


***CR 2010/47 - Income tax: capital gains tax: exchange
of units in Asciano Finance Trust for shares in
Asciano Limited***

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Class Ruling

Income tax: capital gains tax: exchange of units in Asciano Finance Trust for shares in Asciano Limited

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① This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- Division 102 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 104 of the ITAA 1997;
- Division 108 of the ITAA 1997;
- section 109-10 of the ITAA 1997;
- Division 110 of the ITAA 1997;
- Division 112 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- Division 116 of the ITAA 1997;

- Subdivision 124-A of the ITAA 1997; and
- Subdivision 124-H 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 are the holders of Asciano Finance Trust (AFT) units who:

- participate in the Scheme that is the subject of this Ruling;
- are 'residents' of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936*;
- hold their units in AFT on capital account; and
- are not subject to the TOFA rules in Division 230 in relation to gains and losses on their AFT units.

Note: Division 230 will generally not apply to individuals, unless they have made an election for it to apply 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 9 to 26 of this Ruling.

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

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

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Date of effect

8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Class ruling application dated 16 July 2010 from PricewaterhouseCoopers;
- AFT constitution;
- Asciano Limited (AL) constitution;
- Financial Report for the Asciano Group (AIO) for the year ended 30 June 2009;
- draft Corporatisation Implementation Deed;
- draft Explanatory Memorandum for the Corporatisation proposal; and
- draft Supplemental Deed Poll to amend the AFT constitution.

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

The Asciano Group

10. The Asciano Group (AIO) is engaged in the ownership and management of ports, rail assets, and associated operations and services. AIO currently operates as a stapled structure comprising AFT and AL.

11. AIO was formed as a result of a demerger undertaken by a group of entities in 2007 (the Demerger). The Demerger was the subject of Class Ruling CR 2008/32.

12. Following the Demerger, AFT units and AL shares were stapled together to form stapled securities (AIO Stapled Securities). The effect of the stapling was that AIO Stapled Securities could only be dealt with as, in effect, a single security on the Australian Securities Exchange. As at 31 December 2009, AIO had approximately 2.926 billion AIO Stapled Securities on issue.

13. AIO also has on issue approximately 15.7 million options over AIO Stapled Securities.

14. AFT is a managed investment scheme registered under Chapter 5C of the *Corporations Act 2001*. The Responsible Entity of AFT is Trust Company (RE Services) Limited (Responsible Entity).

15. AFT only has one class of units on issue (AFT units). Each AFT unit carries the same rights to the income and capital of AFT as every other AFT unit, in accordance with Clause 4.1 of the AFT Constitution. All units in AFT were acquired after 19 September 1985, as a consequence no AFT unit holder held pre-CGT units in AFT at the time of this Scheme.

16. AL is an Australian company. AL only has one class of ordinary shares on issue.

17. No AFT units are held by AL prior to the implementation of the Scheme that is the subject of this Ruling.

Corporatisation proposal

18. AL and the Responsible Entity (as responsible entity for AFT) will enter into a Corporatisation Implementation Deed under which the parties will agree to take all steps required to restructure AIO from a stapled structure to a single publicly listed company, subject to approval by AIO Stapled Security holders and certain other conditions.

19. Under the proposal, AIO Stapled Securities will be de-stapled so that shares in AL and units in AFT can be dealt with separately to implement the other Corporatisation steps. When the de-stapling is completed, each former AIO Stapled Security holder will be able to deal with their AFT units and AL shares separately for the purposes of implementing the Corporatisation.

20. Following the de-stapling, AL will acquire 100% of the AFT units from AFT unit holders. This will be facilitated by:

- (a) amendments to the AFT Constitution, approved by a special resolution of AFT unit holders, authorising the Responsible Entity to act on behalf of the unit holders to do all things required to implement the Corporatisation Proposal; and
- (b) approval of acquisition of AFT by AL by ordinary resolution of AFT unit holders.

21. AFT unit holders will dispose of their AFT units to AL on or around 17 November 2010 if all the conditions precedent to the Scheme have been satisfied (the Implementation Date). In return, AL will offer AFT unit holders AL shares as consideration for their AFT units.
22. Each unit holder in AFT will obtain one share in AL for each unit they hold in AFT.
23. Immediately after the issue of new shares by AL (and before the AL shares can be dealt with or traded), AL will undertake a share consolidation so that the former AIO Stapled Security holders will hold exactly the same number of AL shares as the number of AL shares they held prior to corporatisation.
24. AL shares will not be issued directly to Ineligible Non-Resident AFT unit holders. Instead, new AL shares to which Ineligible Non-Resident AFT unit holders are entitled will be issued to a Sale Agent.
25. The new AL shares issued to the Sale Agent on behalf of Ineligible Non-Resident AFT unit holders will be sold by the Sale Agent after the Implementation Date. This sale will also occur after the consolidation of AL shares. The Sale Agent will then remit the proceeds from the sale to the Ineligible Non-Resident AFT unit holders.
26. Each existing AIO optionholder has executed (or is expected to execute) a deed poll, under which they have irrevocably waived any right to acquire or subscribe for AFT units pursuant to the exercise of their existing options on or after the Implementation Date. No adjustment will be made to the number of AL shares issued upon exercise of an option as a result of the Corporatisation proposal.

Ruling

Two CGT assets before corporatisation

27. Each unit in AFT and each share in AL is a separate CGT asset before and after the de-stapling (section 108-5).

De-stapling of AIO Stapled Securities

28. AFT unit holder will not make a capital gain or capital loss when de-stapling of AIO Stapled Securities occurs.

CGT event A1 – disposal of AFT units

29. CGT event A1 will happen as a result of the disposal by an AFT unit holder of an AFT unit to AL on the Implementation Date (subsections 104-10(1) and 104-10(2) and paragraph 104-10(3)(b)).

Capital gain or loss

30. An AFT unit holder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an AFT unit exceeds its cost base. The capital gain is the amount of the excess. An AFT unit holder will make a capital loss if those capital proceeds are less than the AFT unit's reduced cost base. The capital loss is the amount of the difference (subsection 104-10(4)).

Cost base of AFT units

31. Where an AIO Stapled Security was acquired under the Demerger, the first element of the cost base and reduced cost base of each AFT unit is \$0.62 (see Class Ruling CR 2008/32 at paragraph 45). The cost base and reduced cost base of each AFT unit for these AIO Stapled Security holders should be reduced by the non-assessable part of any distributions made in respect of an AFT unit since the Demerger totalling \$0.367659 (section 104-70).

32. Where an AIO Stapled Security was purchased, the first element of the cost base and reduced cost base of a unit in AFT will be calculated in accordance with subsection 112-30(1) by allocating to each AFT unit a proportion of the total purchase price that is reasonably attributable to the acquisition of that AFT unit. The cost base and reduced cost base of each AFT unit for these AIO Stapled Security holders should be reduced by the non-assessable part of any distributions made to the AIO Stapled Security holder in respect of an AFT unit (section 104-70).

Capital proceeds

33. For an AFT unit holder, the capital proceeds for each AFT unit will be the market value of the AL share received in respect of its disposal, worked out on the Implementation Date (subsection 116-20(1)).

Conditions for roll-over satisfied

34. A disposal of units in a unit trust for shares in a company, as described in section 124-445, will happen when an AFT unit holder disposes of an AFT unit to AL in exchange for an AL share. As, under the Scheme, the conditions for roll-over under Subdivision 124-H will be satisfied, an AFT unit holder may choose to obtain roll-over under Subdivision 124-H.

Roll-over is chosen

35. AFT unit holders who choose roll-over will disregard any capital gain or loss made when CGT event A1 happens (subsection 124-10(2)).

36. For an AFT unit holder who chooses roll-over, the first element of the cost base and the reduced cost base of each new AL share will be the cost base and the reduced cost base of each AFT unit that was disposed of under the Scheme described in this Ruling and for which roll-over was chosen (subsection 124-10(3)).

Roll-over is not chosen

37. An AFT unit holder who does not choose roll-over must take any capital gain or capital loss from the disposal of their AFT units into account in working out their net capital gain or net capital loss for the income year (subsection 104-10(3), and sections 102-5 and 102-10).

38. AFT unit holders who make a capital gain where roll-over is not chosen may be eligible to treat the gain as a 'discount capital gain' provided that they satisfy the requirements of Subdivision 115-A.

Acquisition date of replacement AL shares

39. The acquisition date of AL shares acquired in exchange for AFT units is the Implementation Date (section 109-10).

40. However, for the purpose of determining eligibility to a discount capital gain, AFT unit holders who choose roll-over are taken to have acquired their replacement AL shares when they acquired the corresponding AFT units (item 2 in the table in subsection 115-30(1)).

Consolidation of AL shares

41. The consolidation of AL shares will not result in a CGT event happening (Taxation Determination TD 2000/10). Each element of the cost base and reduced cost base of the new consolidated AL share (at the time of consolidation) is the sum of the corresponding elements of the original shares that are consolidated to form the new share (subsection 112-25(4)).

Commissioner of Taxation**8 September 2010**

Appendix 1 – Explanation

① *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.*

42. The tax consequences and relevant legislative provisions that arise concerning the Scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

43. The significant tax consequence is the availability of roll-over under Subdivision 124-H. It enables a unit holder of a unit trust to disregard a capital gain or loss from a unit that is disposed of as part of a reorganisation of the affairs of the unit trust where the unit holder becomes the owner of new shares in a company.

44. The roll-over provisions in Subdivision 124-H relating to an exchange of units in a unit trust for shares in a company contain a number of conditions for eligibility to choose roll-over relief. The main conditions in relation to a disposal case that are relevant to the Scheme are:

- there must be more than one entity that owns all the units in the unit trust;
- there must be a scheme for reorganising the trust's affairs and consideration on disposal of the units consist of shares in the company and nothing else;
- all unit holders must dispose of their units in exchange for shares in the company;
- the company must own all the units in the unit trust just after all the exchanging members have disposed of their units in the unit trust (the completion time);
- just after the completion time, each unit holder must own a whole number of shares in the company;
- just after the completion time, each unit holder must own a percentage of the shares in the company that were issued to all unit holders that is equal to the percentage of the units in the unit trust that the unit holder owned;
- just after the completion time, the unit holders must own all the shares in the company, or entities other than those unit holders must own no more than 5 shares in the company and the market value of those shares is such that it is reasonable to treat the unit holders as owning all the shares;
- the shares issued in the company must not be redeemable shares; and
- the ratio test in subsection 124-450(3) is met.

45. Under the Scheme the conditions for roll-over under Subdivision 124-H will be satisfied.

Appendix 2 – Detailed contents list

46. 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; TD 2000/10;
CR 2008/32

Subject references:

- arrangement
- CGT assets
- CGT capital proceeds
- CGT cost base
- CGT event A1 - disposal of a CGT asset
- CGT reduced cost base
- CGT roll-over relief
- consolidation of shares
- de-stapling of securities
- ordinary shares
- re-organisations
- stapled securities
- units
- unit trusts

- ITAA 1997 Div 102
- ITAA 1997 102-5
- ITAA 1997 102-10
- ITAA 1997 Div 104
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(2)
- ITAA 1997 104-10(3)(b)
- ITAA 1997 104-10(4)
- ITAA 1997 104-70
- ITAA 1997 Div 108
- ITAA 1997 108-5
- ITAA 1997 109-10
- ITAA 1997 Div 110
- ITAA 1997 Div 112
- ITAA 1997 112-25(4)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-30(1)
- ITAA 1997 Div 116
- ITAA 1997 116-20(1)
- ITAA 1997 Subdiv 124-A
- ITAA 1997 Subdiv 124-H
- ITAA 1997 124-445
- ITAA 1997 124-450(3)
- ITAA 1997 Div 230
- TAA 1953
- Corporations Act 2001 Ch 5
- Copyright Act 1968

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997

ATO references

NO: 1-2760N59

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Capital Gains Tax ~~ roll-overs – trust to company