various Amcor employee share schemes (ESS interests).
14. Just before the demerger, the value of Amcor's ESS interests represented less than 3% of the total value of ownership interests in Amcor.
15. There were no other ownership interests in Amcor just before the demerger.

Orora

16. Orora was a wholly owned subsidiary of Amcor.
17. Immediately prior to the demerger, Orora and its wholly owned subsidiaries owned Amcor's Australasia and Packaging Distribution business segment referred to in paragraph 12.

Pre-demerger transactions

18. Prior to the demerger, Amcor undertook certain transactions to facilitate the demerger including:
- entering into a demerger deed with Orora, dealing with various transitional and other commercial and legal issues arising in connection with the legal and economic separation of the Orora business from Amcor;
 - transferring certain assets and liabilities relating to the Orora Business (which principally comprise the New Zealand based non-Flexible operations) that was held by Amcor or subsidiaries of Amcor (other than Orora) to Orora or one of its subsidiaries to align with Orora after the demerger;
 - transferring Amcor's Packaging Distribution business to a wholly owned subsidiary of Orora;

- transferring certain assets and liabilities relating to the Flexibles and Rigid Plastics businesses of Amcor (which principally comprise the Australian Flexible operations) that were owned or held by subsidiaries of Orora to Amcor or its subsidiaries to align with Amcor post demerger;
- obtaining separate stand alone funding in Orora, the proceeds of which have been used to pay down existing intercompany loans;
- settling or forgiving various intercompany loans, receivables and payables (other than ordinary trading receivables and payables which will be settled on normal commercial terms);
- novating a contract of sale for the property at Fairfield, Victoria to Amcor and transferring the land to Amcor (as a result, Amcor has become entitled to rights under the sale contract and has assumed all past and future obligations and liabilities under the contract); and
- entering into a Transitional Services Agreement with Orora under which each entity agreed to continue to provide (or procure the provision of) for a transitional period following the demerger, certain services that each provided to the other prior to the Demerger Date.

The demerger of Orora

19. The demerger of Orora was undertaken by a capital reduction and court approved scheme of arrangement, both of which were approved by the requisite majorities of Amcor shareholders on 9 December 2013.

20. On the Implementation Date, 31 December 2013, Amcor reduced its share capital by \$908,878,595 in aggregate (the capital reduction amount) which was applied equally against each ordinary share of Amcor on issue as at the Scheme Record Date and made a distribution of \$564,483,696 (the dividend component).

21. In accordance with the terms of the scheme of arrangement, the capital reduction amount and the distribution comprising the dividend component was satisfied by Amcor making an *in specie* distribution to Amcor shareholders of one Orora share for every Amcor share they held on the Scheme Record Date.

Sale Facility

22. A sales facility was made available for Ineligible Overseas Shareholders to enable their Orora Shares to be sold by a Sales Agent on the ASX. The net proceeds from the sale were then remitted to the Ineligible Overseas Shareholders free of any brokerage costs or stamp duty.

23. Ineligible Overseas Shareholders were Amcor shareholders whose address as shown in the Amcor share register as at the Scheme Record Date as being in a jurisdiction outside Australia, Belgium, Canada, France, Germany, Hong Kong, New Zealand, Singapore, Spain, Switzerland, the United Kingdom, the United States and certain other countries specified in the scheme documentation.

Accounting for the demerger distribution

24. Amcor accounted for the transfer of the Orora Shares to Amcor shareholders by:

- debiting its share capital account by \$908,878,595 in aggregate; and
- debiting the balance of the demerger allocation (\$564,483,696) to a demerger reserve account.

The total demerger distribution amount of \$1,473,362,291 was ascertained by reference to the volume weighted average price of the Orora shares, \$1.22, as traded on the ASX over the first five trading days after the Effective Date of 17 December 2013.

Reasons for the demerger

25. Amcor considered the key advantages of the demerger to be:

- the creation of two distinct ASX listed packaging companies;
- allowing increased management focus on the separate companies;
- enabling each company to pursue its own growth agenda and strategic priorities;
- enabling each company to allocate its own capital resources; and
- recognition of the different investment profiles of the two companies and hence the provision of investor choice.

Other matters

26. Orora commenced trading on the ASX on 18 December 2013 on a deferred settlement basis.

27. Amcor's ESS interests have been issued in accordance with Division 83A of the ITAA 1997 and are interests to which either Subdivision 83A-B and subsections 83A-35(3) to (9) or Subdivision 83A-C of the ITAA 1997 applies.

28. Amcor confirmed that its share capital account is not tainted as defined in Division 197 of the ITAA 1997.

29. Amcor did not make an election under subsection 44(2) of the ITAA 1936 that subsections 44(3) and 44(4) of the ITAA 1936 will not apply to the dividend component of the demerger distribution.

30. Just after the demerger, at least 50% of the market value of capital gains tax (CGT) assets owned by Orora or its subsidiaries were used directly or indirectly in one or more businesses carried on by Orora or any of its subsidiaries.

Ruling

CGT consequences

CGT event G1

31. CGT event G1 happened in relation to each of the Amcor shares owned by Amcor shareholders at the time Amcor made the payment of the capital reduction amount (section 104-135 of the ITAA 1997).

Capital gain

32. Amcor shareholders made a capital gain when CGT event G1 happened if the capital reduction amount exceeded the cost base of the Amcor share (subsection 104-135(3) of the ITAA 1997). No capital loss can be made from CGT event G1.

33. A capital gain made when CGT event G1 happened is disregarded if the Amcor shareholder acquired the Amcor share before 20 September 1985 (pre-CGT Amcor share) (subsection 104-35(5) of the ITAA 1997).

Demerger roll-over relief

34. Amcor and Orora were part of a demerger group under subsection 125-65(1) of the ITAA 1997.

35. A demerger, as described under section 125-70 of the ITAA 1997, happened under the scheme.

36. Therefore, Amcor shareholders can choose demerger roll-over relief under subsection 125-55(1) of the ITAA 1997.

Demerger roll-over relief is chosen for pre-CGT Amcor shares

37. Amcor shareholders who choose demerger roll-over relief for their pre-CGT Amcor shares are taken to have acquired the corresponding Orora shares under the demerger before 20 September 1985 (subsections 125-55(1), 125-80(5) and 125-80(6) of the ITAA 1997).

Demerger roll-over relief is chosen for post-CGT Amcor shares

38. Amcor shareholders who acquired their Amcor shares on or after 20 September 1985 (post-CGT Amcor shares) disregard any capital gain made when CGT event G1 happened if they choose demerger roll-over relief (subsections 125-55(1) and 125-80(1) of the ITAA 1997).

39. If an Amcor shareholder chooses demerger roll-over relief for their post-CGT Amcor shares, they must recalculate the cost base and reduced cost base of their Amcor and Orora shares.

40. The first element of the cost base and reduced cost base of each post-CGT Amcor share and corresponding Orora share received under the demerger is worked out as follows:

- take the sum of the cost bases of the post-CGT Amcor shares (just before the demerger); and
- apportion that sum over the post-CGT Amcor shares and corresponding new Orora shares received under the demerger.

The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the Amcor shares and Orora shares, or a reasonable approximation of those market values (subsections 125-80(2) and 125-80(3) of the ITAA 1997).

Demerger roll-over relief is not chosen for pre-CGT Amcor shares

41. For Amcor shareholders who own pre-CGT Amcor shares and do not choose demerger roll-over relief:

- none of the corresponding Orora shares acquired under the demerger are taken to be pre-CGT shares;
- those Orora shares are acquired on the Implementation Date of the demerger (31 December 2013) (section 109-10 of the ITAA 1997); and
- the first element of the cost base and reduced cost base of those Orora shares is calculated in accordance with the rules in Division 110 of the ITAA 1997.

Demerger roll-over relief is not chosen for post-CGT Amcor shares

42. Amcor shareholders who own post-CGT Amcor shares and do not choose demerger roll-over relief:

- are not entitled to disregard any capital gain made in respect of CGT event G1 that happened to their Amcor shares under the demerger; and
- the first element of the cost base and reduced cost base of each post-CGT Amcor share and the corresponding Orora share is calculated in the manner described in paragraph 40 of this Ruling (subsection 125-85(1) and 125-85(2) of the ITAA 1997).

Acquisition date of the Orora shares for the purposes of the CGT discount

43. For the purposes of determining eligibility for a discount capital gain, the Orora shares received by an Amcor shareholder in relation to post-CGT Amcor shares are taken to have been acquired on the same date as the corresponding Amcor shares (item 2 in the table in subsection 115-30(1) of the ITAA 1997). This is the case irrespective of whether demerger roll-over relief is chosen or not.

44. For Orora shares acquired in relation to pre-CGT Amcor shares under the demerger where demerger roll-over relief is not chosen, the acquisition date of these Orora shares is the Implementation Date of the demerger, being 31 December 2013 for the purposes of the CGT discount.

Dividend consequences

45. Any dividend arising under the demerger is a demerger dividend (subsection 6(1) of the ITAA 1936).

46. In the absence of an election under subsection 44(2), any demerger dividend is neither assessable income nor exempt income of the participating Amcor shareholders (subsections 44(3) and (4) of the ITAA 1936).

47. As the capital reduction amount was debited to Amcor's share capital account it is not a dividend, as defined in subsection 6(1) of the ITAA 1936 (see the exclusion contained in paragraph (d) of the definition of a dividend contained in subsection 6(1) of the ITAA 1936).

Section 45 of the ITAA 1936

48. Section 45 of the ITAA 1936 will not apply to treat the value of the Orora shares received by Amcor shareholders under the demerger as an unfranked dividend paid by Amcor.

Section 45A of the ITAA 1936

49. The Commissioner will not make a determination under paragraph 45A(2) of the ITAA 1936 that section 45C applies to the whole or any part of the any capital benefit provided to Amcor shareholders under the demerger.

Section 45B of the ITAA 1936

50. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole or any part of any demerger benefit provided to Amcor shareholders under the demerger.

51. 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 any part of the capital benefit provided to Amcor shareholders under the demerger.

Commissioner of Taxation

29 January 2014

Appendix 1 – Explanation

❗ *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 G1

52. CGT event G1 happened in relation to the Amcor shares owned by Amcor shareholders at the time that Amcor made the payment of the capital reduction amount. The payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997, nor an amount taken to be a dividend under section 47 of the ITAA 1936 (section 104-135 of the ITAA 1997).

53. An Amcor shareholder made a capital gain if the capital reduction amount is more than the cost base of their Amcor shares. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

54. An Amcor shareholder cannot make a capital loss when CGT event G1 happens (note 1 of subsection 104-135(3) of the ITAA 1997).

55. If the Amcor share to which the payment relates was acquired by an Amcor shareholder at least 12 months before the payment of the capital reduction amount, a capital gain made from CGT event G1 may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

56. An Amcor shareholder who acquired their Amcor shares before 20 September 1985 disregards any capital gain made when CGT event G1 happened (subsection 104-135(5) of the ITAA 1997).

The demerger roll-over relief

57. Demerger roll-over enables a shareholder to choose to disregard a capital gain made as a result of CGT event G1 happening when a non-assessable payment is made in relation to a share under a demerger.

58. The demerger roll-over provisions in Division 125 of the ITAA 1997 contain a number of conditions for eligibility to choose demerger roll-over relief. The main conditions that are relevant to the Scheme are:

- (a) a shareholder owns a share in a company;
- (b) the company 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 a new or replacement interest is acquired in the demerged entity and nothing else.

59. Under the scheme to which this Ruling relates, the conditions for demerger roll-over relief under Division 125 of the ITAA 1997 are satisfied. Further, the scheme to which this Ruling relates raises no issues of tax law interpretation and no further explanation of the application of those tax laws beyond that contained in the Ruling part of this document is necessary, except for the one aspect of the conditions for roll-over. The relevant issue concerns the treatment of employee share schemes under the proportion test in determining whether a demerger happens to a demerger group.

Employee share schemes

60. One of the conditions for a demerger happening to a demerger group is the 'proportion' test contained in subsection 125-70(2) of the ITAA 1997. Subsection 125-70(2) requires that each owner of original interests in the head entity must:

- acquire, under the demerger, the same proportion, of new interests in the demerged entity as the original owner owned in the head entity just before the demerger; and
- just after the demerger, have the same proportionate total market value of ownership interests in the head entity and demerged entity as the original owner owned in the head entity just before the demerger.

61. The ESS interests issued under Amcor's various employee incentive plans are ownership interests for the purposes of the proportion test. However, section 125-75 of the ITAA 1997 provides for certain employee share scheme interests to be disregarded when applying the proportion test where those interests (taking into account either or both of their number and value) represented not more than 3% of the total ownership interest in the entity (subsections 125-75(1), 125-75(2) and 125-75(3) of the ITAA 1997).

62. Amcor's ESS interests are ownership interests as described in subsection 125-75(2) of the ITAA 1997 and, just before the demerger, the value of these ownership interests represent less than 3% of the value of the total ownership interests in Amcor. For these reasons, it is considered that Amcor's ESS interests can be disregarded for the purposes of the proportion test.

Cost base and reduced cost base apportionment

63. For the purposes of the cost base and reduced cost base apportionment under subsections 125-80(2) and (3) of the ITAA 1997, the Commissioner accepts the volume weighted average price of the Orora shares, \$1.22, and the Amcor fully paid ordinary shares, \$10.41, as traded on the ASX (whether on a deferred or normal settlement basis) over the first five trading days after the Effective Date, as a reasonable approximation of the relative market value of those shares.

Demerger Dividend

64. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income a dividend, as defined in subsection 6(1) of the ITAA 1936, paid to a shareholder out of company profits.

65. Paragraph (d) of the definition of dividend in subsection 6(1) of the ITAA 1936 provides that a dividend excludes amounts debited against an amount standing to the credit of the share capital account of the company.

66. 'Share capital account' is defined in subsection 975-300(3) of the ITAA 1997 as an account that the company keeps of its share capital, or any other account created on or after 1 July 1997 where the first amount credited to the account was an amount of share capital.

67. However, subsection 975-300(3) of the ITAA 1997 provides that an account is not a share capital account if it is tainted. A share capital account is tainted if an amount to which Division 197 of the ITAA 1997 applies is transferred to the share capital account where the account is not already tainted.

68. Amcor has stated that its share capital account remains untainted. In the circumstances of this demerger, Amcor debited a capital reduction amount to its 'share capital account' as defined in section 975-300 of the ITAA 1997. This amount is therefore not a dividend for the purposes of subsection 6(1) of the ITAA 1936 and is not assessable as a dividend under subsection 44(1) of the ITAA 1936.

69. However, Amcor shareholders received a dividend to the extent that the market value of the Orora shares distributed under the demerger exceeded the amount debited against the share capital account (see Taxation Ruling TR 2003/8).

70. This dividend is neither an assessable income nor an exempt income amount (subsections 44(3) and 44(4) of the ITAA 1936) if:

- the dividend is a demerger dividend (as defined in subsection 6(1) of the IAA 1936);
- the head entity did not elect that subsections 44(3) and 44(4) of the ITAA 1936 do not apply to the demerger dividend (subsection 44(2) of the ITAA 1936); and
- subsection 44(5) of the ITAA 1936 is satisfied.

71. In the present circumstances, each of the conditions in paragraph 70 is satisfied. Therefore, the dividend received by Amcor shareholders under the demerger is neither assessable income nor exempt income by operation of subsections 44(3) and 44(4) of the ITAA 1936.

Section 45 of the ITAA 1936

72. 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 and minimally franked dividends are received by other shareholders. Minimally franked dividends are dividends which are franked to less than 10%.

73. 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 value of the Orora shares received by Amcor shareholders under the demerger as a dividend paid by Amcor that is unfrankable.

Section 45A of the ITAA 1936

74. Section 45A of the ITAA 1936 applies in circumstances where a company streams the provision of capital benefits to certain shareholders who derive a greater benefit from the receipt of capital (the advantaged shareholders) and it is reasonable to assume that the other shareholders have received or will receive dividends (the disadvantaged shareholders).

75. The Commissioner may make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies. The effect of such a determination is that the capital benefit is taken to be an unfranked dividend.

76. Based on the information provided and having regard to the circumstances of the scheme, section 45A of the ITAA 1936 will not apply to the whole or any part of any capital benefit provided to Amcor shareholders and the Commissioner will not make a determination under subsection 45A(2) that section 45C of the ITAA 1936 applies.

Section 45B of the ITAA 1936

77. The purpose of section 45B is to ensure that relevant amounts distributed to shareholders of a company 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).

78. Subsection 45B(2) of the ITAA 1936 provides that the section applies if:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company;

- (b) under the scheme the taxpayer obtains a tax benefit as defined in subsection 45B(9) of the ITAA 1936; and
- (a) having regard to the relevant circumstances of the scheme, it would be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling the taxpayer to obtain the tax benefit.

79. 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 Amcor shareholders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) is not present.

80. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(a) or 45(3)(b) of the ITAA 1936 that either section 45BA or 45C of the ITAA 1936 applies to the scheme to which this Ruling relates.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	7
Scheme	8
Background	9
Relevant entities	11
Amcor	11
Orora	16
Pre-demerger transactions	18
The demerger of Orora	19
Sale Facility	22
Accounting for the demerger distribution	24
Reasons for the demerger	25
Other matters	26
Ruling	31
CGT consequences	31
CGT event G1	31
Capital gain	32
Demerger roll-over relief	34
Demerger roll-over relief is chosen for pre-CGT Amcor shares	37
Demerger roll-over relief is chosen for post-CGT Amcor shares	38
Demerger roll-over relief is not chosen for pre-CGT Amcor shares	41
Demerger roll-over relief is not chosen for post-CGT Amcor shares	42
Acquisition date of the Orora shares for the purpose of the CGT discount	43
Dividend consequences	45
Section 45 of the ITAA 1936	48
Section 45A of the ITAA 1936	49
Section 45B of ITAA 1936	50
Appendix 1 – Explanation	52

CGT event G1	52
The demerger roll-over relief	57
Employee share schemes	60
Cost base and reduced cost base apportionment	63
Demerger dividend	64
Section 45 of the ITAA 1936	72
Section 45A of the ITAA 1936	74
Section 45B of the ITAA 1936	77
Appendix 2 –Detailed contents list	81

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2003/8; TR 2006/10

Subject references:

- capital benefit
- capital gains
- CGT events
- CGT event G1
- cost base adjustments
- demerger
- demerger allocation
- demerger benefit
- demerger dividend
- demerger group
- demerger subsidiary
- return of capital on shares

Legislative references:

- ITAA 1936 45BA
- ITAA 1936 45C
- ITAA 1936 47
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(5)
- ITAA 1997 109-10
- ITAA 1997 Div 110
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 115-30
- ITAA 1997 115-30(1)
- ITAA 1997 Div 125
- ITAA 1997 125-55(1)
- ITAA 1997 125-65(1)
- ITAA 1997 125-70
- ITAA 1997 125-70(2)
- ITAA 1997 125-75
- ITAA 1997 125-75(1)
- ITAA 1997 125-75(2)
- ITAA 1997 125-75(3)
- ITAA 1997 125-80(1)
- ITAA 1997 125-80(2)
- ITAA 1997 125-80(3)
- ITAA 1997 125-80(5)
- ITAA 1997 125-80(6)
- ITAA 1997 125-85(1)
- ITAA 1997 125-85(2)
- ITAA 1997 Div 197
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968
- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(2)
- ITAA 1936 44(3)
- ITAA 1936 44(4)
- ITAA 1936 45
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(3)(a)
- ITAA 1936 45B(3)(b)

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