


CR 2007/93 - Income tax: exchange of shares in Macquarie Bank Limited for shares in Macquarie Group Limited

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Class Ruling

Income tax: exchange of shares in Macquarie Bank Limited for shares in Macquarie Group 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, we must apply the law to you in the way set out in the Ruling (unless we are satisfied that the Ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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 taxation 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:

- section 45B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45C of the ITAA 1936;
- section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) ;
- section 124-360 of the ITAA 1997;
- section 124-365 of the ITAA 1997;
- section 124-380 of the ITAA 1997;
- section 124-390 of the ITAA 1997;
- section 977-50 of the ITAA 1997; and

- section 995-1 of the ITAA 1997.

All 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 is the ordinary shareholders of Macquarie Bank Limited (MBL) who:
 - (a) participate in the exchange, as defined in paragraph 19 of this Ruling; and
 - (b) are residents of Australia for the purposes of 6(1) of the ITAA 1936 at the time of disposal of their MBL shares.
4. In this Ruling, the entities belonging to this class are referred to as 'participating shareholders'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling and the following assumptions:
 - that the scheme, that is due to take place in November 2007, takes place as described and in accordance with the scheme as defined in paragraphs 16 to 24 of this Ruling;
 - Macquarie Group Limited (MGL) will be a non-operating holding company within the meaning of the *Financial Sector (Business Transfer and Group Restructure) Act 1999* once the scheme takes place;
 - a restructure instrument under Part 4A of that Act will be in force in relation to MGL for the purposes of the scheme within the meaning of that Act;
 - MBL will become a subsidiary of MGL because of the scheme to which the restructure instrument relates; and
 - MBL will continue to be an authorised deposit-taking institution (ADI) from the time that the scheme takes place.
6. This Ruling does not apply in respect of the ordinary shares in MBL that were:
 - (a) acquired under an employee share scheme for the purposes of Division 13A of the ITAA 1936 if they have not made an election under section 139E of the ITAA 1936 and a 'cessation time' has not occurred in respect of those MBL Shares to which an election has not been made; or

- (b) acquired shares upon exercise of options granted to each holder in the capacity of employee under an employee share scheme for the purposes of Division 13A of the ITAA 1936 if they have not made an election under section 139E of the ITAA 1936 and a 'cessation time' has not occurred in respect of those MBL Shares to which an election has not been made.

7. This Ruling does not provide guidance on whether the participating shareholders hold their shares as revenue assets (as defined by section 977-50) or that their shares constitute trading stock (as defined in section 995-1).

8. 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 16 to 24 of this Ruling.

9. 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

11. This Ruling applies from 1 July 2007 to 30 June 2008. However, the Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

12. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or

- the relevant provisions are not amended.

13. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

16. 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 3 July 2007 from Greenwoods & Freehills Pty Limited on behalf of ordinary shareholders in MBL;
- the factual background as provided to the Commissioner in correspondence and emails from Greenwoods & Freehills Pty Limited dated 22 June 2007 and 29 June 2007;
- Draft Scheme of Arrangement (the Scheme of Arrangement) provided on 29 June 2007;
- Draft Implementation Deed (the Implementation Deed) dated 29 June 2007;
- Draft Sale Facility Bank Deed Poll (the Sale Facility Bank Deed Poll) provided on 29 June 2007 and as amended by the email from Greenwoods & Freehills Pty Limited to the Tax Office on 5 July 2007; and
- Draft MGL Deed Poll (the MGL Deed Poll) dated 29 June.

17. MBL is a publicly listed company on the Australian Securities Exchange (ASX). MBL operates in a range of investment banking, commercial banking and selected retail financial services markets both in Australia and overseas. It is an ADI, that is, a licensed bank under the *Banking Act 1959*.

18. By virtue of this scheme, which is a part of the reorganisation of the MBL Group (the Reorganisation), MBL intends to separate the MBL group of companies into two sub-divisions (banking and non-banking), with a common non-operating holding company (NOHC), being MGL.

19. The interposition of MGL between MBL and its ordinary shareholders will comprise the following two steps (the exchange):

- (i) All of the ordinary shares in MBL (the MBL shares) held by the MBL shareholders who will participate in the exchange (including the ordinary shares held by a Sale Facility Bank as nominee of certain non-resident shareholders), will be disposed of to MGL. The disposal of these MBL shares to MGL is expected to occur on or about 13 November 2007.
- (ii) Immediately after the transfer of these MBL shares to MGL, MGL will issue new ordinary shares (the MGL shares) on a one for one basis to those MBL shareholders who participate in the exchange. This issue is expected to occur on or about 13 November 2007.

20. The time that *all* the MBL shareholders who participate in the exchange have disposed of their MBL shares is referred to as the completion time.

21. All MBL shareholders registered at a certain time on the Record Date (one ASX business day before the date on which the exchange is implemented) will participate in the exchange.

22. Following the exchange, MGL will cancel the two MGL shares held by MBL. This is also expected to occur on or about 13 November 2007.

23. The exchange satisfies all of the conditions in subsection 124-360(1), subsections 124-365(1) to 124-365(3), subsections 124-380(1) to 124-380(3) and subsection 124-380(5).

24. For the purposes of applying Subdivision 124-G in this Ruling, certain preference shares on issue in MBL and certain ordinary shares in MBL and MGL held by a Sale Facility Bank as nominee will be disregarded.

Note: certain information received from Greenwoods & Freehills Pty Limited has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

Ruling

Roll-over under subdivision 124-G

25. The participating shareholders will be taken to have chosen the roll-over under subsection 124-360(2) in relation to the exchange.

MBL shares that are not held as trading stock or revenue assets

26. The consequences under subdivision 124-G for the participating shareholders who do not hold their MBL shares as revenue assets or as trading stock will be as follows:

- (i) any capital gain or capital loss that is made on the disposal of MBL shares under the exchange is disregarded pursuant to subsection 124-10(2); and
- (ii) where the participating shareholder acquired the MBL share(s) on or after 20 September 1985:
 - the first element of the cost base/reduced cost base for each MGL share acquired under the exchange is equal to the cost base of each corresponding MBL share disposed of under the exchange pursuant to subsection 124-10(3); or
- (iii) where the participating shareholder acquired the MBL share(s) before 20 September 1985:
 - the participating shareholder is taken to have acquired the MGL share(s) before that day pursuant to subsection 124-10(4).

MBL shares held as revenue assets

27. For each participating shareholder who holds MBL shares as revenue assets (as defined in section 977-50) immediately prior to the disposal of those shares under the exchange, the additional consequences of obtaining rollover under section 124-390 are that:

- (i) the disposal of the MBL shares in exchange for the MGL shares results in the deferral of any profit or loss that arises as a direct consequence of the exchange, and
- (ii) for each replacement share in MGL, the participating shareholder is taken to have paid the total of the participating shareholder's subsection 124-390(4) amounts divided by the number of MGL shares that the participating shareholder acquires under the exchange (subsection 124-390(5)).

MBL shares held as trading stock

28. The consequences under subdivision 124-G for the participating shareholders who hold their MBL shares as trading stock, pursuant to paragraph 124-390(1)(a) and subsections (2) and (3) will be as follows:

- (i) in the income year in which the completion time occurs, pursuant to subsection 124-390(2) the assessable income of a participating shareholder will include an amount equal to:
 - if the MBL shares have been trading stock of that participating shareholder ever since the start of that income year – the total of the ‘value’ of the trading stock at the start of that income year (as defined in sections 70-40 and 70-45) and the amount (if any) by which its cost has increased since the start of that income year; or
 - otherwise – the cost of that participating shareholder’s MBL shares at the time of disposal;
- (ii) for each MGL share acquired under the exchange, a participating shareholder will be taken to have paid an amount determined by dividing the total of the amounts included in the assessable income of that participating shareholder under subsection 124-390(2) by the number of MGL shares that participating shareholder acquires under the exchange pursuant to subsection 124-390(3).

29. A participating shareholder who holds the MGL shares as trading stock will be entitled, in the income year in which the trading stock is considered to be ‘on hand’, to a deduction under section 8-1 equal to the total amounts included in the assessable income of that participating shareholder under subsection 124-390(2).

Anti-avoidance provision

30. The Commissioner will not make a determination under section 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the capital benefits received by the participating shareholders.

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.*

Roll-over under subdivision 124-G

31. The participating shareholders will be taken to have chosen to obtain the roll-over pursuant to subsection 124-360(2) because:

- the exchange satisfies all of the necessary conditions in subsection 124-360(1), subsections 124-365(1) to 124-365(3), subsections 124-380(1) to 124-380(3) and subsection 124-380(5);
- the participating shareholders are all residents at the time of disposing of their MBL shares under the exchange, as required by paragraph 124-365(4)(a);
- immediately before the completion time, MBL will be the head company of the MBL consolidated group; and
- immediately after the completion time, MGL will be the head company of the group.

MBL shares that are not held as trading stock or revenue assets

32. For the participating shareholders who do not hold their MBL shares as trading stock or revenue assets, the roll-over consequences are contained in subdivision 124-A.

33. Under subsection 124-10(2) a capital gain or a capital loss that a participating shareholder makes from the MBL shares is disregarded.

34. Where the participating shareholder acquired the MBL share(s) on or after 20 September 1985, the first element of each MGL share acquired under the exchange by this participating shareholder will be equal to the cost base of the corresponding MBL share disposed of pursuant to subsection 124-10(3).

35. The first element of the reduced cost base of each MGL share will be worked out similarly pursuant to subsection 124-10(3).

36. Where the participating shareholder acquired the MBL shares before 20 September 1985, the participating shareholder is taken to have acquired each new asset before that day pursuant to subsection 124-10(4).

MBL shares held as revenue assets

37. The intent of subsections 124-390(4) and 124-390(5) is to provide roll-over for the participating shareholders who hold their MBL shares as revenue assets (as defined in section 977-50) immediately prior to the disposal of those shares under the exchange. The consequences of obtaining rollover to give effect to section 124-390 is that the disposal of the MBL shares in exchange for the MGL shares results in the deferral of any profit or loss that arises as a direct consequence of the exchange.

38. For each replacement share in MGL the participating shareholder is taken to have paid, the total of the participating shareholder's subsection 124-390(4) amounts divided by the number of MGL shares that the participating shareholder acquires under the exchange (subsection 124-390(5)).

MBL shares held as trading stock

39. For the participating shareholders who hold all or some of their MBL shares as trading stock there are additional consequences if the participating shareholder is taken to have chosen the roll-over under subsection 124-360(2).

40. Under the trading stock provisions, the disposal of an MBL share under the Exchange by one of these participating shareholders would normally result in either:

- (i) the amount that the participating shareholder received for the MBL share being included in assessable income under section 6-5 if the disposal was made in the ordinary course of business (see subsection 70-80(1)); or
- (ii) the market value of the MBL share being included in the participating shareholder's assessable income under subsection 70-90(1) if the disposal was made outside the ordinary course of business.

41. Subsection 124-390(2) changes the above amount that is included in assessable income to an amount that is equal to:

- (a) if the MBL share has been the participating shareholder's trading stock since the beginning of the income year in which the exchange occurs – the total of:
 - (i) its value as trading stock at the start of the income year; and
 - (ii) the amount (if any) by which its cost has increased since the start of the income year; or
- (b) otherwise – its cost at the time of disposal.

42. Under subsection 124-390(3), the participating shareholder is taken to have paid an amount for each of the MGL shares that the participating shareholder acquired in return for their MBL shares that were trading stock at that time. That amount is calculated by the following formula:

$$\frac{\text{Total of the amounts included in the participating shareholder's assessable income under subsection 124-390(2) for the MBL shares}}{\text{Number of those MGL shares}}$$

43. The total of the amounts included under subsection 124-390(2) is, broadly, either the 'cost' or the 'value' of those MBL shares to the participating shareholder. Therefore, the participating shareholder is taken to have paid that same 'cost' or 'value' for those MGL shares acquired under the exchange. In accordance with subsection 70-15(2), the participating shareholder will be entitled to a deduction for this acquisition 'cost' under section 8-1 provided that the MGL shares are considered to be on hand.

Anti-avoidance provision

44. Section 45B of the ITAA 1936 applies where certain capital payments are paid to shareholders in substitution for dividends. In broad terms, section 45B of the ITAA 1936 applies where:

- (i) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- (ii) under the scheme, a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- (iii) 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 a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

45. Under the present scheme, each of the participating shareholders will receive MGL shares which will constitute a capital benefit.

46. If the amount of tax payable by a participating shareholder would be payable at a later time (as a result of the roll-over under subdivision 124-G of the ITAA 1997) than it would be payable if the capital benefit had been a dividend, then the participating shareholder will obtain a tax benefit in accordance with paragraph 45B(2)(b) of the ITAA 1936.

47. However, under the present scheme, the requisite purpose of enabling the participating shareholder to obtain a tax benefit is not present. Having regard to the 'relevant circumstances' of the scheme, as set out in subsection 45B(8) of the ITAA 1936, it is apparent that none of the persons who entered into or carried out the scheme, or any part of it, did so for the requisite purpose of enabling a participating shareholder to obtain a tax benefit.

48. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the capital benefit received by any of the participating shareholders.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Subject references:

- assessable income
- general deduction
- replacement asset roll-over

Legislative references:

- ITAA 1936 6(1)
 - ITAA 1936 45B
 - ITAA 1936 45B(2)(a)
 - ITAA 1936 45B(2)(b)
 - ITAA 1936 45B(2)(c)
 - ITAA 1936 45B(3)
 - ITAA 1936 45B(8)
 - ITAA 1936 45C
 - ITAA 1936 Pt III Div 13A
 - ITAA 1936 139E
 - ITAA 1997 6-5
 - ITAA 1997 8-1
 - ITAA 1997 70-15(2)
 - ITAA 1997 70-40
 - ITAA 1997 70-45
 - ITAA 1997 70-80(1)
 - ITAA 1997 70-90(1)
 - ITAA 1997 Subdiv 124-A
 - ITAA 1997 Subdiv 124-G
 - ITAA 1997 124-10(2)
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 - ITAA 1997 124-10(4)
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 - TAA 1953
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ATO references

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