

CR 2016/94 - Income tax: Asciano Limited Executive Incentive Plan - Special Dividend



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Class Ruling

Income tax: Asciano Limited Executive Incentive Plan – Special Dividend

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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 207-145 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
- Division 1A of former Part IIIA of the *Income Tax Assessment Act 1936* (ITAA 1936).

All subsequent legislative references are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the participating employees of the Asciano Limited (Asciano) Executive Incentive Plan who:

- are residents of Australia (within the meaning of subsection 6(1) of the ITAA 1936)
- were provided shares in Asciano upon the vesting of rights, which were granted under the Executive Incentive Plan Rules approved by the Asciano Remuneration Committee on 18 September 2012 (Executive Incentive Plan Rules)
- were registered on the share register of Asciano on 3 August 2016, and
- were paid the Special Dividend on 11 August 2016 (Special Dividend Payment Date).

In this Ruling this class of entities is referred to as Participating Employees and each entity within this class is referred to as a Participating Employee.

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 8 to 31 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 2016 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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

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 and are to be read with the description:

- Class Ruling application dated 12 September 2016
- Asciano Employee Share Plans Trust Deed executed on 1 March 2011 (Trust Deed)
- Executive Incentive Plan Rules, and
- correspondence received in relation to the Class Ruling application.

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 Employee Share Plans Trust

9. The Asciano Employee Share Plans Trust (Trust) was established, amongst other things, to provide Asciano shares to employees who exercised rights granted under relevant Asciano Employee Share Plans, including the Asciano Executive Incentive Plan.

10. Under the Trust Deed the trustee of the Trust holds certain property on trust for the benefit of employees of Asciano in accordance with the rules of the Asciano Employee Share Plans.

11. Participating Employees acquire rights to acquire Asciano shares under the Asciano Executive Incentive Plan pursuant to the Executive Incentive Plan Rules. Clause 1.1 of the Trust Deed provides that 'Beneficiaries' means all 'Participants' (as defined in the Asciano Employee Share Plans) and all other employees of the Group. A 'Participant' under the Executive Incentive Plan Rules is an 'Eligible Employee' who is granted an Award (includes a right to acquire Asciano shares) under the Asciano Executive Incentive Plan. Therefore, Participating Employees who are granted rights to acquire Asciano shares under the Asciano Executive Incentive Plan are beneficiaries of the Trust.

12. All Asciano shares issued under the Asciano Employee Share Plans rank equally in all respects with other ordinary Asciano shares, except any rights attaching to other ordinary Asciano shares by reference to a record date prior to the date of the allocation of those shares.

Asciano Executive Incentive Plan

13. The Executive Incentive Plan Rules outlines the general terms governing the award of rights to Participating Employees under the Asciano Executive Incentive Plan. Each right entitles a Participating Employee to acquire one share in Asciano subject to the satisfaction of performance hurdles. Upon the vesting of or exercise of a right, Asciano must procure the transfer of one share for each right that vests or is exercised by a Participating Employee.

14. Clause 1.1 of Part A of the Executive Incentive Plan Rules provides that rights may also vest when a Change of Control occurs pursuant to clause 6.1 of the General Terms.

Scheme of Arrangement between Asciano and its shareholders for the disposal of shares in Asciano to the Joint Consortium (The Principal Scheme of Arrangement)

15. The Joint Consortium includes:

- Qube Holdings Limited (Qube)
- Global Infrastructure Partners (GIP)
- Canada Pension Plan Investment Board (CPPIB), and
- CIC Capital Corporation (CIC Capital) (together the Qube Consortium) along with
- Brookfield Infrastructure Partners L.P. (and certain of its affiliates) (Brookfield)
- Buckland Investment Pty Ltd (and certain of its affiliates) (Buckland)
- British Columbia Investment Management Corporation (bcIMC), and
- Qatar Investment Authority (QIA) (together, the Brookfield Consortium).

16. Australian Logistics Acquisition Investments Pty Limited (BidCo) is indirectly owned by GIP (27%), CPPIB (33%), CIC (16%), Buckland (12%) and bcIMC (12%).

17. On 19 August 2016 (Scheme Implementation Date), pursuant to the Principal Scheme of Arrangement, BidCo acquired 100% of the issued capital of Asciano at \$9.15 cash per Asciano share (reduced by the cash value of any Special Dividend) (Scheme Consideration).

Special Dividend

18. On the Special Dividend Payment Date (11 August 2016) Asciano paid a dividend to its shareholders of \$0.87 per share (the Special Dividend), as declared by the Board of Directors on 27 July 2016. The Special Dividend was fully franked.

19. The payment of the Special Dividend was conditional upon satisfaction of the conditions precedent to the Scheme of Arrangement and was payable at the discretion of the Asciano Board.

20. The Special Dividend was sourced entirely from Asciano's profit reserve brought forward from 30 June 2015 and current year profit from 1 July 2015 to 31 May 2016 (which included dividends received from subsidiaries of the company in the six months to 31 December 2015) as disclosed in its special purpose financial statements for the period from 1 July 2015 to 31 May 2016. Asciano did not debit the Special Dividend totalling \$848 million against its share capital account.

21. The Special Dividend of \$0.87 per Asciano share was funded by:

- existing bank facilities
- an underwritten bridge facility of \$500 million, and
- existing cash reserves of Asciano.

22. The underwritten bridge facility is a facility which Asciano will access based only on its existing financial capacity. The facility has no recourse to, and is not based on any commitment of, any of the entities owning BidCo (the acquirer under the Principal Scheme of Arrangement).

23. The share capital account of Asciano is untainted for the purposes of Division 197 of the ITAA 1997.

24. The Special Dividend was a dividend that complied with the requirements of the Corporations Act, including section 254T of the Corporations Act.

25. The Special Dividend was a dividend paid in accordance with Asciano's Constitution.

Vesting of rights for Participating Employees (Scheme of Arrangement)

26. There were two dates on which the Participating Employees rights became vested.

27. One tranche of Participating Employees rights became vested on 22 July 2016, as a result of the satisfaction by Asciano of certain total shareholder return (TSR) based performance hurdles attaching to the rights. The tranche of Participating Employees rights that became vested on this date were originally granted to the Participating Employees in respect of the financial year ended 30 June 2013.

28. The balance of the rights held by Participating Employees that became vested had a vesting date of 27 July 2016. The Asciano Board had determined that Participating Employees rights were not to vest on a Change of Control, within the meaning of the Executive Incentive Plan Rules, but rather on 27 July 2016, whereby the rights

vested in connection with the Scheme of Arrangement and the conditions specified in that board determination were satisfied being:

- the Scheme of Arrangement was approved by shareholders at the Scheme meeting (3 June 2016)
- approval of the Scheme of Arrangement was obtained from the Australian Competition and Consumer Commission (21 July 2016), and
- approval of the Scheme of Arrangement was obtained from the Foreign Investment Review Board (27 July 2016).

29. Upon vesting, the Trust provided Asciano shares to Participating Employees in satisfaction of their interests in the Trust and the Asciano Executive Incentive Plan.

30. Set out in the below table are the acquisition dates and the number of Asciano Shares acquired by the Trust, the Participating Employees' rights which became vested on 22 July 2016 and 27 July 2016 and the Asciano shares that were provided to Participating Employees upon the vesting of their rights.

Acquisition date by the Trust	No. of Asciano shares acquired by the Trust	No. of Asciano shares used by the Trust to satisfy vesting of rights on 22 July 2016 (due to FY13 TSR performance hurdle)	No. of shares used by the Trust to satisfy vesting of rights on 27 July 2016 (due to Scheme of Arrangement)
15 June 2015	412,951	412,951	-
6 October 2015	58,303	58,303	-
6 October 2015	1,105,523	-	1,105,523
7 October 2015	1,163,826	-	1,163,826
10 March 2016	140,147	-	140,147
10 June 2016	19,244	-	8,835
Total	2,899,994	471,254	2,418,331

31. The rights of the Participating Employees under the Asciano Executive Incentive Plan and acquired in accordance with the Executive Incentive Plan Rules are 'ESS interests' for the purposes of Division 83A of the ITAA 1997.

Ruling

45 day holding period rule

32. For the purposes of determining whether the Participating Employee is a 'qualified person' in relation to the Special Dividend under paragraph 207-145(1)(a) of the ITAA 1997, the Participating Employee will be able to combine the period of time that the trustee of the Trust holds the Asciano shares for the benefit of the Participating

Employee with the time the Participating Employee holds the shares directly, in determining whether the 45 day holding period under Division 1A of former Part IIIAA is satisfied.

Shares upon vesting held 'at risk'

33. The Asciano shares provided to a Participating Employee upon vesting of the rights (which were 'ESS interests' within the meaning of Division 83A of the ITAA 1997) were held 'at risk' during the relevant holding period by virtue of the exclusion for employee share scheme securities under former subsection 160APHL(10).

Commissioner of Taxation14 December 2016

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.*

45 day holding period rule

34. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked distribution made by an entity, only a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA is required to include the amount of the franking credit in their assessable income and is entitled to claim the franking credit as a tax offset.

35. In broad terms, a person is a 'qualified person' under Division 1A of former Part IIIAA if they satisfy both the holding period requirement and the related payment rule contained in former subsection 160APHO(1):

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a qualified person in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification period in relation to the dividend.

36. The holding period requirement, in former subsection 160APHO(2), requires the taxpayer to continuously hold the shares or interest in shares on which a dividend has been paid for at least 45 days if the shares are not preference shares, or at least 90 days if the shares are preference shares (excluding the day the shares were acquired, and, if relevant, the day on which disposal of the shares occurred).

37. Under former subsection 160APHO(3), any days on which the taxpayer has materially diminished risks of loss or opportunities for gain in respect of the shares or interests in the shares (within the meaning of former sections 160APHM and 160APHJ) are also excluded and not taken to break the continuity of the period for which the taxpayer held the shares or interest.

38. The related payments rule determines the relevant qualification period for which the holding period rule applies. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

39. Former section 160APHN provides non-definitive examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIA. Former subsection 160APHN(2) states:

The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

40. Former paragraph 160APHN(3)(d) states:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other persons:

...

- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or

...

41. Former subsection 160APHN(4) states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to;

the amount of dividend or distribution.

42. Under the present Principal Scheme of Arrangement, in considering whether the Asciano shareholders are under an obligation to make a related payment, it is considered that an integral part of the Scheme is the payment of the Special Dividend of \$0.87 per Asciano share. The consideration was reduced by the amount of the Special Dividend of \$0.87 per Asciano share declared by the Asciano Directors.

43. In these circumstances, in determining whether an Asciano shareholder is taken to have made or be likely to make a related payment in respect of the Special Dividend, it is considered that the circumstances surrounding the payment of the Special Dividend would constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) by causing property (that is, shares in Asciano) to be transferred to BidCo. In this case, the actual amount of the Special Dividend is effectively applied to the benefit of another person (that is, BidCo). The benefit received by BidCo is effectively a decrease/set-off in the consideration by an amount equal to the Special Dividend. As such, it can be concluded that an Asciano shareholder will be taken to have made a related payment in respect of the Special Dividend.

44. As the Asciano shareholders will be taken, for the purposes of Division 1A of former Part IIIAA, to have made a related payment in respect of the Special Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b).

45. The secondary qualification period is defined in former section 160APHD as follows:

In relation to a taxpayer in relation to shares or an interest in shares, means:

- (a) if the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest becomes ex dividend...

46. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) as follows:

A share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

47. Eligibility for the Special Dividend is determined on the Special Dividend Record Date of 3 August 2016. This is the last day on which acquisition by a person of an Asciano share entitled the person to receive the Special Dividend as per former section 160APHE. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 4 August 2016.

48. The secondary qualification period thus runs from 45 days before the ex-dividend date of 4 August 2016 and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 20 June 2016 to 18 September 2016. However, pursuant to former subsection 160APHO(3), any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Asciano shares are to be excluded.

49. Entitlement to participate in the Scheme of Arrangement will be determined on the Scheme Record Date of 12 August 2016. Asciano shareholders who dispose of their shares under the Scheme of Arrangement will no longer be considered to hold their Asciano shares 'at risk' for the purposes of Division 1A of former Part IIIAA.

50. Accordingly, for an Asciano shareholder who disposed of their shares under the Scheme of Arrangement, the secondary qualification period will run from 20 June 2016 to 11 August 2016 (inclusive). An Asciano shareholder who received the Special Dividend will need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA. Further, pursuant to former subparagraph 160APHO(2)(a), neither the date of acquisition nor the date of disposal is included in the relevant 45 day period.

51. The Asciano shares acquired by the Participating Employees relate to the vesting of rights under the Executive Incentive Plan Rules that were 'ESS interests' for the purposes of Division 83A of the ITAA 1997 and would have been 'rights acquired under an employee share scheme' as described in the former Division 13A of Part III if that Division had not been repealed.

52. The trustee of the Trust holds the Asciano shares in the Trust for the benefit of all Participating Employees in a manner required by the rules of the Asciano Employee Share Plans. By virtue of the terms of the Trust the Participating Employees are beneficiaries of the Trust.

53. The Participating Employees directly held the Asciano shares provided to them from the vesting dates, 22 July and 27 July 2016, until 11 August 2016. This period of time will be less than the required 45 days.

54. The rules dealing with the operation of the 45 day holding rule for trusts in the former section 160APHG provides that objects of a trust may be treated as satisfying the holding period by reference to the holding period of the trustee.

55. The Participating Employee will be treated as holding the relevant shares whilst they are held in the Trust. Pursuant to former subsection 160APHG(3) the actions of a trustee in relation to the 'interests' of a trust are attributable to a beneficiary or potential beneficiary. Former section 160APHG(3) provides:

If the trustee of a trust (other than a widely held trust) acquires, holds, or disposes of, shares or an interest in shares, each beneficiary of the trust (including, if the trust is a discretionary trust, a potential beneficiary) is taken to acquire, hold, or dispose of, as the case may be, an interest in the shares.

56. As a result, a Participating Employee who is a beneficiary of the Trust is taken to 'acquire, hold or dispose' of an interest in the shares at the time the trustee does.

57. The Participating Employee is provided shares in Asciano in satisfaction of their interest in the Trust and in accordance with the Asciano Executive Incentive Plan. As a result, the Participating Employee should be taken to have held the interest from the time the share was acquired by the Trust. Former section 160APHH(3) provides:

If:

- (a) a taxpayer holds an interest in shares:
 - (i) under a trust; or
 - ..., and
- (b) the shares, or an interest in the shares, is distributed to the taxpayer in satisfaction of the interest referred to in paragraph (a);

the taxpayer is taken, for the purposes of this Division, to have held the shares or interest so distributed, to the extent to which the shares or interest distributed satisfies the interest referred to in paragraph (a), from the time when the taxpayer acquired the interest referred to in that paragraph.

...

58. The combined effect of former subsections 160APHG(3) and 160APHH(3) is that a beneficiary of a trust is deemed to acquire and hold an interest in the relevant share from the time that the share is acquired by the trust.

59. The relevant Asciano shares were acquired by the Trust over the period 15 June 2015 to 10 June 2016 and were held by the Trust until the vesting dates in July 2016. The relevant period during which the shares were held by the Participating Employee directly is from the vesting dates, 22 July or 27 July 2016 until 11 August 2016.

60. Accordingly, a Participating Employee is able to combine the period of time that the trustee of the Trust holds the Asciano shares for the benefit of the Participating Employee with the time the Participating Employee held the shares directly, to determine whether they satisfy the 45 day holding period under Division 1A of former Part IIIAA for the purposes of determining whether the Participating Employee is a 'qualified person' in relation to the Special Dividend.

Shares upon vesting held 'at risk'

61. Following the vesting of the Asciano shares the Participating Employee's 'holding' of Asciano shares is also required to be held 'at risk'.

62. The Asciano shares provided to the Participating Employee upon vesting of their rights (which were 'ESS interests' within the meaning of Division 83A of the ITAA 1997) are held 'at risk' during the relevant holding period by virtue of the exclusion for employee share scheme securities under former section 160APHL(10).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; CR 2016/81

Legislative references:

- ITAA 1997
 - ITAA 1997 207-145
 - ITAA 1997 207-145(1)(a)
 - ITAA 1997 Div 83A
 - ITAA 1997 Div 197
 - ITAA 1936
 - ITAA 1936 Div 1A of Pt IIIAA
 - ITAA 1936 Div 13A of Pt III
 - ITAA 1936 6(1)
 - ITAA 1936 160APHD
 - ITAA 1936 160APHE
 - ITAA 1936 160APHE(1)
 - ITAA 1936 160APHG
 - ITAA 1936 160APHG(3)
 - ITAA 1936 160APHH(3)
 - ITAA 1936 160APHJ
 - ITAA 1936 160APHL(10)
 - ITAA 1936 160APHM
 - ITAA 1936 160APHN
 - ITAA 1936 160APHN(2)
 - ITAA 1936 160APHN(3)
 - ITAA 1936 160APHN(3)(d)
 - ITAA 1936 160APHN(4)
 - ITAA 1936 160APHM
 - ITAA 1936 160APHO(1)
 - ITAA 1936 160APHO(1)(b)
 - ITAA 1936 160APHO(2)
 - ITAA 1936 160APHO(2)(a)
 - ITAA 1936 160APHO(3)
 - Corporations Act 2001 254T
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ATO references

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