



Class Ruling

Income tax: roll-over – exchange of employee share rights in Afterpay Holdings Limited for share rights in Afterpay Touch Group Limited

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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.

Summary – 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:

- Division 104 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 83A-130 of the ITAA 1997
- Subdivision 124-M of the ITAA 1997
- section 130-80 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the employees of Afterpay Holdings Limited (AHL) who:

- held Performance Rights and/or Options over AHL shares (AHL Rights) and had those AHL Rights exchanged for like rights over shares in Afterpay Touch Group Limited (Afterpay Touch Group) under the scheme described below;
- are residents of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (and not temporary residents as defined in section 995-1 of the ITAA 1997);
- held those AHL Rights on capital account at the time of the scheme and not as trading stock or revenue assets;
- are not subject to the Taxation of Financial Arrangements (TOFA) under Division 230 of the ITAA 1997 in regard to their AHL Rights.

(**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 arrangement 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 23 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 2017 to 30 June 2018. The Ruling continues to apply after 30 June 2018 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 information provided by the applicant for this Ruling.

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

9. On 6 July 2017 (the Implementation Date), pursuant to a scheme of arrangement effected under the *Corporations Act 2001*, all shareholders of AHL transferred all their shares to a newly incorporated Australian company, Afterpay Touch Group Limited (Afterpay Touch Group), in exchange for being issued new shares in Afterpay Touch Group and nothing else.

Background

10. AHL is a company incorporated in Australia on 22 June 2015. Its shares were listed on the Australian Securities Exchange (ASX) on 4 May 2016. All of the group's activities are conducted in Australia and derives 100% of its revenues from Australian operations and customers.

11. As at 31 December 2016, there were over 1,000 holders of a total 180,337,038 ordinary shares in AHL. The largest shareholder with a holding of approximately 27.8% is Touch Australia Pty Limited, a 100% subsidiary company of Touchcorp Limited, another ASX listed company.

12. On 23 February 2017, AHL announced, in an ASX announcement, an intention to merge with Touchcorp Limited under a newly incorporated holding company, Afterpay Touch Group.

13. Afterpay Touch Group is a company that was incorporated in Australia on 30 March 2017 with nominal contributed share capital of \$2 consisting of two ordinary shares. It was incorporated for the above merger.

14. The merger was effected by both AHL and Touchcorp Limited undertaking separate schemes of arrangement under their relevant companies regulations with approval of their respective shareholders and the court.

15. The AHL scheme of arrangement was approved by a vote of its shareholders at a meeting on 19 June 2017 and was approved by the Federal Court of Australia on 28 June 2017 pursuant to paragraph 411(4)(b) of Part 5.1 of the *Corporations Act 2001*.

16. The Touchcorp Limited scheme was implemented first on 6 July 2017. The AHL scheme was also implemented on 6 July 2017 immediately after the Touchcorp Limited scheme.

17. Under the AHL scheme, on 6 July 2017 all shareholders of AHL (except for Touch Australia Pty Limited) transferred ownership of all their shares to Afterpay Touch Group, and in exchange received one new share in Afterpay Touch Group, and nothing else, for each share in AHL.

18. As a consequence of the AHL scheme and the Touchcorp Limited scheme, AHL became an, indirectly, wholly owned subsidiary company of Afterpay Touch Group Limited.

19. Subsequently the AHL shares were delisted from the ASX and the new shares in Afterpay Touch Group Limited were listed on the ASX.

20. Any foreign shareholders who were ineligible to receive shares in Afterpay Touch Group under the scheme due to laws of their country, had their new shares in Afterpay Touch Group issued instead to a nominee who would then sell the shares on the ASX and pay the net proceeds to the ineligible foreign shareholders.

Afterpay Employee Share Rights

21. AHL operated the Afterpay Employee Option Plan and the Afterpay Employee Incentive Plan (Employee Share Plans) under which it made grants of Performance Rights and Options (AHL Rights) over AHL shares, which are subject to vesting conditions based on continuation of employment and performance criteria.

22. As at 12 May 2017 there were 155,000 outstanding Performance Rights and 16,065,000 outstanding Options issued under the Employee Share Plans.

23. In connection with the merger scheme outlined above, all the AHL Rights were either cancelled or acquired by Afterpay Touch Group, in exchange for the issue of replacement rights over shares in Afterpay Touch Group. The exchange of rights was on a one-for-one basis for the same number of AHL Performance Rights and/or Options (as applicable) and on terms the same in all respects (including exercise price, expiry date and vesting conditions).

Ruling

CGT event on exchange of Rights

24. A CGT event happened to the AHL Rights when they were cancelled or disposed of in exchange for replacement rights over shares in Afterpay Touch Group.
25. A capital gain is made if the capital proceeds from the CGT event exceeded the cost base of the AHL Rights. A capital loss is made if the capital proceeds from the CGT event were less than the reduced cost base of the AHL Rights.
26. However a capital gain, if any, may be disregarded if the circumstances below apply to you.

Where no prior ESS deferred taxing point had happened to the AHL Rights

27. Where an employee had AHL Rights subject to Division 83A, and an ESS deferred taxing point had not previously happened in relation to their AHL Rights, the exchange of the AHL Rights for like rights in Afterpay Touch Group will be eligible for rollover under Division 83A (section 83A-130). Under this rollover an ESS taxing point will not arise for the AHL Rights as a result of the exchange and the new rights are treated for Division 83A purposes as a continuation of the old AHL Rights.
28. This rollover is not applicable to an employee whose share ownership in the new company, Afterpay Touch Group, at the time the replacement rights are issued is more than 10% inclusive of shares that could be acquired via the new replacement rights (subsection 83A-130(9)).
29. A capital gain or a capital loss made from the CGT event happening to the AHL Rights that have not had a prior ESS deferred taxing point is ignored (section 130-80).

Where prior ESS deferred taxing point had happened to the AHL Rights

30. Where an employer had AHL Rights subject to Division 83A, but an ESS taxing point had previously happened in relation to their AHL Rights, the exchange of the AHL Rights for like rights in Afterpay Touch Group will constitute a CGT event happening to the AHL Rights as described above.

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31. If a capital gain was made from the CGT event, the holder is eligible to choose CGT rollover under Subdivision 124-M (section 124-780 and section 124-785). Where rollover is chosen, the capital gain is ignored and the first element of the cost base and reduced cost base of each replacement right in Afterpay Touch Group is the cost base of the original AHL Right that was exchanged (section 124-785).

32. Rollover under Subdivision 124-M is not applicable if a capital loss was made.

Commissioner of Taxation

2 August 2017

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.*

Where no prior ESS deferred taxing point had happened to the AHL Rights

No ESS deferred taxing point on exchange of rights

33. Where the employee's new replacement rights in Afterpay Touch Group are, for the purposes of section 83A-130, treated as a continuation of the old AHL Rights, the exchange alone would not trigger an ESS deferred taxing point for the AHL Rights.

34. Section 83A-130 provides, relevantly, that where:

- as a result of a company takeover an employee stops holding ESS interests in the old company (AHL) that were acquired under an employee share scheme
- the employee acquires in connection with the takeover replacement ESS interests in a new company (Afterpay Touch Group) that can reasonably be regarded as matching any of the old ESS interests
- the replacement ESS interest relate to ordinary shares
- the employee is employed by the new company, or a subsidiary of the new company, or a holding company of the new company, or a subsidiary of a holding company of the new company
- the employee at the time they acquire the replacement ESS interest:
 - does not hold and is not taken to hold a beneficial interest in more than 10% of the shares in the new company
 - is not in a position and is not taken to be in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of the new company, and

the replacement ESS interests will, for the purposes of Division 83A, be treated as a continuation of the employee's ESS interests in the old company.

35. The AHL scheme of arrangement constituted a 'takeover' within the meaning of section 83A-130 because AHL (the 'old company') became a 100% subsidiary of another company, Afterpay Touch Group (the 'new company'), as a result of the scheme (subsection 83A-130(1)).

36. The above conditions are satisfied, except for any employee whose share ownership in the new company, Afterpay Touch Group, at the time the replacement rights are issued is more than 10% inclusive of shares that could be acquired via the new replacement rights.

CGT treatment of AHL Rights

37. Subsection 130-80(1) applies to disregard any capital gain or capital loss made from the CGT event happening to the AHL Rights as:

- they are ESS interests that were acquired under an employee share scheme (paragraph 130-80(1)(a))
- the CGT event that happens is not CGT event E4, G1 or K8 (paragraph 130-80(1)(b))
- if subdivision 83A-C applies to the AHL Rights, the CGT event happened before the ESS deferred taxing point (subparagraph 130-80(1)(d)(ii)), and
- if subdivision 83A-C applies to the AHL Rights, the CGT event did not happen because the ESS interest was forfeited or lost (paragraphs 130-80(2)(a) and (b)).

38. The above conditions are satisfied where an employee had AHL Rights subject to Division 83A, and an ESS deferred taxing point had not previously happened in relation to their AHL Rights. In that case, any capital gain or capital loss made from the CGT event happening on cancellation or disposal of the AHL Rights in exchange for the replacement rights, is disregarded.

Where a prior ESS deferred taxing point had happened to the AHL Rights

Availability of CGT rollover under Subdivision 124-M

39. A scrip for scrip roll-over under Subdivision 124-M enables an entity to disregard a capital gain from share rights if the share rights holder receives replacement share rights in exchange. It also provides special rules for calculating the cost base of the replacement share rights.

40. Subdivision 124-M contains a number of conditions for, and exceptions to, an entity 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:

- an entity exchanges an option, right or similar interest issued by the original entity that gives the holder an entitlement to acquire a share in the original entity for a similar interest in another company (sub-paragraph 124-780(1)(a)(ii))

- the exchange is in consequence of a single arrangement that satisfies subsection 124-780(2) or (2A)
- conditions for the roll-over in subsection 124-780(3) are satisfied
- further conditions, if applicable, are satisfied, and
- exceptions to obtaining scrip for scrip roll-over are not applicable.

41. Under the scheme, where an employee had AHL Rights subject to Division 83A, but an ESS taxing point had previously happened in relation to their AHL Rights, the exchange of the AHL Rights for like rights in Afterpay Touch Group satisfies the requirements for the roll-over under Subdivision 124-M.

Appendix 2 – Detailed contents list

42. 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

Legislative references:

- ITAA 1936
 - ITAA 1936 6(1)
 - ITAA 1997
 - ITAA 1997 Div 83A
 - ITAA 1997 83A-130
 - ITAA 1997 83A-130(1)
 - ITAA 1997 83A-130(9)
 - ITAA 1997 83A-C
 - ITAA 1997 Div 104
 - ITAA 1997 Subdiv 124-M
 - ITAA 1997 124-780
 - ITAA 1997 124-780(1)(a)(ii)
 - ITAA 1997 124-780(2)
 - ITAA 1997 124-780(2A)
 - ITAA 1997 124-780(3)
 - ITAA 1997 124-785
 - ITAA 1997 130-80(1)
 - ITAA 1997 130-80(1)(a)
 - ITAA 1997 130-80(1)(b)
 - ITAA 1997 130-80(1)(d)(ii)
 - ITAA 1997 130-80(2)(a)
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 - ITAA 1997 Div 230
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 - Corporations Act 2001
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ATO references

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ATOlaw topic: Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 – disposal of a CGT asset
Income tax ~~ Capital gains tax ~~ Rollovers ~~ Scrip for scrip – Subdivision 124-M

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