


# ***CR 2014/85 - Income tax: Macquarie Atlas Roads International Limited Return of Capital***

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## Class Ruling

### Income tax: Macquarie Atlas Roads International Limited Return of Capital

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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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant Provisions

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

- section 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 45C of the ITAA 1936, and
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997).

All subsequent legislative references in this Ruling are to the ITAA 1936 unless otherwise stated.

## Class of entities

3. The class of entities to which this Ruling applies are the holders of ordinary shares in Macquarie Atlas Roads International Limited (MARIL) who:
- (a) were listed on the MARIL share register on the Record Date (being 24 September 2014) for the Scheme
  - (b) are residents of Australia as defined in subsection 6(1) on the Record Date
  - (c) did not hold their MARIL shares as revenue assets (as defined in section 977-50 of the ITAA 1997) nor as trading stock (as defined in subsection 995-1(1) of the ITAA 1997) – that is, they held their MARIL shares broadly on capital account, and
  - (d) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their MARIL shares. (Note – Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them).
4. In this Ruling, a person belonging to this class of entities is referred to as a 'MARIL shareholder'.

## Qualifications

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 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.

## Date of effect

7. This Ruling applies from 1 July 2014 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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).

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## Scheme

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8. 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 the ruling and are to be read along with the description:

- The Class Ruling application dated 29 August 2014 lodged by PricewaterhouseCoopers on behalf of Macquarie Atlas Roads International Limited (the Applicant) and documents attached to the Class Ruling application, including Appendices 1 to 7A.
- Further correspondence received from the Applicant dated 29 August 2014, 5 September 2014, 11 September 2014 and 18 September 2014.

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

### Background

9. Macquarie Atlas Roads (MQA) is a global toll road developer and operator.

10. MQA is a stapled structure consisting of MARIL and Macquarie Atlas Roads Limited (MARL). MARIL is a non-resident company within the meaning of section 6(1) which was incorporated in Bermuda and MARL is an Australian public company. Each MQA stapled security comprises a MARL share and a MARIL share, which cannot be traded separately.

11. MQA was created out of the portfolio reorganisation of the Macquarie Infrastructure Group in 2010. The MQA portfolio includes investments in a number of toll roads including Autoroutes Paris-Rhin-Rhone (APRR). The MQA shareholder profile is predominantly Australian resident.

### APRR Investment Structure

12. MARIL's investment portfolio is comprised of foreign assets, including a 20.14% effective investment in APRR. APRR is a toll road network located in Europe held through a consortium investment vehicle, Financiere Eiffarie SAS (FE).

13. MARIL indirectly holds a 20.14% interest in FE through Macquarie Autoroutes de France 2 SA (MAF2). The remaining interests in MAF 2 are held by third party investors. MAF 2 is a company incorporated in Luxembourg and is not an Australian resident company within the meaning of section 6(1).

14. From a shareholder perspective, FE has been funded indirectly by way of both equity and shareholder debt by third party and MAF2 investors.

**Distribution History**

15. FE's shareholders have agreed that no dividends will be paid by FE until all shareholder debt is repaid.

16. Prior to the Scheme, FE had used all available cash flows to repay interest, including unpaid accrued interest, on the shareholder debt.

17. To the extent that any payments by FE included interest or accrued interest, such amounts were used to fund interest payments through the holding structure to MARIL. To the extent such payments generated available cash at the MARIL level, MARIL distributed the funds to shareholders by way of dividend.

18. Details of dividends paid by MARIL to date are:

Year	A\$ Cents per share	Record date	Payment Date	Gross A\$
First Half 2013	2.4	08.04.2013	19.04.2013	11,484,752
Second Half 2013	3.3	23.09.2013	04.11.2014	16,078,612
First Half 2014	5.0	21.03.2014	04.04.2014	24,361,527

19. Prior to the Scheme from when MARIL acquired its indirect interest in FE, FE had not paid any dividends or made any principal repayments on its shareholder debt.

**Return of Share Capital**

20. FE has commenced making repayments of principal on the shareholder loans.

21. The repayments of principal by FE have in turn been used to fund principal repayments up the chain. To the extent MARIL received repayments of principal, MARIL has distributed these funds as a return of capital after retention of a prudent working capital reserve.

22. To the extent that payments by FE included an interest component, or accrued interest, these amounts have continued to be paid as interest through the holding structure to MARIL. At the MARIL level, the receipt of interest payments has continued to be distributed by way of dividends after retention of a prudent working capital reserve.

23. On 16 September 2014 it was resolved that MARIL declare and pay a dividend of 1.8c and to make a distribution from its share capital account of 6.4c per share, with a Record Date on 24 September 2014.

24. The distribution of 8.2c was paid to MARIL shareholders on 8 October 2014. The 6.4c capital distribution is referred to in this ruling as the Capital Return.

**Additional Facts and Matters**

25. MARIL's share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (within the meaning of Division 197 of the ITAA 1997).

26. The third party investors in MAF2 are not associates, within the meaning of section 318, of MARIL.

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**Ruling****Distribution debited to the share capital account is not a dividend for income tax purposes**

27. The Capital Return paid to MARIL shareholders being debited entirely to the share capital account of MARIL, will not be a 'dividend' as defined in subsection 6(1).

28. No amount of the Capital Return will be included in the assessable income of MARIL shareholders as a dividend under section 44.

**The application of sections 45A, 45B and 45C**

29. The Commissioner will not make a determination under section 45A or section 45B that section 45C applies to the Capital Return. Accordingly, no part of the Capital Return will be taken to be a dividend for income tax purposes.

**CGT consequences**

30. CGT event G1 (section 104-135 of the ITAA 1997) happens when MARIL paid the Capital Return to MARIL shareholders in respect of a MARIL share that they owned at the Record Date.

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**Commissioner of Taxation**

15 October 2014

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## 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.*

### Capital Return is not a dividend

31. The term 'dividend' is defined in subsection 6(1) and includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' excludes a distribution from the meaning of 'dividend' if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

32. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

33. Subsection 975-300(3) of the ITAA 1997 provides that an account is generally taken not to be a share capital account if it is tainted. MARIL has confirmed that its share capital account is not tainted within the meaning of Division 197 of the ITAA 1997.

34. The Capital Return was recorded as a debit to MARIL's share capital account. As the share capital account of MARIL was not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 does not apply. Accordingly, the Capital Return is not a 'dividend' as defined in subsection 6(1).

### Anti-avoidance Provisions

35. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that section 45C applies to treat all or part of the Capital Return received by MARIL shareholders as an unfranked dividend paid by the company out of profits.

### Section 45A – streaming of dividends and capital benefits

36. Section 45A applies where capital benefits are streamed to some shareholders (the Advantaged Shareholders), who would derive a greater benefit from the receipt of capital than other shareholders (the Disadvantaged Shareholders) and the Disadvantaged Shareholders receive, or are likely to receive, dividends.

37. A reference to the 'provision of a capital benefit to a shareholder in a company' is defined in paragraph 45A(3)(b) to include the distribution to the shareholder of share capital. MARIL provided its shareholders with a 'capital benefit' as defined in paragraph 45A(3)(b) when MARIL paid the Capital Return to its shareholders.

38. The capital benefit was provided to all MARIL shareholders in the same proportion as their share holdings. Therefore there are no Advantaged Shareholders or Disadvantaged Shareholders present under the Scheme.

39. Accordingly, section 45A does not apply to the Capital Return under the Scheme and the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the capital benefit.

### **Section 45B – schemes to provide capital benefits**

40. Section 45B applies where certain capital payments are made to shareholders in substitution for dividends. In broad terms, subsection 45B(2) applies where:

- (a) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a)); and
- (b) under the scheme, a taxpayer (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose), of enabling a taxpayer (the relevant taxpayer) to obtain a tax benefit (paragraph 45B(2)(c)).

41. While the Capital Return satisfies the conditions in paragraphs 45B(2)(a) and 45B(2)(b), paragraph 45B(2)(c) is not satisfied. Having regard to the relevant circumstances of the scheme, set out in subsection 45B(8), it cannot be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling MARIL shareholders to obtain a tax benefit.

42. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole, or a part, of the payment of the Capital Return.



## **CGT consequences**

### ***CGT event G1 – section 104-135 of the ITAA 1997***

43. CGT event G1 happens when MARIL paid the Capital Return to a MARIL shareholder in respect of a share that the shareholder owned at the Record Date and continues to own at the Payment Date (section 104-135 of the ITAA 1997).

44. A MARIL shareholder makes a capital gain if the Capital Return is more than the cost base of the shareholder's MARIL share. The amount of the capital gain is equal to the amount the Capital Return exceeded the cost base of the shareholder's MARIL share (subsection 104-135(3) of the ITAA 1997).

45. If a MARIL shareholder makes a capital gain when CGT event G1 happens, the cost base and reduced cost base of the MARIL share is reduced to nil. A MARIL shareholder cannot make a capital loss when CGT event G1 happens (subsection 104-135(3) of the ITAA 1997).

46. If the Capital Return is equal to or less than the cost base of the MARIL share at the time of payment, the cost base and reduced cost base of the share is reduced by the amount of the payment (subsection 104-135(4) of the ITAA 1997).

## **Appendix 2 – Detailed contents list**

47. 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

### *Subject references:*

- capital benefit
- capital gains tax
- capital reductions
- CGT event G1-G3 – shares
- return of capital on shares
- share capital
- shareholder payments

### *Legislative references:*

- TAA 1953
- Copyright Act 1968
- ITAA 1936 6(1)
- ITAA 1936 23AJ
- ITAA 1936 44

### ATO references

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