

# ***CR 2011/100 - Income tax: scrip for scrip: exchange of shares in MAp Airports International Limited for units in MAp Airports Trust 2 and cash consideration***



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## Class Ruling

### Income tax: scrip for scrip: exchange of shares in MAp Airports International Limited for units in MAp Airports Trust 2 and cash consideration

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>9</b>
<b>Ruling</b>	<b>35</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<b><i>Explanation</i></b>	<b>52</b>
<b>Appendix 2:</b>	
<b><i>Detailed contents list</i></b>	<b>83</b>

#### **❶ This publication provides you with the following level of protection:**

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

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

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

## What this Ruling is about

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

#### **Relevant provision(s)**

2. The relevant provisions dealt within this Ruling are:

- Section 45B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Section 45C of the ITAA 1936;
- Section 177A of the ITAA 1936;
- Section 177E of the ITAA 1936;
- Section 177F of the ITAA 1936;
- Division 102 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Section 104-10 of the ITAA 1997;

- Section 109-10 of the ITAA 1997;
- Section 110-25 of the ITAA 1997;
- Section 110-55 of the ITAA 1997;
- Section 112-25 of the ITAA 1997;
- Section 115-30 of the ITAA 1997;
- Section 116-20 of the ITAA 1997; and
- Subdivision 124-M of the ITAA 1997.

All subsequent 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 shareholders of MAp Airports International Limited (MAIL) who, on the Implementation Date of the scheme:

- (a) participate in the scheme and exchange their MAIL shares for units in MAp Airports Trust 2 (MAT2) and the Cash Consideration;
- (b) hold their MAIL shares neither as revenue assets (as defined in section 977-50), nor as trading stock (as defined in subsection 995-1(1)) – that is, broadly on capital account;
- (c) are residents of Australia within the meaning of subsection 6(1) of the ITAA 1936;
- (d) are not ‘temporary residents’ of Australia within the meaning of subsection 995-1(1); and
- (e) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their MAIL shares.

(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 9 to 34 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

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8. This Ruling applies from 1 July 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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

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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:

- Application for a Class Ruling from the applicant dated 25 August 2011; and
- Correspondence from the applicant dated between 8 September 2011 and 24 October 2011.

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

## Overview

10. Currently, MAp Group (MAp) is a triple stapled structure listed on the Australian Securities Exchange (ASX) comprising three entities:

- MAp Airports Trust 1 (MAT1), an Australian resident unit trust;
- MAT2, an Australian resident unit trust that is a 'public trading trust' under Division 6C of the ITAA 1936 (MAT2 is the head company of the MAT2 tax consolidated group pursuant to Subdivision 713-C); and
- MAIL, a Bermudian mutual fund company.

11. MAp Airports Limited (MAPL) is the trustee and responsible entity of MAT1 and MAT2. Both MAT1 and MAT2 are managed investment schemes registered under Chapter 5C of the *Corporations Act 2001*.

12. Approximately 60% of MAp security holders are Australian resident entities which includes an Australian resident company holding approximately 20% of the issued securities in MAp (MAp securities).

13. As at 30 June 2011, MAIL's paid-up capital was \$1.341 billion and its retained profits was \$2.146 billion.

14. MAp was established in 2002 to acquire interests in airports worldwide. Specifically, MAT1 and MAT2 were established to acquire interests in Australian and New Zealand airports. In contrast, MAIL was established to acquire primarily non-Australian airports.

15. As at 28 September 2011, MAp held a 74.1% interest in Sydney Airport through MAT1's direct interest of 6.7%, MAT2's direct interest and indirect interests of 47.3% and MAIL's indirect interest of 20.1%. MAp also held, through MAIL, a 39% interest in Brussels Airport and a 30.8% interest in Copenhagen Airports.

16. On 20 July 2011, MAp announced that it had entered into a binding agreement with an Overseas Pension Fund (OPF) under which MAIL, and its wholly owned subsidiaries, would divest all their interests in the Brussels and Copenhagen Airports in return for cash of \$791 million, and MAp acquiring the OPF's 11% interest in Sydney Airport (the OPF asset swap). The OPF asset swap was substantially completed on 7 October 2011. Consequently, MAp's only significant airport investment is its approximate 85% interest in Sydney Airport.

**The simplification scheme**

17. On 28 September 2011, MAp announced that after the OPF asset swap is completed MAp would focus solely on the ownership and operation of Sydney Airport. Consequently, MAp's triple stapled structure, including an offshore company and two boards overseeing the operations of MAp, would no longer be appropriate.

18. Accordingly, MAp proposes to simplify its strategy, operations and corporate structure by removing MAIL from the triple stapled structure (the simplification scheme). The simplification scheme is expected to provide the following commercial benefits to MAp:

- first, MAp's structure will be simplified and any negative governance perceptions will be removed due to MAIL delisting and becoming an Australian resident wholly-owned subsidiary of MAT2;
- secondly, the scheme will better position MAp to explore opportunities to increase its foreign ownership limit; and
- finally, the simplification scheme will deliver cost savings of approximately \$1 million per annum.

19. As a result of the simplification scheme, all of MAp's ownership interest in Sydney Airport will be held and controlled by Australian resident entities.

20. The simplification scheme, if approved, will proceed pursuant to the following steps.

***The MAIL scheme of arrangement***

21. The acquisition of MAIL by MAT2 will be undertaken by way of a scheme of arrangement under Bermudan law. Under the scheme of arrangement, MAT2 will acquire all the issued shares in MAIL in exchange for the Scheme Consideration comprising the Scrip Consideration and the Cash Consideration.

- Scheme Consideration is equal to the total market value of the MAIL shares sold (determined as the 10-day VWAP of the MAp securities allocated to the shares in MAIL based on relative net asset values).
- Scrip Consideration is that part of the Scheme Consideration paid as units in MAT2.
- Cash Consideration is that part of the Scheme Consideration paid in cash being \$0.80 per MAIL share.

22. To be effective, the scheme of arrangement must be approved by the requisite majority of MAIL shareholders voting in favour of the resolution at the Scheme Meeting to be held on 24 November 2011.

23. If the scheme of arrangement is approved by the requisite majority of MAIL shareholders, an application will be made to the Supreme Court of Bermuda for an order to sanction the scheme. The Effective Date for the scheme is the date the Court order is lodged with the Registrar of Companies in Bermuda.

24. On, or after, the day when MAIL shareholders approve the scheme but in any event before the Effective Date, MAIL will undertake steps to migrate its residency from Bermuda to Australia. MAIL shareholders will be asked to approve amendments to MAIL's bye-laws to enable MAIL to migrate its residency to Australia.

## ***Scheme implementation***

25. To ensure there is no disruption to trading, MAp will undertake the following steps relevant to the scheme implementation over the weekend of 17-18 December 2011:

- the MAIL shares will be unstapled from the MAT1 and MAT2 units;
- following the unstapling of the MAIL shares, the stapling arrangement between MAT1 units and MAT2 units will be temporarily suspended;
- each MAT2 unit will be split into a greater number of MAT2 units to allow the number of new MAT2 units to be issued as Scrip Consideration for each MAIL share to be a whole number;
- new MAT2 units will be issued to MAIL shareholders;
- the MAT2 units will be consolidated; and
- the MAT1 and MAT2 units will be re-stapled to form MAp double stapled securities.

26. The above changes will be reflected on the CHESS Register on the Implementation Date, being 19 December 2011. On the Implementation Date, MAT2 will acquire all of the issued shares in MAIL, and MAIL will be formally delisted.

27. Also on the Implementation Date, MAT2 will pay each MAIL shareholder the Cash Consideration of \$0.80 for each MAIL share held as at the Record Date, being 12 December 2011. The total cash consideration to be paid by MAT2 will be approximately \$1.49 billion.

28. The Scrip Consideration, being the issue of new MAT2 units, will be equal to the value of each MAIL share minus the Cash Consideration.

29. MAT2 will borrow approximately \$1.313 billion from MAIL to enable the payment of the Cash Consideration to MAIL shareholders. In addition, MAT2's unit capital account will be credited with an amount (estimated as in the region of \$1.6 billion) in relation to the issue of new MAT2 units.

30. MAT2 will undertake a unit consolidation to restore the ratio of MAT2 units and MAT1 units to a ratio of 1:1 and ensure that the number of MAp securities held by an investor immediately after the simplification scheme is the same as the number held immediately prior to the simplification scheme. However, the economic value of the Scrip Consideration received under the scheme will increase the value of each MAT2 unit held by a MAp security holder after the consolidation, compared to the value of a MAT2 unit the MAp security holder held prior to the simplification scheme.

***MAp securities list on the ASX***

31. On 20 December 2011, MAp securities will resume trading on the ASX on a non-deferred basis. Two days later, the group will adopt the Sydney Airport name and brand, and the ASX ticker code will change from ASX:MAP to ASX:SYD.

**Ineligible overseas investors**

32. Certain overseas investors (Ineligible Overseas Investors) are not entitled to receive MAT2 units under the scheme. Based on the composition of MAp's stapled security register and MAp's analysis of the residence of investors as at 19 October 2011 MAp is not aware of any Ineligible Overseas Investor. However, if there are any Ineligible Overseas Investors at the Record Date, an Ineligible Overseas Investor will participate in the Nominee Sale Facility under which:

- any MAp securities held at the Record Date by the Ineligible Overseas Investor will be transferred to the Nominee;
- the MAT2 units to which the Ineligible Overseas Investor would otherwise have been entitled will be issued to the Nominee;
- the transferred MAp securities and the issued MAT2 units will be reorganised in accordance with the steps described in paragraph 25; and
- MAT2 will procure that the Cash Consideration to which each Ineligible Overseas Investor would have been entitled is paid to the Nominee (or at its direction, including directly to the relevant Ineligible Overseas Investor if so directed).

33. The Nominee will then sell the MAp securities held by it on behalf of Ineligible Overseas Investors on the ASX as soon as practicable, but not more than 30 business days following the Implementation Date and remit the proceeds (after deducting any applicable brokerage and other selling costs, taxes and charges) to MAT2 or its nominee. MAT2 will procure the payment of the net proceeds of the sale to the Ineligible Overseas Investors and the Cash Consideration to the extent not already paid to that Ineligible Overseas Investor at the Nominee's direction

## **Other**

34. This Ruling is made on the basis of the scheme as described in paragraphs 10 to 33 outlined above, as well as the additional facts outlined below:

- All transactions under the scheme are conducted on an arm's-length basis;
- There is no existing MAIL shareholder who holds a 'significant stake' in MAIL for the purpose of the significant stakeholder test under subsection 124-783(8);
- There is no existing MAIL shareholder that is a 'common stakeholder' for the scheme pursuant to subsection 124-783(5);
- The scheme does not represent a 'restructure' for the purposes of section 124-784A; and
- MAIL will have at least 300 members at all times, up to and including, the time of the transfer of all the shares in MAIL to MAT2.

## **Ruling**

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### **CGT event A1 – disposal of MAIL shares to MAT2**

35. CGT event A1 will happen as a result of the disposal by a MAIL shareholder of a MAIL share to MAT2 on the Implementation Date (subsections 104-10(1) and 104-10(2) and paragraph 104-10(3)(b)).

### ***Capital gain or loss***

36. A MAIL shareholder will make a capital gain when CGT event A1 happens if the capital proceeds from the disposal of a MAIL share exceed its cost base. The capital gain is the amount of the excess. A MAIL shareholder will make a capital loss if those capital proceeds are less than the reduced cost base of the MAIL share. The capital loss is the amount of the difference (subsection 104-10(4)).

***Capital proceeds***

37. For a MAIL shareholder, the capital proceeds for each MAIL share will be the sum of the Cash Consideration received and the market value of the MAT2 units issued, worked out on the Implementation Date (subsection 116-20(1)).

***If a capital gain is made******Availability of partial scrip for scrip roll-over***

38. Subject to the qualification in paragraph 39 of this Ruling, a MAIL shareholder who makes a capital gain from the disposal of a MAIL share may choose partial scrip for scrip roll-over under Subdivision 124-M (section 124-790).

39. Scrip for scrip roll-over cannot be chosen if any capital gain the MAIL shareholder made from the replacement MAT2 units would be disregarded, except because of a roll-over (paragraph 124-795(2)(a)).

***If roll-over is chosen***

40. If a MAIL shareholder chooses scrip for scrip roll-over, the capital gain made from the disposal of a MAIL share is disregarded to the extent the MAIL shareholder received replacement MAT2 units for the disposal of their MAIL shares. The capital gain is not disregarded to the extent that the MAIL shareholder received cash for the disposal of their MAIL shares (subsections 124-785(1) and 124-790(1)).

***If roll-over is not chosen, or cannot be chosen***

41. A MAIL shareholder who does not, or cannot, choose scrip for scrip roll-over must take any capital gain or capital loss from the disposal of their shares 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).

***Cost base of new unconsolidated MAT2 units******If roll-over is chosen***

42. Where scrip for scrip roll-over is chosen, the first element of the cost base of each new unconsolidated MAT2 unit is worked out by reasonably attributing to it the cost base of the MAIL share exchanged for the relevant MAT2 unit. The cost base of the new unconsolidated MAT2 unit is reduced by so much of it that is attributable to the Cash Consideration (subsections 124-785(2) and (3)).

43. The first element of the reduced cost base of the unconsolidated MAT2 unit is calculated in the same manner (subsection 124-785(4)).

44. In working out the amount of the cost base of a MAIL share that is reasonably attributable to the Cash Consideration, the Commissioner accepts the following method:

$$\text{Cost base of MAIL shares exchanged} \times \frac{\text{Cash Consideration}}{\text{Market value of MAT2 units plus Cash Consideration}}$$

The remaining portion of the cost base is used to determine the first element of the cost base (and reduced cost base) for the replacement MAT2 units issued as consideration for the transfer of the MAIL shares (subsections 124-785(2), 124-785(3) and 124-785(4)). The Commissioner accepts that the cost base of the MAT2 units can be worked out using the following method:

$$\text{Cost base of MAIL shares exchanged} \times \frac{\text{Market value of MAT2 units}}{\text{Market value of MAT2 units plus Cash Consideration}}$$

***If roll-over is not chosen, or cannot be chosen***

45. Where scrip for scrip roll-over is not, or cannot be, chosen the first element of the cost base and reduced cost base of each MAT2 unit received is equal to the market value of the part of the MAIL shares given in exchange for the MAT2 unit (subsections 110-25(2) and 110-55(2)). The Commissioner accepts the following method for working out the relevant part of the market value of the MAIL shares given in exchange for MAT2 units:

$$\text{Market value of MAIL shares exchanged} \times \frac{\text{Market value of MAT2 units}}{\text{Market value of MAT2 units plus Cash Consideration}}$$

**Acquisition date of new unconsolidated MAT2 units**

46. The acquisition date for the new unconsolidated MAT2 units is the date those units were issued to the MAIL shareholder, being the Implementation Date (item 2 of the table in section 109-10).

47. However, for the purposes of determining eligibility for a discount capital gain, MAIL shareholders who choose scrip for scrip roll-over are taken to have acquired their new unconsolidated MAT2 units when they acquired the corresponding MAIL shares (item 2 of the table in subsection 115-30(1)).

**MAT2 units – split and consolidation**

48. No CGT event will happen when the MAT2 units are split (just after the suspension of the stapling arrangement between MAT1 units and MAT2 units) into a greater number of MAT2 units as it does not result in a change in the beneficial ownership of those units (see subsections 112-25(1) and (2)).

49. No CGT event will happen as a result of the consolidation of MAT2 units (just before the re-stapling of the MAT1 and MAT2 units) as it does not result in a change in the beneficial ownership of those units. (subsection 112-25(4)).

**The anti-avoidance provisions*****Section 45B of the ITAA 1936***

50. 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 provided by MAT2 to MAIL shareholders under the scheme.

***Part IVA of the ITAA 1936***

51. The Commissioner will not make a determination pursuant to subsection 177F(1) of the ITAA 1936 in respect of the capital proceeds received by MAIL shareholders under the simplification scheme as described in paragraphs 17 to 34.

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**Commissioner of Taxation**23 November 2011

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## 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.*

### Subdivision 124-M

52. Scrip for scrip roll-over enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in the exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

53. Subdivision 124-M contains a number of conditions for, and exceptions to, a shareholder being eligible to choose partial scrip for scrip roll-over. The main conditions and exceptions that are relevant to the present scheme are:

- shares in a company are exchanged for shares in another company;
- the exchange occurs as part of a single arrangement;
- conditions for roll-over are satisfied;
- further conditions are not applicable or are satisfied; and
- exceptions to the availability of scrip for scrip roll-over are not applicable.

54. In the present case, MAT2 is a public trading trust under Division 6C of the ITAA 1936 and has made a choice under section 703-50 to form an income tax consolidated group. The effect of the choice by MAT2 is that, generally, 'the Act', as defined in subsection 995-5(1), applies to MAT2 in a way corresponding to the way in which the Act applies to a company. One application of the Act in this way is to treat the units in MAT2 as analogous to shares in a company (see Note 2 to subsection 713-135(1)).

55. Under the scheme, the conditions for partial roll-over under Subdivision 124-M are satisfied. The Ruling section provides a detailed explanation of the Commissioner's decision in this regard. Therefore, no further explanation is warranted.

### Split and consolidation of MAT2 units

56. Under subsections 112-25(1) and 125-25(2) if a CGT asset is split into 2 or more assets and the beneficial ownership of the original asset and the new assets remains the same, the split does not result in a CGT event happening. Therefore, no CGT event will happen when the MAT2 units are split (just after the suspension of the stapling arrangement between MAT1 units and MAT2) into a greater number of units.

57. Under subsection 112-25(4), if two or more CGT assets are merged into a single asset and the beneficial ownership of the old and new assets remains the same the merger does not result in a CGT event happening. Accordingly, the consolidation of the MAT2 units prior to the re-stapling of the MAT1 and MAT2 units does not result in a CGT event happening for a MAT2 unitholder.

### **The anti-avoidance provisions**

#### ***Section 45B of the ITAA 1936***

58. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends. The provision applies where:

- 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);
- 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
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme 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).

#### ***Scheme***

59. The exchange of MAIL shares for Scrip Consideration, being the issue of MAT2 units, and Cash Consideration is a 'scheme' for the purposes of paragraph 45B(2)(a) of the ITAA 1936.

#### ***Capital benefit***

60. The issue of new MAT2 units to MAIL shareholders is a provision of a capital benefit pursuant to paragraph 45B(5)(a) of the ITAA 1936 as it is the provision of ownership interests in MAT2 to MAIL shareholders. Alternatively, MAIL shareholders are provided with a capital benefit pursuant to paragraph 45B(5)(c) of the ITAA 1936 as the scheme has the effect of increasing the value of each MAT2 unit held by MAIL shareholders compared to the value of the MAT2 units prior to the simplification scheme.

61. The Cash Consideration provided to MAIL shareholders is not a capital benefit as defined in subsection 45B(5) of the ITAA 1936.

## *Tax benefit*

62. A shareholder 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B of the ITAA 1936:

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit instead had been a dividend.

63. In the event that the Scrip Consideration was a dividend rather than a capital benefit, it is likely that Australian resident MAIL shareholders would have incurred a greater tax liability. Consequently, the receipt of the capital benefit will represent a tax benefit.

## *Relevant circumstances*

64. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) of the ITAA 1936 to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. The test of purpose is an objective one. The relevant taxpayer(s) in this instance would be the Australian resident shareholders of MAIL.

65. Subsection 45B(8) of the ITAA 1936 includes a non-exhaustive list of relevant circumstances designed to expose both the tax and non-tax implications of the scheme in order to answer the requisite purpose question objectively, as subsection 45B(3) of the ITAA 1936 prescribes.

66. The circumstances listed in subsection 45B(8) of the ITAA 1936 fall into three broad categories which include: the position of the company and its associates in relation to capital and profit (realised and unrealised) and the culture of distribution thereof; the tax profiles of the shareholders; and the eight matters from paragraph 177D(b) of the ITAA 1936 (included at paragraph 45B(8)(k) of the ITAA 1936) that pertain to the scheme itself, including the manner and timing of its execution, its form and substance, the results it produces, financial and otherwise, and the relations of the parties involved.

67. Having regard to the relevant circumstances of the scheme, identified above, it is apparent that the tax benefits obtained by the MAIL shareholders from the provision of the capital benefits described in paragraph 60 would be obtained as a mere incident of a scheme to simplify the MAp stapled structure. Accordingly, it cannot be concluded objectively that MAT2, MAIL, the MAIL shareholders or any other person who entered into or carried out the scheme, did so for a more than incidental purpose of enabling MAIL shareholders to obtain a tax benefit.

68. Consequently, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the provision of those capital benefits to the MAIL shareholders.

#### ***Part IVA of the ITAA 1936***

69. The Commissioner has the discretion to cancel all, or part of, a 'tax benefit' that has been obtained, or would, but for section 177F of the ITAA 1936, be obtained, by a taxpayer in connection with a scheme to which section 177D or section 177E of the ITAA 1936 applies. 'Scheme' is defined broadly in section 177A of the ITAA 1936 and, in this case, would include all of the steps that comprise the simplification scheme.

70. Section 177D of the ITAA 1936 applies to a scheme of which it would be concluded objectively, after having regard to the eight matters in paragraph 177D(b) of the ITAA 1936, that it was entered into or carried out by any of its participants for the dominant purpose of enabling a taxpayer (the relevant taxpayer) to obtain a tax benefit. In this case the relevant taxpayer(s) would be the Australian resident MAIL shareholders.

71. For schemes to which section 177D of the ITAA 1936 applies, the reference to obtaining a tax benefit is explained, relevantly, in section 177C of the ITAA 1936 as a reference to an amount that, but for the scheme, would be included, or might reasonably be expected to be included, in the taxpayer's assessable income.

72. In this instance, after having regard to the manner and other relevant circumstances of the simplification scheme, as directed in paragraph 177D(b) of the ITAA 1936, it is apparent that the shape of the scheme is not inconsistent with the commercial objectives sought to be achieved by MAp. Hence, it cannot be objectively inferred that the scheme would be entered into or carried out for the dominant purpose of enabling the relevant taxpayer(s) to obtain a tax benefit, as that term is explained in subsection 177C(1) of the ITAA 1936.

73. Section 177E of the ITAA 1936 applies to schemes in the nature of, or that have the effect of, dividend stripping. The tax benefit is identified within the section as the amount of profit the Commissioner determines that is stripped from the target company, in this case MAIL, and would have been included in the relevant taxpayer's assessable income as a dividend out of those profits.

74. More particularly, section 177E of the ITAA 1936 applies where:

- a company's property is disposed of under a scheme by way of, or in the nature of dividend stripping, or a scheme having substantially the effect of a scheme by way, or in the nature, of a dividend strip;
- the Commissioner concludes that the disposal represents in whole, or in part, a distribution of the company's past, present or future profits; and
- if, immediately before the scheme was entered into, the company notionally paid a dividend out of the profits represented by the disposal of the property, the amount represented by the dividend would have been, or might reasonably be expected to have been, included in the assessable income of a taxpayer.

75. In other words, section 177E of the ITAA 1936 presupposes the exercise by the target company of its discretion to pay a dividend and, thereafter, explores the circumstances of the scheme to determine whether it has taken place for the dominant purpose of enabling the target company's shareholders to avoid the tax payable on that dividend.

76. There are objective circumstances surrounding the present scheme which would appear, *prima facie*, to suggest dividend stripping (as it is commonly understood), or its effect:

- MAIL (the 'target company') has undistributed profits of \$2.146 billion which, if distributed as a dividend, would expose approximately 40% of its shareholders to a potential tax liability;
- Under the proposed Bermudan scheme of arrangement, the MAIL shareholders will dispose of their shares to MAT2 (the potential 'stripper') in return for Cash Consideration of \$0.80 per MAIL share and the Scrip Consideration; and
- The cash loan of approximately \$1.313 billion from MAIL to MAT2 will constitute the disposal of MAIL's property for the purposes of subsection 177E(2) of the ITAA 1936.

77. However, there are other objective circumstances surrounding the scheme which challenge the suggestion:

- MAIL has approximately \$1.341 billion of paid-up capital from which to source at least part of a cash distribution;
- The scheme will result in capital gains tax for many Australian resident shareholders; and

- 40% of MAIL's shareholders are non-resident entities who would appear to be indifferent tax-wise as to whether they receive cash as a dividend from MAIL or from MAT2 as part of the purchase price of their shares.

78. Indeed, the non-resident shareholders might prefer the cash not be linked to the restructure, and even that MAIL remain in Bermuda. From MAp's perspective, however, linking the cash to the restructure is crucial to obtaining participation from the non-residents and, thus, the success of the simplification scheme by which MAp expects to reduce the complexity of the stapled structure, be better positioned to explore opportunities to increase its foreign ownership levels and reduce costs going forward.

79. After examining the circumstances of the scheme, in particular its effect of collapsing the triple stapled structure by bringing MAIL onshore as a subsidiary of MAT2, it is considered that it will not be entered into for the dominant purpose of avoiding tax that would otherwise be paid by Australian resident shareholders of MAIL on a dividend from MAIL. Rather, the purpose of the scheme is objectively focussed on the reorganisation of MAp. In that regard, the scheme's shape reflects what MAp considered necessary to encourage the support of the requisite majority of shareholders.

80. Finally, and not insignificantly, it is noted that any dividend distribution would likely have been tax-free to the holders of a majority of the shares in MAIL.

81. For the purposes of section 177E of the ITAA 1936, the simplification scheme is therefore considered not to constitute a scheme in the nature of, or that has the effect of, dividend stripping.

82. Accordingly, there is no tax benefit obtained by the Australian resident MAIL shareholders either under section 177C of the ITAA 1936 or section 177E of the ITAA 1936 in respect of which the Commissioner would make a determination under subsection 177F(1) of the ITAA 1936.

## Appendix 2 – Detailed contents list

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>9</b>
Overview	10
The simplification scheme	17
<i>The MAIL scheme of arrangement</i>	21
<i>Scheme implementation</i>	25
<i>MAp securities list on the ASX</i>	31
Ineligible overseas investors	32
Other	34
<b>Ruling</b>	<b>35</b>
CGT event A1 – disposal of MAIL shares to MAT2	35
<i>Capital gain or loss</i>	36
<i>Capital proceeds</i>	37
If a capital gain is made	38
<i>Availability of partial scrip for scrip roll-over</i>	38
<i>If roll-over is chosen</i>	40
<i>If roll-over is not chosen, or cannot be chosen</i>	41
Cost base of new unconsolidated MAT2 units	42
<i>If roll-over is chosen</i>	42
<i>If roll-over is not chosen, or cannot be chosen</i>	45
Acquisition date of new unconsolidated MAT2 units	46
MAT2 units – split and consolidation	48
The anti-avoidance provisions	50
<i>Section 45B of the ITAA 1936</i>	50
<i>Part IVA of the ITAA 1936</i>	51
<b>Appendix 1 – Explanation</b>	<b>52</b>
Subdivision 124-M	52

Split and consolidation of MAT2 units	56
The anti-avoidance provisions	58
<i>Section 45B of the ITAA 1936</i>	58
<i>Scheme</i>	59
<i>Capital benefit</i>	60
<i>Tax benefit</i>	62
<i>Relevant circumstances</i>	64
<i>Part IVA of the ITAA 1936</i>	69
<b>Appendix 2 – Detailed contents list</b>	<b>83</b>

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10

### *Subject references:*

- capital benefits
- CGT asset
- CGT capital proceeds
- CGT cost base
- CGT event A1
- dividend streaming arrangements
- dividend stripping
- Part IVA
- partial roll-over
- scrip for scrip roll-over

### *Legislative references:*

- ITAA 1936
- 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(5)
- ITAA 1936 45B(5)(a)
- ITAA 1936 45B(5)(c)
- ITAA 1936 45B(8)
- ITAA 1936 45B(8)(k)
- ITAA 1936 45B(9)
- ITAA 1936 45C
- ITAA 1936 Div 6C
- ITAA 1936 Part IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177C(1)
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 177E
- ITAA 1936 177E(1)
- ITAA 1936 177E(2)
- ITAA 1936 177F
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NO: 1-3F771KG

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Capital Gains Tax ~~ CGT event A1 – disposal of a CGT asset  
Income Tax ~~ Capital Gains Tax ~~ roll-overs – scrip for scrip