

CR 2008/32 - Income tax: capital gains: establishment of Asciano Finance Trust and demerger of Asciano Ltd by Toll Holdings Ltd



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Class Ruling

Income tax: capital gains: establishment of Asciano Finance Trust and demerger of Asciano Ltd by Toll Holdings Ltd

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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 relevant provision(s) identified below apply to the defined class of entities, who took 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 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45BA of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 128B of the ITAA 1936;
- section 128D of the ITAA 1936;

- Division 1A of the former Part IIIAA of the ITAA 1936;
- subsection 104-10(4) of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997;
- section 109-10 of the ITAA 1997;
- Division 110 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- Division 125 of the ITAA 1997;
- section 207-20 of the ITAA 1997; and
- Division 855 of the ITAA 1997.

Class of entities

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

- (a) participated in the scheme that is the subject of this Ruling;
- (b) owned ordinary shares in Toll and held those shares on capital account on the record date of 13 June 2007 for that scheme; and
- (c) are either:
 - residents of Australia as that term is defined in subsection 6(1) of the ITAA 1936 (resident); or
 - foreign residents as that term is defined in subsection 995-1(1) of the ITAA 1997 (foreign resident) whose shares in Toll are not taxable Australian property (as that term is defined in section 855-15 of the ITAA 1997).

4. In this Ruling this class of entities is referred to as 'participating Toll shareholders'.

Qualifications

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

6. 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 14 to 35 of this Ruling.

7. 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 was not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

9. This Ruling applies to the income year ended 30 June 2007. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

10. 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.

11. 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)).

12. 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.

13. 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

14. The following description of the scheme is based on information provided by KPMG (the applicant for this Ruling).

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

15. The scheme that is the subject of this Ruling involves the establishment of the Asciano Finance Trust (Asciano Trust) and the demerger by Toll of Asciano Limited (Asciano). This scheme involved two separate Schemes of Arrangement.

Background to Toll

16. Toll is an Australian resident company listed for quotation on the Australian Securities Exchange (ASX).

17. At the time of undertaking the Scheme, the Toll Group was a major transport and logistics group, consisting of various divisions which included transport, ports, infrastructure, automotive and stevedoring. Toll's transport and infrastructure assets included warehousing, road fleets, ships, railways and air freight capacity.

18. At the time of undertaking this scheme, Toll was the head entity of a consolidated group for income tax purposes.

Acquisition of Patrick Corporation Ltd

19. During 2006, Toll acquired 100% of Patrick Corporation Ltd (Patrick). Patrick was a transport logistics company specialising in the loading and unloading of ships and the efficient land-based collection, distribution and storage of cargo for import, export and within Australia.

20. Prior to this acquisition, Toll and Patrick each owned 50% of Pacific National Pty Ltd (PN). As a result of the acquisition of Patrick, Toll became the owner of the 50% of PN owned by Patrick, and PN became a wholly-owned subsidiary of Toll.

21. The Australian Competition and Consumer Commission (ACCC) obtained certain undertakings from Toll in relation to the Patrick acquisition, parts of which were, in effect, satisfied by aspects of the second Scheme of Arrangement.

Toll ownership interests

22. At the time of undertaking the scheme, Toll had on issue:
- approximately 643 million ordinary shares;
 - 2.5 million Reset Preference shares; and
 - 8.1 million employee share options.
23. The Reset Preference shares are issued on terms such that their value was not affected by the demerger.
24. At the time of undertaking the scheme:
- the Reset Preference shares represented less than 10% of the total of all ownership interests in Toll;
 - all employee share options were qualifying rights within the meaning of section 139CD of the ITAA 1936. Their total value as a percentage of the total value of all ownership interests in Toll was less than 3%; and
 - Toll had no shareholders who acquired their interest in Toll before 20 September 1985 (pre-CGT shareholders).

Toll corporate restructure

25. Toll divided its existing corporate structure into a Logistics Group and an Infrastructure Group (the restructure). Toll effected this restructure by undertaking the following transactions:
- incorporating a new company, Asciano;
 - establishing a new unit trust, Asciano Trust; and
 - transferring infrastructure assets to Asciano from members of the Toll Group of companies.
26. Under the two Schemes of Arrangement that were approved by Toll shareholders on 28 May 2007, Toll made two separate and distinct capital reductions and payments of special dividends.
27. The first Scheme of Arrangement involved the payment of a fully franked dividend of \$0.17 (first special dividend) and a return of capital of \$0.45 (first capital reduction amount) for each ordinary Toll share. The total amount of \$0.62 per share was compulsorily applied on behalf of Toll shareholders to subscribe for a unit in the Asciano Trust. The Asciano Trust units were allotted on the implementation date of the first Scheme of Arrangement, which was 15 June 2007.
28. The second Scheme of Arrangement involved the payment of an unfranked dividend of \$1.40 (second special dividend) and a return of capital of \$3.75 (second capital reduction amount) for each ordinary Toll share. Those amounts were applied for the issue of Asciano shares which were allotted to Toll shareholders on the implementation date of the second Scheme of Arrangement, which was 15 June 2007.

Accounting for the distributions

29. Toll accounted for the payments made under the first Scheme of Arrangement by debiting its retained earnings account by \$109 million and its share capital account by \$289 million.

30. Toll accounted for the payments made under the second Scheme of Arrangement by debiting its retained earnings account by \$899 million and its share capital account by \$2,410 million.

Reasons for the restructure

31. The Schemes of Arrangement were undertaken for the following reasons:

- to comply with undertakings that Toll made to the ACCC relating to the acquisition of Patrick;
- to allow the Asciano Infrastructure Group and the Toll Logistics Group to pursue their own business plans and operate independently;
- to ensure that the capital structures of the logistics and infrastructure businesses were appropriate to their operations and underlying assets;
- to facilitate the raising of debt and equity; and
- to provide flexibility to undertake future acquisitions.

Other matters

32. Immediately after the demerger the Asciano Trust units and the Asciano shares were stapled together.

33. The effect of stapling is that the interests comprising the staple may only be dealt with together as, in effect, one security on the ASX.

34. Further, Toll has advised that at the time the Schemes of Arrangement were undertaken:

- no transfers to Toll's share capital account had resulted in it becoming 'tainted' within the meaning of section 197-50 of the ITAA 1997;
- at least 50% of the market value of capital gains tax (CGT) assets owned by Asciano were used in the carrying on of a business; and
- no entity owned more than 20% of the ownership interests in Toll.

35. Toll did not make an election under subsection 44(2) of the ITAA 1936.

Ruling

The first Scheme of Arrangement

Assessable dividend

36. The first special dividend amount (\$0.17 per ordinary Toll share) paid under the first Scheme of Arrangement was:

- assessable income (as a dividend) under subsection 44(1) of the ITAA 1936 for a participating Toll shareholder who was a resident;
- a franked distribution; and
- exempt from withholding tax pursuant to paragraph 128B(3)(ga) of the ITAA 1936 for a participating Toll shareholder who was a foreign resident and was neither assessable income nor exempt income of that foreign resident (section 128D of the ITAA 1936).

Qualified person

37. Subject to a resident individual, superannuation fund or company shareholder being a 'qualified person', an amount equal to the franking credit of the first special dividend (gross-up) is included in their assessable income under subsection 207-20(1) of the ITAA 1997. These shareholders are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the first special dividend included in their assessable income.

38. The payment of the first special dividend did not constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

39. For the purposes of Division 1A of former Part IIIAA of the ITAA 1936, eligible shareholders will be considered to satisfy the holding period rule under former section 160APHO of the ITAA 1936 and therefore be qualified persons in relation to the first special dividend received if:

- (a) the Toll shares were acquired on or before 5 June 2007; and
- (b) during the period when the shares or interest in the shares were held the shareholders did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) for a continuous period of at least 45 days.

40. As the first capital reduction amount (\$0.45 per ordinary Toll share) was debited to Toll's share capital account it was not a dividend, as defined in subsection 6(1) of the ITAA 1936.

CGT event G1

41. CGT event G1 (section 104-135 of the ITAA 1997) happened to each of the shares of the participating Toll shareholders at the time they received the first capital reduction amount (of \$0.45 for each ordinary Toll share) under the first Scheme of Arrangement.

42. Participating Toll shareholders made a capital gain from CGT event G1 happening to the extent that the first capital reduction amount exceeded the cost base of their Toll shares (subsection 104-10(4) of the ITAA 1997).

Disregarding any capital gain for foreign residents

43. If the participating Toll shareholder was a foreign resident, any capital gain from CGT event G1 that happened in relation to the first capital reduction amount on the Toll shares was disregarded (subsection 855-10(1) of the ITAA 1997).

Cost base of shares in Toll

44. As a result of CGT event G1 happening, the cost base and reduced cost base of each Toll share were reduced (but not below nil) by the first capital reduction amount (subsections 104-135(3) and (4) of the ITAA 1997).

Cost base of units in Asciano Trust

45. The first element of the cost base and reduced cost base of each unit in the Asciano Trust received by participating Toll shareholders is \$0.62, being the sum of the first capital reduction amount and the first special dividend that was applied for the subscription of each of those units (sections 110-25 and 110-55 of the ITAA 1997).

Acquisition date of units in Asciano Trust

46. The acquisition date of the new units in the Asciano Trust is the date they were issued to each Toll shareholder (section 109-10 of the ITAA 1997). This happened on the implementation date of the first Scheme of Arrangement, which was 15 June 2007.

Application of sections 45A, 45B and 45C

47. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 or 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 participating Toll shareholders under the first Scheme of Arrangement.

The second Scheme of Arrangement***Demerger dividend***

48. The second special dividend (\$1.40 per ordinary Toll share) was:

- a demerger dividend (subsection 6(1) of the ITAA 1936) that was neither assessable income nor exempt income (subsections 44(3) and (4) of the ITAA 1936) for a participating Toll shareholder; and
- exempt from withholding tax pursuant to subsection 128B(3D) of the ITAA 1936 for a participating Toll shareholder who was a foreign resident.

49. As the second capital reduction amount (\$3.75 per ordinary Toll share) was debited to Toll's share capital account it was not a dividend as defined in subsection 6(1) of the ITAA 1936.

CGT event G1

50. CGT event G1 (section 104-135 of the ITAA 1997) happened to each Toll share of the participating Toll shareholders at the time they received the second capital reduction amount (of \$3.75 for each ordinary Toll share) under the second Scheme of Arrangement.

51. Participating Toll shareholders made a capital gain from CGT event G1 happening to the extent the second capital reduction amount exceeded the cost base of their Toll shares (subsection 104-10(4) of the ITAA 1997).

Disregarding any capital gain for foreign residents

52. If the participating Toll shareholder was a foreign resident, any capital gain from CGT event G1 that happened in relation to the second capital reduction amount on the Toll shares was disregarded (subsection 855-10(1) of the ITAA 1997).

Demerger rollover for residents

53. If the participating Toll shareholders were residents they are eligible to choose demerger rollover under subsection 125-55(1) of the ITAA 1997 for their Toll shares.

54. Resident participating Toll shareholders who choose demerger rollover for their Toll shares can disregard any capital gain made in respect of CGT event G1 that happened to their Toll shares under the second Scheme of Arrangement (subsection 125-80(1) of the ITAA 1997).

55. Resident participating Toll shareholders who do not choose demerger rollover are not entitled to disregard any capital gain made in respect of CGT event G1 that happened to their Toll shares under the second Scheme of Arrangement.

Cost base of shares in Toll and Asciano

56. Whether or not demerger rollover is chosen by the participating Toll shareholders, adjustments to the cost bases of their shares in Toll and Asciano are required under sections 125-80 and 125-85 of the ITAA 1997.

57. The first element of the cost base and reduced cost base of each remaining Toll share and corresponding Asciano share participating Toll shareholders received under the demerger is worked out by taking the sum of the cost bases of their Toll shares (just before the second Scheme of Arrangement but after the first Scheme of Arrangement) and apportioning that sum over their remaining Toll shares and new Asciano shares. The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the Toll shares and Asciano shares, or a reasonable approximation of those market values (sections 125-80 and 125-85 of the ITAA 1997).

58. The cost base of each Toll share must be reduced by the \$0.45 first capital reduction amount prior to calculating the apportioned cost bases in accordance with sections 125-80 and 125-85 of the ITAA 1997.

Acquisition date of shares in Asciano

59. For the purpose of accessing the CGT discount, the Asciano shares received by the participating Toll shareholders are taken to have been acquired on the date that the shareholder acquired the corresponding Toll shares (item 2 of subsection 115-30(1) of the ITAA 1997).

60. For general CGT purposes, participating Toll shareholders acquired their Asciano shares when those shares were received under the demerger (section 109-10 of the ITAA 1997).

Application of sections 45A, 45B, 45BA and 45C

61. 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 participating Toll shareholders under the second Scheme of Arrangement.

62. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 or 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 participating Toll shareholders under the second Scheme of Arrangement.

Commissioner of Taxation30 April 2008

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 first Scheme of Arrangement

Assessable dividend

What is a dividend?

63. 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 shareholder out of profits derived by the company.

64. The word *dividend* is defined in subsection 6(1) of the ITAA 1936 to include, at paragraph (a), any distribution made by a company to any of its shareholders. However, later paragraphs in the definition exclude certain amounts from being a dividend for income tax purposes.

65. Relevantly, paragraph (d) specifically excludes from the definition of *dividend* in subsection 6(1) of the ITAA 1936:

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company;...

Was the amount debited to the share capital account a dividend?

66. Under the first Scheme of Arrangement, Toll distributed an amount of \$398 million to its shareholders. Of this distribution, \$289 million (the first capital reduction amount) was debited against an amount standing to the credit of Toll's share capital account (as that term is defined in subsection 6(1) of the ITAA 1936 and section 975-300 of the ITAA 1997). Therefore, the exclusion in paragraph (d) of the definition of *dividend* in subsection 6(1) of the ITAA 1936 applies to the first capital reduction amount.

Was the amount debited to profit accounts a dividend?

67. Of the \$398 million distributed to shareholders under the first Scheme of Arrangement, the remaining \$109 million (the first special dividend) was debited to profit accounts of Toll. This amount represents a distribution by a company to its shareholders (subsection 6(1) of the ITAA 1936) paid out of profits (subsection 44(1) of the ITAA 1936). The amount of \$0.17 paid per Toll share is therefore an assessable dividend to the resident participating Toll shareholders.

68. The first special dividend is a frankable distribution pursuant to section 202-40 of the ITAA 1997, and is capable of being franked under section 202-5 of the ITAA 1997. In this regard, a resident individual, superannuation fund or company taxpayer who is a 'qualified person' is entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the first special dividend that is included in their assessable income.

Qualified person

69. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked distribution, an entity that is not a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 is denied a gross-up and a tax offset. Broadly speaking, to be a 'qualified person' in relation to the dividend paid, the shareholder must satisfy the holding period rule having regard to the related payment rule.

70. Broadly, a shareholder will be considered to be under an obligation to make a related payment if the shareholder, or an associate of the shareholder, is under an obligation to make, or makes a payment in respect of the dividend which effectively passes the benefit of the dividend to another person.

71. In the case of the Toll first special dividend there is no related payment in respect of a dividend as it cannot be said that a shareholder, or an associate of a shareholder, does anything that has the effect of passing the benefit of the dividend to another person. As the eligible shareholders are not taken, for the purposes of Division 1A of the former Part IIIAA of the ITAA 1936, to be under an obligation to make a related payment in respect of the final dividend, the relevant holding period is therefore the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

72. Accordingly, the holding period rule requires shareholders to hold the shares, or the interest in shares, on which the dividend is paid at risk for a continuous period of at least 45 days. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

73. Under former subsection 160APHM(2) of the ITAA 1936, a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the 'net position' of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares.

74. It is considered that eligible shareholders will not, by reason of the scheme, have done anything to diminish materially their risks of loss or opportunities for gain in respect of their Toll shares.

75. The primary qualification period, as defined in former section 160APHD of the ITAA 1936, for the first special dividend, means the period beginning on the day after the day on which the shareholder acquired the shares and ending on the 45th day after the day on which the shares became ex dividend. There are 45 clear days between 6 June 2007 and 22 July 2007. Therefore, an eligible shareholder who acquired shares on or after 6 June 2007 will not satisfy the holding period rule. Shares purchased on or before 5 June 2007 satisfy the holding period rule as long as those shares are held at risk for at least 45 continuous days.

Non-resident shareholders

76. For foreign resident participating Toll shareholders, the dividend is not assessable income and is not exempt income as a consequence of the whole amount of the first special dividend being franked (section 128D and paragraph 128B(3)(ga) of the ITAA 1936).

Dividend withholding tax

77. Dividends paid by a resident company to foreign resident shareholders are generally subject to withholding tax under section 128B of the ITAA 1936, unless particular exclusions apply. Paragraph 128B(3)(ga) of the ITAA 1936 operates to exclude as income, subject to dividend withholding tax, a franked dividend. As the whole amount of the first special dividend is a franked dividend, paragraph 128B(3)(ga) precluded the application of dividend withholding tax to foreign resident shareholders who received the first special dividend under the first Scheme of Arrangement.

CGT event G1

78. CGT event G1 (section 104-135 of the ITAA 1997) happens if a company makes a payment to a shareholder in respect of their share and some or all of that payment is not a dividend or an amount that is taken to be a dividend under section 47 of the ITAA 1936 (non-assessable payment). The non-assessable payment can include the giving of property (subsection 104-135(1) of the ITAA 1997).

79. If CGT event G1 happens, a shareholder will make a capital gain if the non-assessable payment made by the company in relation to a share exceeds the cost base of the share (subsection 104-135(3) of the ITAA 1997).

80. CGT event G1 happened on the distribution by Toll of the first capital reduction amount (subsection 104-135(2) of the ITAA 1997) as this amount was neither a dividend nor an amount taken to be a dividend under section 47 of the ITAA 1936.

81. A capital gain arose to participating Toll shareholders to the extent that the capital reduction amount of \$0.45 per share exceeded the cost base of their Toll shares at the time of the first Scheme of Arrangement.

82. No rollover is available for participating Toll shareholders in relation to the first capital reduction amount. A participating Toll shareholder who was a resident of Australia (as that term is defined in subsection 6(1) of the ITAA 1936) and who made a capital gain on CGT event G1 happening to their Toll shares at the time of the first Scheme of Arrangement will need to include this amount in calculating their net capital gain or net capital loss when completing their 2006-2007 income tax return.

Disregarding any capital gain for foreign residents

83. A participating Toll shareholder who was a foreign resident disregards any capital gain that arose on CGT event G1 happening on their Toll shares at the time of the first Scheme of Arrangement. Subsection 855-10(1) of the ITAA 1997 provides that a capital gain or loss from CGT events is disregarded if you are a foreign resident and the CGT event happens in relation to a CGT asset that is not taxable Australian property (as that term is defined in section 855-15 of the ITAA 1997).

Cost base of shares in Toll

84. The cost base of each Toll share is reduced (but not below nil) by the first capital reduction amount (being \$0.45) (subsections 104-135(3) and 104-135(4) of the ITAA 1997).

85. A capital loss cannot be made from CGT event G1 happening (Note 1 of subsection 104-135(3) of the ITAA 1997).

Cost base of the units in Asciano Trust

86. The first element of the cost base and reduced cost base of each unit in the Asciano Trust received by participating Toll shareholders is \$0.62, being the sum of the first capital return amount and the first special dividend that was applied for the subscription of those units (sections 110-25 and 110-55 of the ITAA 1997).

Acquisition date of the units in Asciano Trust

87. Participating Toll shareholders acquired their Asciano Trust units when those units were received under the first Scheme of Arrangement (item 3 of section 109-10 of the ITAA 1997). This occurred on the implementation date of the first Scheme of Arrangement, which was 15 June 2007.

Section 45A – streaming of dividends and capital benefits

88. In broad terms, for the Commissioner to make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies, a company must stream capital benefits to its advantaged shareholders and pay dividends to its disadvantaged shareholders, whether in the same income year or in different income years.

89. Under the first Scheme of Arrangement, Toll provided a capital benefit to all holders of ordinary shares in proportion to their shareholding in that company. In these circumstances, there was no streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly, section 45A of the ITAA 1936 does not apply to the first capital reduction amount.

Section 45B – schemes to provide certain benefits

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

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

91. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a demerger benefit or capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- under the scheme a 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
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into the scheme or carried out the scheme or any part of the scheme did so for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

92. Where the requirements of subsection 45B(2) of the ITAA 1936 are met, subsection 45B(3) of the ITAA 1936 empowers the Commissioner to make a determination that either section 45BA applies in relation to a demerger benefit or section 45C applies in relation to a capital benefit.

Scheme and capital benefit

93. The transactions that are the subject of this Ruling constitute a 'scheme' within the broad meaning of that term (subsection 45B(10) of the ITAA 1936).

94. Under the first Scheme of Arrangement, the provision of share capital, being the first capital reduction amount, constituted the participating Toll shareholders receiving a capital benefit (paragraph 45B(5)(b) of the ITAA 1936).

Tax benefit

95. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. The return of capital will reduce the cost base of the shares under CGT event G1 (section 104-135 of the ITAA 1997). Shareholders will make a capital gain to the extent that the distribution is more than the cost base of the shares. For a foreign resident shareholder the provisions of Division 855 of the ITAA 1997 will operate to disregard any capital gain or capital loss provided that the CGT asset is not taxable Australian property. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or in the case of a foreign resident, be subject to dividend withholding tax if unfranked. Therefore, participating Toll shareholders generally obtained a tax benefit from the proposed return of capital (subsection 45B(9) of the ITAA 1936).

Purpose

96. 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 participating Toll shareholders to obtain a tax benefit (by way of 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 scheme entered into or carried out the scheme for more than an incidental purpose of obtaining a tax benefit in the form of a capital benefit.

97. Therefore, 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 participating Toll shareholders under the first Scheme of Arrangement.

The second Scheme of Arrangement

Demerger dividend

What is a dividend?

98. As described in paragraphs 63 to 65, 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 shareholder out of profits derived by the company.

99. Paragraph (d) of the definition of *dividend* in subsection 6(1) of the ITAA 1936 specifically excludes distributions credited to a company's share capital account.

Was the amount debited to the share capital account a dividend?

100. Under the second Scheme of Arrangement, Toll distributed an amount of \$3,309 million to its shareholders. Of this distribution, \$2,410 million (the second capital reduction amount) was debited against an amount standing to the credit of Toll's share capital account (as that term is defined in subsection 6(1) and section 975-300 of the ITAA 1997). Therefore, the exclusion in paragraph (d) of the definition of *dividend* in subsection 6(1) of the ITAA 1936 applies to the second capital reduction amount.

Was the amount debited to profit accounts a dividend?

101. Of the \$3,309 million distributed to shareholders under the second Scheme of Arrangement, the remaining \$899 million (the second special dividend) was debited to profit accounts of Toll. This amount represents a distribution by a company to its shareholders (subsection 6(1) of the ITAA 1936) paid out of profits (subsection 44(1) of the ITAA 1936). The amount of \$1.40 paid per ordinary Toll share is therefore, *prima facie*, an assessable dividend to the participating Toll shareholders.

Was a demerger dividend paid to Toll shareholders?

102. A *demerger allocation* is defined in subsection 6(1) of the ITAA 1936 to mean (relevantly) the market value of the ownership interests issued under a demerger to owners of the head entity. In the present circumstances, the issue of the Asciano shares to the Toll shareholders as part of the second Scheme of Arrangement happened under a demerger (see paragraphs 113 to 114 of this Ruling). Therefore, the market value of these shares represents the demerger allocation.

103. A *demerger dividend* is defined in subsection 6(1) of the ITAA 1936 to mean that part of a demerger allocation that is assessable as a dividend under subsection 44(1) of the ITAA 1936 or that would be so assessable apart from subsections 44(3) and (4) of the ITAA 1936.

104. As noted above, the amount of \$899 million (or \$1.40 paid per ordinary Toll share) was a dividend, and therefore is that part of the demerger allocation which is a *demerger dividend*. This demerger dividend will be neither assessable income nor exempt income of the participating Toll shareholders as a result of subsections 44(3) and (4) of the ITAA 1936. This is because:

- the dividend is a demerger dividend (as defined in subsection 6(1) of the ITAA 1936);
- Toll did not elect that subsections 44(3) and (4) of the ITAA 1936 do not apply to the demerger dividend (subsection 44(2) of the ITAA 1936); and
- more than 50% of the CGT assets of Asciano and its subsidiaries were used in the carrying on of a business after the demerger (subsection 44(5) of the ITAA 1936).

Dividend withholding tax

105. Dividends paid by a resident company to a foreign resident shareholder are generally subject to withholding tax under section 128B of the ITAA 1936, unless particular exclusions apply. Subsection 128B(3D) of the ITAA 1936 operates to exclude as income subject to dividend withholding tax a demerger dividend to which section 45B of the ITAA 1936 does not apply. As the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 in respect of the scheme, subsection 128B(3D) of the ITAA 1936 will operate to preclude the application of dividend withholding tax to foreign resident participating Toll shareholders who receive a dividend under the second Scheme of Arrangement.

CGT event G1

106. CGT event G1 happened on the distribution by Toll of the second capital reduction amount (subsection 104-135(2) of the ITAA 1997) as this amount was neither a dividend nor an amount taken to be a dividend under section 47 of the ITAA 1936.

107. A capital gain arose to participating Toll shareholders to the extent that the second capital reduction amount of \$3.75 per share exceeded the cost base of their Toll shares at the time of the second Scheme of Arrangement. A capital loss cannot be made from CGT event G1 happening (subsection 104-135(3) (note 1) of the ITAA 1997).

Disregarding any capital gain for foreign residents

108. A participating Toll shareholder who was a foreign resident disregards any capital gain that arose on CGT event G1 happening on their Toll shares at the time of the second Scheme of Arrangement. Subsection 855-10(1) of the ITAA 1997 provides that a capital gain or loss from CGT events is disregarded if you are a foreign resident and the CGT event happens in relation to a CGT asset that is not taxable Australian property (as that term is defined in section 855-15 of the ITAA 1997).

Demerger rollover for residents

109. In order for participating Toll shareholders who are residents to be able to choose CGT rollover relief in relation to any capital gain made from CGT event G1 happening to their Toll shares under section 125-55 of the ITAA 1997, this event must occur under a demerger within the meaning of Division 125 of the ITAA 1997.

Was there a demerger group?

110. A demerger group comprises one head entity and at least one demerger subsidiary (subsection 125-65(1) of the ITAA 1997). For the purposes of this Ruling, at the time of undertaking the Second Scheme of Arrangement, the demerger group included Toll as the head entity and Asciano as a demerger subsidiary.

111. Toll was the head entity of a demerger group because at the time of undertaking the arrangement:

- (a) Asciano did not own any ownership interests in Toll (subsection 125-65(3) of the ITAA 1997); and
- (b) no other company or trust was capable of being the head entity of a demerger group of which Toll could have been a demerger subsidiary (subsection 125-65(4) of the ITAA 1997).

112. Asciano was a demerger subsidiary of Toll at the time of undertaking the arrangement because Toll owned ownership interests that carried the right to:

- (a) receive more than 20% of any distribution of income or capital by Asciano; and
- (b) exercise more than 20% of the voting power in Asciano (subsection 125-65(6) of the ITAA 1997).

Did a demerger happen?

113. A demerger happened (within the meaning of subsections 125-70(1) to (5) of the ITAA 1997) to the Toll demerger group under the arrangement because:

- there was a restructuring of the demerger group (paragraph 125-70(1)(a) of the ITAA 1997), under which Asciano issued new shares to Toll shareholders (subparagraph 125-70(1)(b)(ii) of the ITAA 1997);
- under the restructuring, CGT event G1 happened to the Toll shares, and Toll shareholders received nothing other than new shares in Asciano (subparagraph 125-70(1)(c)(i) of the ITAA 1997);
- Toll shareholders received shares in Asciano under the restructure on the basis that they were shareholders of Toll (paragraph 125-70(1)(d) of the ITAA 1997 and subparagraph 125-70(1)(e)(i) of the ITAA 1997);
- at the time of undertaking the restructure, neither Toll nor Asciano was a superannuation fund within the meaning of that term in section 10 of the *Superannuation Industry (Supervision) Act 1993* (paragraph 125-70(1)(g) of the ITAA 1997);
- under the restructure, each Toll shareholder acquired the same proportion of shares in Asciano as the shares they owned in Toll just before the demerger, and each Toll shareholder owned the same proportionate total market value of Toll shares and Asciano shares just after the demerger as they owned in Toll just before the demerger (paragraphs 125-70(2)(a) and (b) and subsection 125-70(3) of the ITAA 1997);
- the restructure did not constitute an off-market share buy-back for the purposes of Division 16K of Part III of the ITAA 1936 (subsection 125-70(4) of the ITAA 1997); and
- no other rollover was available under another provision of the ITAA 1936 or ITAA 1997 (subsection 125-70(5) of the ITAA 1997).

114. As a demerger happened to the demerger group, resident participating Toll shareholders can choose demerger rollover under section 125-55 of the ITAA 1997. Foreign resident participating Toll shareholders cannot choose demerger rollover since their shares in Asciano are not taxable Australian property (subsection 125-55(2) of the ITAA 1997).

Certain ownership interests were disregarded

115. Section 125-75 of the ITAA 1997 provides that certain ownership interests may be disregarded for the purposes of determining that the requirements of subsection 125-70(2) have been met. At the time of the restructure, in addition to ordinary shares, the ownership interests in Toll included options issued under an employee share scheme (employee options) and Reset Preference shares.

Employee options

116. The employee options were ownership interests for the purposes of subsection 125-60(1) of the ITAA 1997. However, these options were disregarded (for the purposes of subsection 125-70(2) of the ITAA 1997), because they are qualifying rights acquired under an employee share scheme (within the meaning of Division 13A of the ITAA 1936) and they represent less than 3% of the total ownership interests on issue in Toll just before the demerger (subsection 125-75(1) of the ITAA 1997).

Reset Preference shares

117. The Reset Preference shares were ownership interests for the purposes of subsection 125-60(1) of the ITAA 1997. However, these shares were disregarded (for the purposes of subsection 125-70(2) of the ITAA 1997) because they were adjusting instruments, as defined in subsection 125-75(5) of the ITAA 1997, and they represented less than 10% of the total ownership interests on issue in Toll just before the demerger (subsection 125-75(4) of the ITAA 1997).

Consequences of choosing rollover

118. Subsection 125-80(1) of the ITAA 1997 provides that if a shareholder chooses the rollover, a capital gain or capital loss made from a CGT event happening under the demerger to an original interest the shareholder owned is disregarded.

119. Where the participating Toll shareholder who is a resident of Australia chooses rollover, any capital gain resulting from CGT event G1 happening to their Toll shares under the second Scheme of Arrangement is disregarded (subsection 125-80(1) of the ITAA 1997). Where the participating Toll shareholder who is a resident of Australia does not choose rollover, any capital gain resulting from CGT event G1 happening to their Toll shares is not disregarded, and the shareholder must include this amount in calculating their net capital gain or net capital loss when completing their 2006-2007 income tax return.

Cost base of shares in Toll and Asciano

120. Irrespective of whether or not a participating Toll shareholder chooses demerger rollover, adjustments need to be made to the cost base of the shares (sections 125-80 and 125-85 of the ITAA 1997).

121. The first element of the cost base and reduced cost base of each remaining Toll share and corresponding Asciano share participating Toll shareholders received under the demerger is worked out by taking the sum of the cost bases of their Toll shares (just before the second Scheme of Arrangement but after the first Scheme of Arrangement) and apportioning that sum over their remaining Toll shares and new Asciano shares. The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the Toll shares and Asciano shares, or a reasonable approximation of those market values (sections 125-80 and 125-85 of the ITAA 1997).

122. Participating Toll shareholders may apportion the cost base of the Toll shares they held just before the second Scheme of Arrangement, applying 59.276% of the cost base to the Toll shares they held just after the second Scheme of Arrangement, and applying 40.724% of the cost base to the Asciano shares they received under the second Scheme of Arrangement. These proportions have been advised to Toll shareholders by Toll.

123. The cost base of each Toll share must be reduced by the \$0.45 first capital reduction amount prior to calculating the apportioned cost bases in accordance with sections 125-80 and 125-85 of the ITAA 1997.

Acquisition date of shares in Asciano

124. Before a capital gain can be reduced by the CGT discount, one of the conditions that must be satisfied is that the capital gain relates to an asset that was owned for at least 12 months (subsection 115-25(1) of the ITAA 1997).

125. For the purposes of this 12 month ownership condition, participating Toll shareholders will be taken to have acquired the Asciano shares they received under the demerger on the date they acquired the corresponding Toll shares (item 2 of subsection 115-30(1) of the ITAA 1997).

126. For general CGT purposes, participating Toll shareholders acquired their Asciano shares when those shares were received under the demerger (section 109-10 of the ITAA 1997). This means, for example, that when calculating a capital gain on the subsequent disposal of these Asciano shares, indexation will not be included in the cost base of those shares.

Section 45A – streaming of dividends and capital benefits

127. As explained in paragraph 88 of this Ruling, in broad terms, for the Commissioner to make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies, a company must stream capital benefits to its advantaged shareholders and pay dividends to its disadvantaged shareholders, whether in the same income year or in different income years.

128. Under the second Scheme of Arrangement, Toll provided a capital benefit to all holders of ordinary shares in proportion to their shareholding in that company. In these circumstances, there was no streaming of capital benefits to some shareholders and dividends to other shareholders. Accordingly, section 45A of the ITAA 1936 does not apply to the second capital reduction amount.

Section 45B – schemes to provide certain benefits

129. As explained in paragraph 91 of this Ruling, there are three elements to consider under section 45B of the ITAA 1936. Where these requirements are met, subsection 45B(3) of the ITAA 1936 empowers the Commissioner to make a determination that either section 45BA of the ITAA 1936 applies in relation to a demerger benefit or section 45C of the ITAA 1936 applies in relation to a capital benefit.

Scheme, demerger and capital benefit

130. The transactions that are the subject of this Ruling constitute a 'scheme' within the broad meaning of that term (subsection 45B(10) of the ITAA 1936).

131. 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). Under the second Scheme of Arrangement, the market value of the Asciano shares issued to the participating Toll shareholders constitutes a demerger benefit.

132. The provision of those Asciano shares also constitutes a capital benefit to the extent it is not a demerger dividend (paragraph 45B(5)(a) and subsection 45B(6) of the ITAA 1936). Therefore, the market value of the Asciano shares issued under the demerger less the demerger dividend (of \$899 million in total and \$1.40 per Toll ordinary share) is a capital benefit provided to the participating Toll shareholders. Similarly, the return of share capital by Toll to the participating Toll shareholders also falls within the definition of a capital benefit (paragraph 45B(5)(b) of the ITAA 1936).

Tax benefit

133. For most 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 or a dividend respectively. This arises because the demerger dividend concession ensures that the demerger dividend is free of tax for shareholders. As indicated in paragraph 79 of this Ruling, unless the amount of the capital distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain is made. For a foreign resident shareholder the provisions of Division 855 of the ITAA 1997 will operate to disregard any capital gain or capital loss provided that the CGT asset is not taxable Australian property. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a foreign resident, be subject to dividend withholding tax. As such, the provision of those benefits constituted the obtaining of a tax benefit by the participating Toll shareholders (subsection 45B(9) of the ITAA 1936).

Purpose

134. 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 participating Toll 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 demerger entered into or carried out the scheme for more than an incidental purpose of obtaining a tax benefit in the form of a demerger benefit or a capital benefit.

135. Therefore, the Commissioner will not make a determination under either paragraph 45B(3)(a) or (b) of the ITAA 1936 that sections 45BA or 45C of the ITAA 1936 applies to the whole or any part of any capital benefit or demerger benefit provided to participating Toll shareholders under the second Scheme of Arrangement.

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Previous draft:

Not previously issued as a draft

Subject references:

- capital benefit
- capital gains
- cost base adjustments
- demerger
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