




TR 97/18 - Income tax: capital gains: roll-over relief following reorganisation of the affairs of a unit trust or company - sections 160ZZPA, 160ZZPB, 160ZZPC and 160ZZPD

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 This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

 This document has changed over time. This is a consolidated version of the ruling which was published on *17 September 1997*



Taxation Ruling

Income tax: capital gains: roll-over relief following reorganisation of the affairs of a unit trust or company - sections 160ZZPA, 160ZZPB, 160ZZPC and 160ZZPD

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

Class of person/arrangement

1. This Ruling covers aspects of the roll-over relief provided by sections 160ZZPA, 160ZZPB, 160ZZPC and 160ZZPD of the *Income Tax Assessment Act 1936* (the Act).

2. The Ruling specifically covers sections 160ZZPA and 160ZZPB of the Act, which are the operative provisions that provide for roll-over relief for a scheme for the reorganisation of the affairs of a unit trust where a company is interposed between the trust and its unitholders. It also covers sections 160ZZPC and 160ZZPD, as they extend sections 160ZZPA and 160ZZPB respectively, to apply to schemes for the reorganisation of the affairs of a company where another company is interposed between the company and its shareholders. The Ruling examines the operative requirements (that is, the conditions) that must be met for roll-over relief to be available. These conditions determine when a scheme will qualify for roll-over relief.

3. This Ruling does not deal with the general income provisions of the Act or the possible application of the general anti-avoidance provisions of Part IVA.

4. The provisions of sections 160ZZPA and 160ZZPB are in many respects similar in their construction. Accordingly, in this Ruling a reference to certain words and phrases in section 160ZZPA is intended to include a reference to comparable words and phrases in section 160ZZPB. The table below sets out these references:

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Reference to:	Includes reference to:
disposed of	cancelled or redeemed
section 160ZZPA	sections 160ZZPB, 160ZZPC and 160ZZPD
subsections, paragraphs and subparagraphs of section 160ZZPA	subsections, paragraphs and subparagraphs of section 160ZZPB
units	shares in the original company
units in the unit trust	shares in the original company
unit trust	original company
unitholder	shareholder

Definitions

5. The meanings of key terms used in the legislation and this Ruling are as follows:

Relevant to sections 160ZZPA, 160ZZPB, 160ZZPC and 160ZZPD

completion time: the time when the last of the unitholders disposes of his or her units in the unit trust;

exchange units: all the units in the unit trust, being units which are disposed of for shares in the interposed company;

exchanging taxpayer: each of the two or more taxpayers who are the holders of all the units in the unit trust, being units which are disposed of for shares in the interposed company;

exchanging taxpayer's disposal time: the time when all of the units in the unit trust held by a particular unitholder are disposed of;

interposed company: a resident company that acquires all the units in the unit trust and whose shares are held by the original unitholders;

remaining shares: shares in the interposed company that are not owned by exchanging taxpayers immediately after the completion time;

replacement share: a non-redeemable share in the interposed company received as consideration for the disposal of units in the unit trust.

Relevant to section 160ZZPB and section 160ZZPD only

formal units: if the exchange units are to be disposed of and new units are to be issued to the interposed company, the interposed company may acquire up to five units (formal units) in the unit trust before this disposal takes place;

scheme units: if the exchange units are to be disposed of and new units issued to the interposed company, then, once this disposal is made, the trustee of the unit trust must issue to the interposed company two or more units (scheme units) in the unit trust.

Relevant to section 160ZZPC and section 160ZZPD only

original company: the existing resident company in which the shareholders originally held shares before disposing of the shares.

Key concept

6. Broadly, roll-over relief is available for certain business reorganisations where no change occurs in the economic ownership of a particular underlying asset, or where the underlying assets in which the taxpayer has an economic interest do not change. The provisions were not designed to extend to any other type of arrangement which may involve the introduction of new economic owners into the structure or where the owners obtain an economic interest in underlying assets which they did not previously hold.

7. This policy is reflected in the Press Release of 20 March 1986 of the (then) Treasurer in which it was stated:

'In my 19 September statement I indicated that the Government intended to give further consideration to the question of providing rollovers (ie deferral of capital gains tax liability) for asset ownership changes associated with certain types of business reorganisations. The Government has come to the view that rollovers can be justified in this area in certain situations **where no change occurs in the underlying ownership of the asset concerned or where the underlying assets against which the taxpayer has a claim do not change.**' (emphasis added)

8. The (then) Treasurer's Press Release of 29 September 1987, which announced the extension of roll-over relief to reorganisations involving the interposition of a resident company between the unitholders in a resident unit trust and the existing business structure, which were enacted as sections 160ZZPA and 160ZZPB, stated that

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this extension was consistent with the principles announced on 20 March 1986.

9. The principle is affirmed in the explanatory memorandum to the *Taxation Laws Amendment Bill (No 5) 1987* and the *Taxation Laws Amendment Bill (No 3) 1988*. It states at page 3 in the explanatory memorandum to the *Taxation Laws Amendment Bill (No 3) 1988* that one of the main requirements for roll-over relief to be available is that:

'... immediately after the reorganisation the former shareholders in the existing company hold all the shares in the interposed company in the same proportion, and as to the same value, as shares were held immediately before the exchange, redemption or cancellation'.

10. It is readily observed that if there is a reorganisation of the affairs of a wholly owned group/conglomerate by reconfiguring the group under two main operating companies, there occur changes in cross holdings between each related company **but no change in the overall economic ownership of the underlying assets within the group**. This type of arrangement is common commercial practice and not offensive to the roll-over provisions of section 160ZZO.

11. The provisions of section 160ZZPA were drafted to reflect the specific type of scheme for which the extension of roll-over relief was intended. Section 160ZZPA was introduced to extend roll-over relief under Division 17 of Part IIIA to schemes where unitholders in a unit trust dispose of their units in consideration for shares in an interposed company. Such a scheme is described in **Example 1** (at paragraphs 91 to 94). In essence, it involves a wholly internal reorganisation of a unit trust where a company is interposed between the owners (the unitholders) and the unit trust.

12. This view is supported by the words of these provisions and by the overall scheme of Part IIIA of the Act. The operative requirements of the provisions prescribe a number of requirements that must be satisfied for the roll-over relief to be available. These are all designed to give effect to the clear intention of the provisions.

13. Subsection 15AA(1) of the *Acts Interpretation Act 1901* provides:

'In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.'

It is with this key concept in mind that the views expressed in this Ruling have been formed.

Ruling

14. It is an essential requirement for roll-over relief under section 160ZZPA that there must be a scheme for the reorganisation of the affairs of a unit trust.

15. A scheme for the reorganisation of the affairs of a unit trust is different from the merger of that unit trust with another unit trust. Roll-over relief under section 160ZZPA is therefore not available for schemes where the merger of two or more unit trusts is effected. In any event, mergers will generally not satisfy the other operative requirements of section 160ZZPA for the availability of roll-over relief.

16. Furthermore, roll-over relief under section 160ZZPA cannot be available for schemes for the reorganisation of the affairs of more than one unit trust as that section is clearly expressed in the singular form. The words of the provisions are specifically directed at a scheme for the reorganisation of a unit trust, **not** two or more unit trusts. Schemes for the reorganisation of the affairs of more than one entity will typically not be able to satisfy the other operative requirements of the section.

17. The requirement of paragraph 160ZZPA(1)(k) is satisfied if the proportions obtained by comparing the number of units held by an exchanging taxpayer to the total number of units in the unit trust, is the same as the proportion represented by the exchanging taxpayer's holding of replacement shares to the **total** replacement shares in the interposed company.

18. The only shares on issue by the interposed company at the completion time must be replacement shares subject only to the exception for the five or fewer remaining shares that may be disregarded, for the purposes of paragraph 160ZZPA(1)(k), by operation of subsection 160ZZPA(10).

19. The time at which the proportions of units in the unit trust are ascertained for the purposes of paragraph 160ZZPA(1)(k) is immediately before the earliest exchanging taxpayer's disposal time.

20. All replacement shares held by a taxpayer in the capacity of trustee must be held on the same trust as the original units in the unit trust. This means that the trust property must be held for the benefit of the same beneficiaries and upon the same terms and conditions as before the exchange.

21. The 'multiple' of exchange units required by paragraph 160ZZPA(1)(c) [and subparagraph 160ZZPB(1)(a)(vii)] must be a whole number and not a fraction.

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22. The only consideration that exchanging taxpayers may receive in respect of the disposal of their units is non-redeemable shares in the interposed company.

Operative requirements

23. The following tables set out the operative requirements (conditions) which must **all** be met for roll-over relief under section 160ZZPA to 160ZZPD to be available.

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Common features of sections 160ZZPA, 160ZZPB, 160ZZPC and 160ZZPD

Matter	Provision	Requirement
Arrangements covered	(1)(a)	Scheme for the reorganisation of the affairs of a unit trust.
Consideration	(1)(b)	Non-redeemable (replacement) shares in the interposed company issued to the exchanging taxpayers.
Numerical continuity	(1)(c)	The number of replacement shares equals, or is a multiple of, the number of exchange units.
Timing	(1)(d)	Each exchanging taxpayer's exchange units are disposed of at the same time.
Control	(1)(e)	<p>On completion, the exchanging taxpayers are the owners of all, or substantially all, the shares in the interposed company.</p> <p>The 'substantially all' modification results from the Commissioner's discretion in subsection (10) where the number of shares held by others does not exceed five.</p>
Continuity of ownership	(1)(f)	Each exchanging taxpayer owns the replacement shares from disposal time to completion time.
Residence	(1)(g) and (1)(h)	The unit trust and the interposed company are residents for the prescribed income year or period.
Trustee status	(1)(j)	Replacement shares held by a trustee are held upon the same trust as the exchange units.
Proportional ownership	(1)(k)	Each exchanging taxpayer owns the replacement shares in the interposed company in the same proportion that the exchange units were held in the unit trust.

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Matter	Provision	Requirement
Proportional value	(1)(m)	For each exchanging taxpayer: the ratio which so much of the market value, at completion time, of the taxpayer's replacement shares, as is attributable to the exchange (or scheme) units , bears to the market value of all replacement shares attributable to those units must be the same as the ratio which the market value of the taxpayer's units bore to the market value of the exchange units immediately before the exchanging taxpayers disposal time.
Election	(1)(n) and (1)(p)	The interposed company provides a written election within two months after completion time (or such further time as the Commissioner allows) accompanied by a declaration.

Applicable to sections 160ZZPA and 160ZZPC only

Matter	Provision	Requirement
Elements of scheme	(1)(a)(i)	<p>Two or more taxpayers hold all the units in a unit trust.</p> <p>All the units are disposed of to an (interposed) company.</p> <p>The interposed company is not the trustee of a trust estate.</p>

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Applicable to sections 160ZZPB and 160ZZPD only

Matter	Provision	Requirement
Elements of scheme	(1)(a)(ii)	An (interposed) company acquires up to five (formal) units in a unit trust. The interposed company is not the trustee of a trust estate.
	(1)(a)(iii)	The interposed company did not previously hold any units in the unit trust.
	(1)(a)(iv)	Two or more taxpayers own the remaining (exchange) units.
	(1)(a)(v)	All exchange units are redeemed or cancelled.
	(1)(a)(vi)	Two or more (scheme) units are issued to the interposed company.
	(1)(a)(vii)	The number of scheme units equals, or is a multiple of, the number of exchange units.

Applicable to sections 160ZZPA and 160ZZPB only

Matter	Provision	Requirement
Commencing date	(1)(a)(i) or (ii)	On or after 9 December 1987.

Applicable to sections 160ZZPC and 160ZZPD only

Matter	Requirement
Commencing date	On or after 28 January 1988.

Date of effect

24. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

25. If a taxpayer has a more favourable private ruling (whether legally or administratively binding), this Ruling applies to that taxpayer to the extent of any inconsistency only in respect of any

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transactions, arrangements, agreements, acts or events entered into, commenced or occurring from the date of this Ruling.

Explanations

Schemes for the reorganisation of the affairs of a unit trust

26. Paragraph 160ZZPA(1)(a) separately requires that there must be a scheme for the reorganisation of the affairs of a unit trust. The succeeding paragraphs of subsection 160ZZPA(1) then set out further requirements that indicate what type of reorganisation is contemplated by subparagraph 160ZZPA(1)(a)(i). They do this as the expression 'scheme for the reorganisation of the affairs of a unit trust' must be interpreted in the context in which that expression appears. What is meant is the interposition of a company between the unit trust and its unitholders.

Mergers

27. Schemes described as 'mergers' where taxpayers have sought to have roll-over relief available under section 160ZZPA have taken either one of the following forms. The first involves two operating companies with different sets of shareholders. Under this form of scheme both sets of shareholders become the shareholders in one of the companies whilst that company becomes the sole shareholder in the other company (such an arrangement involving a unit trust and a company is described in **Example 2** at paragraphs 95 to 98).

28. The second form of scheme also involves two operating companies with separate sets of shareholders. The two sets of shareholders become the shareholders in another company which is the sole shareholder in each of the two operating companies (such a scheme is described in **Example 3** at paragraphs 99 to 102).

29. A merger between two companies involves one entity absorbing another, or two or more companies uniting or combining. Accordingly, we consider that for the purposes of the application of section 160ZZPA a merger cannot constitute a reorganisation. Under a reorganisation no change occurs in the economic ownership of the underlying assets and the underlying assets in which the taxpayer has an economic interest do not change.

30. Further, we do not consider that an arrangement involving the merger of two companies which have the same shareholders, but holding those shares in different proportions, constitutes a reorganisation as there will be a change in the economic ownership of the underlying assets and a proportional change in the underlying

assets in which the taxpayer has an economic interest (see **Example 7** at paragraphs 114 and 115).

31. Our view is that the legislation does not intend that roll-over relief of this type should be available in the case of a merger, but rather should be available for the type of reorganisation where another company is interposed between the owners of an existing entity and that entity. In this way, the owners exchange their existing direct interests in the entity for shares in the interposed company, thus retaining their existing economic ownership of the underlying assets. For example, a company may be interposed between unitholders and a unit trust where the unitholders exchange their existing unitholdings for shares in the company and the company holds 100% of the units in the unit trust.

32. It is not possible to consider parts of schemes in isolation. In considering a scheme, we must look at the entirety of the scheme and its effect in determining whether the scheme is one for the reorganisation of the affairs of a unit trust.

33. Case law provides analysis of the meaning of the word 'reorganisation' and how it is distinguished from the word 'amalgamation'. The word 'amalgamation' is a commercial term which has been adopted in various companies legislation and in subsection 136(2) of the *Taxation of Chargeable Gains Act 1992* (UK).

34. In the English case of *Hooper v. Western Counties & South Wales Telephone Company Limited* (1892) 68 LT 78 at 80, Chitty J was of the view that 'reorganisation' of a company means the same as, and not more than, 'reconstruction' of a company. He further discussed (at 80) how a 'reconstruction' differed from an 'amalgamation'.

35. Later, Buckley J in *In re South African Supply and Cold Storage Company; Wild v. Same Company* [1904] 2 Ch 268 at 286 discussed the term 'reconstruction':

'It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on.'

36. Buckley J then went on to explain what he considered an 'amalgamation' to be, stating at 287:

'There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam - a blending of two undertakings. ... The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern.'

37. What these cases describe as an amalgamation is representative of arrangements we describe in this Ruling as mergers. These cases

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support the view that a merger, or an amalgamation, is not a scheme contemplated by subparagraph 160ZZPA(1)(a)(i).

38. In *The Citizens and Graziers' Life Assurance Company Limited v. The Commonwealth Life (Amalgamated) Assurances Limited and Anor* (1934) 51 CLR 422, Dixon J said, at 455:

'In spite of the commercial origin of the terms "amalgamation," "reconstruction," and "reorganisation" as descriptions of company transactions, their meaning is not to be ascertained by considering the lay understanding of the expressions but rather by referring to the text writers upon company law, who are specially conversant with the subject ...'.

39. Dixon J in his judgment referred to *Lindley on Companies*, 6th edition (1902) and *Palmer's Company Precedents*, 13th edition (1927). Text writers also support the proposition that a merger or amalgamation is not a reconstruction or reorganisation.

40. In the case of share disposals prompted by takeovers, there is a change in the economic ownership of the underlying assets of the target company after takeover. In the course of company amalgamations the economic ownership of the underlying assets also changes. These changes are not consistent with the policy of roll-over relief.

41. In our view, therefore, a merger does not constitute a scheme for the reorganisation of the affairs of a unit trust or company within the meaning of subparagraph 160ZZPA(1)(a)(i).

The words used in the legislation are 'singular' not 'plural'

42. If a scheme is one for the reorganisation of the affairs of more than one unit trust, roll-over relief under section 160ZZPA is not available.

43. If, contrary to the view expressed in this Ruling, it is possible to have a reorganisation at law of the affairs of two or more unit trusts, section 160ZZPA does not provide roll-over relief as the section is clearly limited to the reorganisation of the affairs of a single unit trust.

44. Under schemes that result in a merger of two or more companies we consider that the scheme involves more than the reorganisation of the affairs of a company. The affairs of both of the operating companies have been fundamentally altered. Neither of the companies involved retains the same shareholder ownership as it had before the scheme as, at the very least, some new shareholders are introduced. In some cases the entire shareholding in the company is changed. By tracing through the interposed company it will be clear that there has been, at least, a partial change in the economic ownership in the underlying assets, as persons who did not previously hold economic

interests in some of the underlying assets of the companies now hold such interests. The economic interests in underlying assets of shareholders who have not disposed of a share in a company will also change because other persons have economic interests in the underlying assets of the company. Further, the underlying assets in which those shareholders have an economic interest will change.

45. Section 160ZZPA uses language which is expressed in the singular. It provides that the reorganisation must be by way of interposing a company (singular) between the unitholders and the unit trust (singular) where all unitholders' units in the unit trust (singular) are disposed of in exchange for non-redeemable shares in the interposed company (singular) in the same proportions that they originally held the exchange units.

46. The legislation was drafted with words in the singular to ensure that the proportional interest of each former unitholder in the ownership of the unit trust was maintained after the reorganisation. This interpretation is within the spirit and intent of roll-over relief under Part IIIA of the Act.

47. Section 23 of the *Acts Interpretation Act 1901* provides:

'In any Act unless the contrary intention appears:

...

(b) words in the singular number include the plural and words in the plural number include the singular.'

48. In *Blue Metal Industries Limited v. Dilley and Anor* (1969) 117 CLR 651 the Privy Council considered the equivalent provisions of the *Interpretation Act 1899* (NSW). Their Lordships in their judgment said, at 656:

'Words in the singular will include the plural unless the contrary intention appears. But in considering whether a contrary intention appears there need be no confinement of attention to any one particular section of an Act. **It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole.** (See *Sin Poh Amalgamated (H.K.) Ltd. v. Attorney-General of Hong Kong* [1965] 1 W.L.R. 62.)' (emphasis added)

49. And then later, at 658:

'The *Interpretation Act* is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation. Acquisition of shares by two or more companies is not merely the plural of acquisition by one. It is quite a different

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kind of acquisition with different consequences. It would presuppose a different legislative policy.'

50. To adopt the singular construction when it is used and not the plural is appropriate when the character of the legislation would be changed by adopting the plural. We consider that a contrary intention does appear here. By adopting a plural construction, the character of the provisions is altered and anomalies may arise. For example, under paragraphs 160ZZPA(2)(c) and (d), an exchanging taxpayer who holds units in a unit trust that were acquired before 20 September 1985 is allowed to have the replacement shares received under the reorganisation of the affairs of the unit trust also taken to have been acquired before 20 September 1985 for the purposes of Part IIIA.

51. If the scheme is one for the reorganisation of the affairs of two unit trusts, such as in **Example 3** (see paragraphs 99 to 102), and the exchanging taxpayer holds units in only one of the unit trusts that were acquired before 20 September 1985, an anomaly arises. If roll-over relief were available, that exchanging taxpayer would be able to treat replacement shares received as also being acquired before 20 September 1985. However, that exchanging taxpayer now has an economic interest in the underlying assets of the unit trust in which such an interest was previously not held. The status of those replacement shares will not reflect the economic reality that, under the scheme, the taxpayer has newly acquired economic interests in underlying assets. It does not appear reasonable that in these circumstances the taxpayer should be able to treat all the replacement shares as being acquired before 20 September 1985.

52. It is the clear intention of roll-over relief of this type that it be available where the interests of the economic owners of the property are maintained after the reorganisation. To construe terms expressed in the singular to include the plural would, in our view, change the essential character of the provisions and not properly reflect the intention of the Parliament.

Alternative views

53. The view has been expressed that the legislation is aimed at the entity which, as a result of the reorganisation, becomes wholly owned by the interposed company. Under this view, any reorganisation of the affairs of the interposed company will not cause the roll-over relief to be unavailable. It is our view that the provisions consider the economic interests held in the underlying assets of the entity which becomes wholly owned by the interposed company. To allow the affairs of the interposed company to be reorganised in such a way so as to vary those economic interests would be contrary to the wording, and would defeat the intent, of these roll-over provisions.

54. It has been suggested that the relevant scheme, in its entirety, is constituted by the steps involving the disposal by the holders of all the units in a unit trust to a company, in consideration for non-redeemable shares in that company. Under this analysis, the scheme does not extend to include steps other than those for which roll-over relief is sought. Further, any scheme comprising only those relevant steps will satisfy the description of a scheme being for the reorganisation of the affairs of a unit trust.

55. This view is not shared by this Office. The requirement in section 160ZZPA is that, under a scheme for the reorganisation of the affairs of a company, certain requirements must be met for roll-over relief to be available. In no way does the legislation restrict the scheme to those other requirements of the roll-over provision. It is the entire scheme, and not just the part of the scheme necessary to satisfy roll-over requirements, which is to be considered in determining whether the entire operative requirements, including the requirement under paragraph 160ZZPA(1)(a) of the purpose of the scheme, are satisfied.

56. It has been put to us that all that happens in these schemes is the sale of the unitholders' units, with the consideration being the issue of shares in the interposed company. Accordingly, that cannot be considered a merger. The effect of a scheme at the unitholder/shareholder level, whilst being taken into account in determining whether the scheme is one for the reorganisation of the affairs of a unit trust, is not the only factor to be considered in determining whether the scheme is one for which this roll-over relief is available. A merger will ordinarily be evidenced upon examination of the relationship of the companies and/or unit trusts upon completion of the scheme.

57. It has been suggested that section 160ZZPA means that, if all other conditions are satisfied, it follows that the arrangement, even if it is a merger, satisfies the reorganisation requirement of paragraph 160ZZPA(1)(a). This analysis is not sustainable, in our opinion, because subsection 160ZZPA(1) contains a number of distinct operative requirements, **all** of which must be met for roll-over relief to be available. Whilst the other requirements do indicate the type of reorganisation contemplated by paragraph 160ZZPA(1)(a), it does not automatically follow that, if all of these requirements are met, the scheme will be one for which roll-over relief will be available. The operative requirement of paragraph 160ZZPA(1)(a) must be satisfied of its own accord. It follows that a scheme that satisfies all other operative requirements but is not one for the reorganisation of the affairs of a unit trust will not have roll-over relief available.

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In the same proportion

58. Paragraph 160ZZPA(1)(k) requires that, immediately after the completion time, each exchanging taxpayer owns replacement shares in the interposed company in the same proportion as he or she held exchange units in the unit trust.

59. The paragraph requires comparison of the proportion held by each exchanging taxpayer of the replacement shares issued in the interposed company with the proportion of the units held by that exchanging taxpayer. This impliedly requires that issued shares, other than replacement shares in the interposed company, not be taken into account in determining whether the requirements of paragraph 160ZZPA(1)(k) are satisfied. However, paragraph 160ZZPA(1)(k) must be read in the context that, subject to the exception contained in subsection 160ZZPA(10), the replacement shares will be **all** the shares of the interposed company on issue at the completion time.

60. The requirement that, subject to the exception contained in subsection 160ZZPA(10), the replacement shares will be all the shares of the company on issue at the completion time is discernible from the entirety of the requirements of section 160ZZPA. Paragraphs 62 to 76 provide a full analysis of how the words of the section detail this requirement.

61. An important rule of statutory interpretation requires an Act to be read as a whole, with the result that the words must be read in their context. In this regard, reference is made to the joint judgment of Isaacs and Rich JJ in *The Metropolitan Gas Company v. The Federated Gas Employees' Industrial Union and Anor* (1925) 35 CLR 449 at 455.

62. Roll-over relief under section 160ZZPA is available because the economic ownership of the underlying assets remains unchanged by the reorganisation. Therefore, the economic interest of each former unitholder in the underlying assets of the unit trust must be maintained immediately after the completion time. If no regard is paid to the totality of the shareholding in the interposed company, it is not possible to ensure that the economic ownership of the underlying assets was maintained.

63. It is argued by some that the requirement in subparagraph 160ZZPA(1)(e)(i), that 'all the shares' in the interposed company must be owned immediately after the completion time by the exchanging taxpayers, will be satisfied in cases where the exchanging taxpayers own not only replacement shares in the interposed company immediately after the completion time but also other shares (existing shares) in that company which they acquired before the commencement of the scheme for reorganisation. However, when the specific requirements of paragraphs 160ZZPA(1)(b), (c), (d), (e), (f),

(k) and (m) are looked at, it is clear that what subsection 160ZZPA(1) is directed towards is ensuring that the proportional interest of each exchanging taxpayer in the interposed company will be the same as the proportional interest of that exchanging taxpayer in the unit trust.

64. If subparagraph 160ZZPA(1)(e)(i) referred to all the 'replacement shares', instead of 'all the shares', in the interposed company, there would be a clear inference that the interposed company could have on issue, at the completion time, shares other than the replacement shares. By using the expression 'all the shares' in the interposed company, it is made clear that the shares being referred to are the shares, and only the shares, acquired by the exchanging taxpayers under paragraph 160ZZPA(1)(b). The replacement shares are the only shares in the interposed company referred to in subsection 160ZZPA(1), other than in subparagraph 160ZZPA(1)(e)(i). They are, therefore, the relevant shares for the purposes of subsection 160ZZPA(1).

65. It would be odd, to say the least, if the interposed company could have existing shareholdings by the exchanging taxpayers before the exchange of units. If this were the case after the exchange, despite complying with the various operative requirements of subsection 160ZZPA(1) that ensure the maintenance of economic interests in the underlying assets, the economic interest of an exchanging taxpayer in the underlying property of the unit trust could be altered. This would occur where the existing shareholding of that exchanging taxpayer in the interposed company before the reorganisation was a different proportion of the existing total shareholdings from the proportion of units held by the exchanging taxpayer in the unit trust.

66. For example, before implementation of a scheme, a taxpayer holds 10% of the issued units in a unit trust (10 units of 100 units issued) and already holds 20% of the issued capital of the company to be interposed (20 shares of 100 shares issued). Under the scheme, the taxpayer receives 10% of replacement shares (10 shares of 100 shares issued). After the scheme, the taxpayer has 30 shares of the 200 shares issued in the interposed company, being 15% of the issued capital. The economic interest of the taxpayer in the underlying assets has changed from the 10% held in the unit trust and the 20% held in the company to 15% in the consolidated group.

67. The above view is further supported by subsection 160ZZPA(10) which operates where, immediately after the completion time, the exchanging taxpayers are the owners of some but not all of the shares in the interposed company.

68. Subsection 160ZZPA(10) modifies the requirements of subparagraph 160ZZPA(1)(e)(i) to enable the ownership of shares held in the interposed company by persons other than the exchanging

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taxpayers immediately after the completion time, being the remaining shares, to be disregarded for the purposes of establishing compliance with those provisions. The circumstances in which the Commissioner may disregard the remaining shares are detailed in paragraphs 160ZZPA(10)(a) to (c). Paragraph 160ZZPA(10)(a) requires that, immediately after the completion time, the exchanging taxpayers will not be the owners of all the shares in the interposed company. Paragraph 160ZZPA(10)(b) requires that there be no more than five remaining shares. Paragraph 160ZZPA(10)(c) states that the Commissioner is to have regard to the ratio of the market value of those shares to the market value of the replacement shares, and also to any other matter considered relevant.

69. Paragraphs 160ZZPA(10)(a) to (c) recognise that small shareholdings of nominal value may exist in the interposed company immediately after the completion time to facilitate the reorganisation.

70. In the situation envisaged by paragraph 160ZZPA(10)(a), it is obvious that not all the shares on issue by the interposed company immediately after the completion time will be replacement shares. Replacement shares can only be owned by an exchanging taxpayer.

71. If the shares not owned by the exchanging taxpayers (the remaining shares) meet the requirements of paragraphs 160ZZPA(10)(b) and (c), the exchanging taxpayers are treated, for the purposes of subparagraph 160ZZPA(1)(e)(i), as if, immediately after the completion time, they were the owners of all the shares in the interposed company (paragraph 160ZZPA(10)(d)). Paragraph 160ZZPA(10)(e) provides that those remaining shares shall be disregarded for the purposes of paragraph 160ZZPA(1)(k).

72. It is noted that paragraph 160ZZPA(1)(k) refers to each exchanging shareholder owning the **replacement shares** in the interposed company in the same proportion as that taxpayer held units in the unit trust. In other words, the relevant proportionate shareholding of the exchanging taxpayer in the interposed company is **not** the taxpayer's proportionate shareholding in **all** the issued shares of the interposed company but in the **replacement shares**. However, paragraph 160ZZPA(10)(e) provides that, in given circumstances, the remaining shares, which are not, and cannot be, the replacement shares, shall be disregarded for the purposes of paragraph 160ZZPA(1)(k).

73. Paragraph 160ZZPA(10)(e) can only, therefore, be seen as necessary or relevant if it is accepted that there is an underlying assumption in subsection 160ZZPA(1) that the only shares of the interposed company on issue immediately after the completion time were, subject to the exception in subsection 160ZZPA(10), replacement shares.

74. Further, it would seem illogical that, whilst paragraph 160ZZPA(10)(d) specifically provides for the ownership of remaining shares not to be taken into account for the purposes of paragraph 160ZZPA(1)(e)(i), any existing shares in the interposed company held by the exchanging taxpayers would not cause that subparagraph to be breached. This is so even though their presence could (and in many cases would) change the proportion of the economic interests of the exchanging taxpayers in the underlying property of the unit trust.

75. In respect of paragraph 160ZZPA(1)(k), the explanatory memorandum to the *Taxation Laws Amendment Bill (No 5) 1987* states:

'Paragraph (k) stipulates that immediately after the completion time, each exchanging taxpayer must own the **replacement shares** in the interposed company in the same proportion as the exchange units were held in the unit trust. For example, a taxpayer who held 10 per cent of the issued units of the unit trust would be required to own 10 per cent of **the shares** in the interposed company.' (emphasis added)

76. This passage clearly supports our view that, subject to the exception in subsection 160ZZPA(10), the only issued shares in the interposed company at completion time are the replacement shares. A taxpayer who holds 10% of the units in the unit trust would not necessarily own 10% of the shares in the interposed company (so as to own replacement shares in the same proportion as he owned the exchange units) merely because he owns 10% of the shares in the interposed company. The sole exception is when the only shares on issue were replacement shares.

Alternative view

77. It has been suggested that paragraph 160ZZPA(1)(k) will be satisfied if the proportion obtained by comparing the number of units held by an exchanging taxpayer that were disposed of, to the total number of units that were disposed of, is the same as the proportion represented by the exchanging taxpayer's holding of replacement shares to the total issued shares in the interposed company.

78. We do not consider that this is the proper construction of paragraph 160ZZPA(1)(k). In relation to establishing the proportion held by the exchanging taxpayer in the interposed company, the expression used in the paragraph is 'replacement shares in the interposed company in the same proportion' which in our view restricts the analysis to just the replacement shares, with no warrant to take into account any other shares that may be on issue at the completion time.

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79. It has been suggested that roll-over relief may be available where the company to be interposed has shareholders, other than exchanging taxpayers, at the time it acquires all the shares in the other company. We do not consider this to be a sustainable view as the language of the provisions is such that it is not considered possible for a scheme, seeking to interpose a company with existing shareholders, to satisfy the operative requirements for the availability of roll-over relief. The analysis that leads us to this conclusion is detailed at paragraphs 62 to 76 of this Ruling.

80. Some hold the view that a scheme will satisfy the operative requirements of section 160ZZPA for roll-over relief even if shareholders in the interposed company hold shares other than replacement shares at the completion time. It is our view that the proper construction of the provisions does not allow for this result. It is clear that the provisions, when considered as a whole, do not contemplate that there will be shares other than replacement shares on issue at the completion time. The only exception is those shares that may be disregarded under subsection 160ZZPA(10).

At what time are proportions of exchange units to be determined?

81. Paragraph 160ZZPA(1)(d) requires that **each** exchanging taxpayer dispose of **all** of his or her individual holding of exchange units at the same time. However, it is not a requirement of the section that **all** exchanging taxpayers dispose of **all** of their exchange units at the same time. Paragraph 160ZZPA(1)(k) requires a comparison to be made of the number of units held by an exchanging taxpayer to the total number of units in the unit trust (see paragraph 17). The time at which the proportion of each exchanging taxpayer's units to the total units in the unit trust for the purposes of this comparison is determined, is immediately before the earliest exchanging taxpayer's disposal time, being the only practical and reliable time. At any earlier time, there may be persons holding units that affect the relevant proportions who will not be disposing of those units under the scheme. Any time after the earliest exchanging taxpayer's disposal time and before the completion time would produce proportions that are distorted by the earlier disposals of exchange units by exchanging taxpayers.

Same trust

82. Paragraph 160ZZPA(1)(j) deals with the case of an exchanging taxpayer who is the trustee of a trust estate. It requires that the taxpayer, immediately after the disposal time, hold the replacement shares on the same trust as the exchange units had been held. This means that the trust property must be held for the same beneficiaries

and on the same terms and conditions. The paragraph seeks to adopt a tracing rule to ensure that underlying economic ownership is maintained.

83. These provisions may cause some difficulty in the case of a public company or unit trust listed on a stock exchange. The requirement may involve a tracing of beneficial ownership of a unit or share back to natural persons. For example, the power exists under Part 6.8 of the Corporations Law to allow a listed company to enquire as to the beneficial ownership of its shares.

84. In the case of a public company we expect that the company would take all reasonable steps to ascertain whether beneficial ownership is maintained upon the same trust.

Multiple

85. The word 'multiple' is used in paragraph 160ZZPA(1)(c) and subparagraph 160ZZPB(1)(a)(vii). These provisions require that a certain number of either replacement shares or scheme units issue.

86. The *Macquarie Dictionary* defines the word 'multiple' to mean:

'a number which contains another number some number of times without a remainder: *12 is a multiple of 3.*'

87. The explanatory memorandum to the *Taxation Laws Amendment Bill (No 5) 1987* states, in respect of paragraph 160ZZPA(1)(c):

'Paragraph (c) requires that the total number of replacement shares in the interposed company received by the former unitholders as a result of the re-organisation, equals, or is a multiple of, the total number of exchange units. If there were, for example, 10,000 exchange units, the number of replacement shares needed would be 10,000 or a whole number multiple of 10,000.'

88. The requirement is that the 'multiple' must be a whole number. A fraction being less than one, or a figure which is greater than one and not a whole number, does not satisfy the provision (see **Example 4** at paragraphs 103 to 107).

Alternative view

89. It has been suggested that a multiple, other than a whole number, may be used, as long as the multiple used always gives rise to a whole number of replacement shares or scheme units, as the case may be. It is our view that the ordinary meaning of the word 'multiple', which is supported by the explanatory memorandum, is that the multiple cannot be anything but a whole number.

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Consideration must be non-redeemable shares

90. Paragraph 160ZZPA(1)(b) requires that the consideration in respect of the disposal of the units consist only of non-redeemable shares in the interposed company. These replacement shares must be the only type or form of consideration received by the exchanging taxpayers. The receipt by the exchanging taxpayer of any additional form of consideration, including 'stapled units' or 'piggyback options' (which may be attached or linked to the shares), or cash, will not satisfy the requirements of the section (see **Example 5** at paragraphs 108 to 111).

Examples

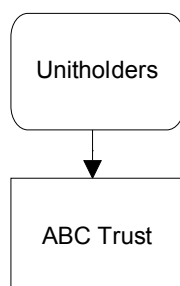
Example 1

91. A publicly trading unit trust, ABC Trust, proposes to incorporate.

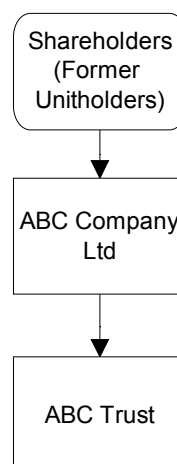
92. This is achieved by the ABC Trust issuing units to a newly formed company with only two issued shares and assets of two dollars, ABC Company Ltd. ABC Trust then cancels all the remaining units and, in consideration for the cancellation, ABC Company Ltd issues the same number of shares to the former unitholders as the number of units that were cancelled.

93. The respective structures appear as follows:

Pre Reorganisation



Post Reorganisation

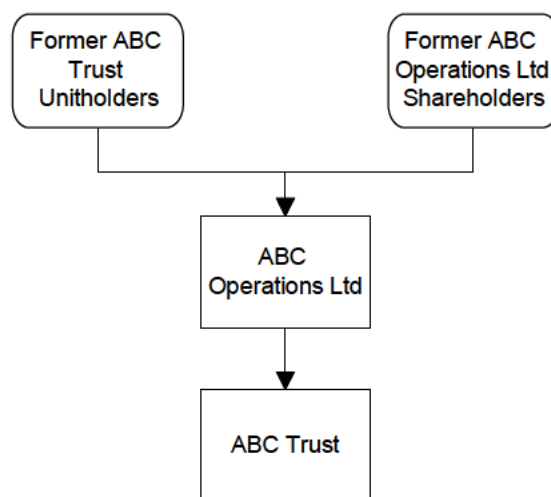


94. The economic interests of each former unitholder in the underlying assets of the interposed company are maintained after reconstruction. We consider that roll-over relief under section 160ZZPB is available because the scheme for the reorganisation of the affairs of the unit trust meets all of the operative requirements of the section.

Example 2

95. The merger is proposed of a publicly listed trading unit trust, ABC Trust, and a public company, ABC Operations Ltd.

96. The first step is for all shareholders in ABC Operations Ltd to acquire units in ABC Trust. These units are acquired by way of dividend declared by the company after the company subscribes for the units. The dividend is satisfied by the distribution of those units in specie to the shareholders. ABC Operations Ltd then acquires all the issued units of the ABC Trust, thereby wholly owning the trust. In consideration for the acquisition of the units, ABC Operations Ltd will issue a proportionate number of shares to the former unitholders of the ABC Trust. The resultant structure appears as follows:



97. In these circumstances, we consider that roll-over relief under section 160ZZPA is **not** available for the proposed arrangement. Apart from the fact that this merger is not considered to be for the reorganisation of the affairs of a unit trust, the other operative requirements of section 160ZZPA are not satisfied. Before the reorganisation, the former ABC Trust unitholders held 100% of the trust. However, as the shareholders in ABC Operations Ltd maintain their shares in the interposed company (ABC Operations Ltd), the

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requirement that the only shares of the interposed company on issue at the completion time are replacement shares, is not met.

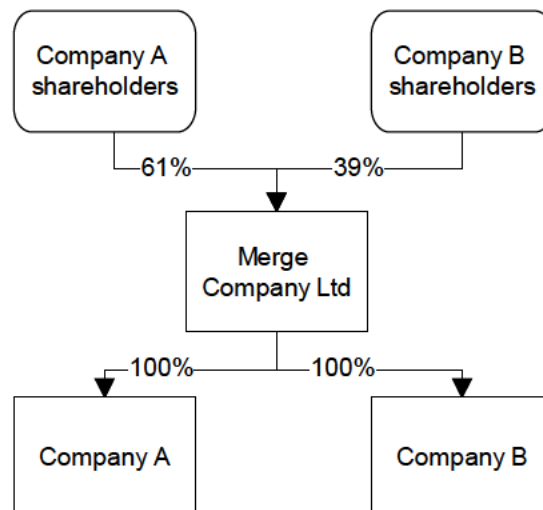
98. It is noted that the requirement of subparagraph 160ZZPA(1)(e)(i) is only satisfied because the original shareholders in ABC Operations Ltd acquired the units by way of a dividend declared immediately before the time at which identification of the exchanging taxpayers is made.

Example 3

99. It is proposed that two Schemes of Arrangement (one for each company) be undertaken independently, under section 411 of the Corporations Law, in order to effect a merger.

100. This is achieved by Company A issuing a nominal number of shares (but less than five) to Merge Company Ltd. Company A then cancels the other issued capital and, in consideration for the cancellation, Merge Company Ltd issues shares to the former shareholders in proportion to their former shareholdings in Company A. Company A then issues to Merge Company Ltd the same number of shares that were cancelled. The same process is repeated by Company B.

101. The resultant structure appears as follows:



102. In these circumstances, we consider that roll-over relief under section 160ZZPB is **not** available for the proposed arrangement. Because the former shareholders in both Company A and Company B become the shareholders in Merge Company Ltd, it is not possible for them to maintain the proportionate interests they previously held in the

respective companies before the change. Further, the requirement of subparagraph 160ZZPB(1)(e)(i) is not satisfied because the exchanging taxpayers in respect of each company are not the holders of all the shares in Merge Company Ltd, shares also being held by the exchanging taxpayers of the other company. In addition, the scheme does not meet the requirement of being a reorganisation of the affairs of a company, as there is more than one company involved in these schemes and, further, the effect of a scheme is not that of a reorganisation.

Example 4

103. A scheme is proposed whereby a company will be interposed between a unit trust and its unitholders. To effect the interposition the following steps are taken. The trustee of the unit trust issues 5 formal units in the trust to the company. The trustee of the unit trust redeems all existing units currently held in the unit trust with the exception of those issued to the company. The trustee of the unit trust issues new units to the company. The company issues shares in the company to the unitholders in the unit trust as consideration for the redemption of their units. The unit trust has 75 units on issue, the units held by Jack (10 units), Ted (15 units) and Patricia (50 units).

104. The number of shares to be issued is determined in accordance with the trust deed, which stipulates a formula which takes into account the current value of a unit (U), stamp duty in respect of the redemption and allotments required under the scheme (S), and the value of a replacement share (R). The result is then rounded down to the nearest whole number. The formula is:

$$\text{Number of shares per unit} = (U-S)/R.$$

105. The value of the units is \$1, the attributable stamp duty is \$0.02 and the value of a share \$2. The result is that, for every unit held in the unit trust, a multiplication factor of 0.49 is applied in determining the number of shares each unitholder is to be allotted.

106. For this reason, it is not possible to satisfy the requirement of paragraph 160ZZPB(1)(c) as the requirement is that the multiple be a whole number.

107. Further, the act of rounding down will mean that the 'same proportion' test of paragraph 160ZZPB(1)(k) is not met. The former unitholders will not hold the replacement shares in the company in the same proportions as they held the units in the unit trust that were redeemed. The table below illustrates this point:

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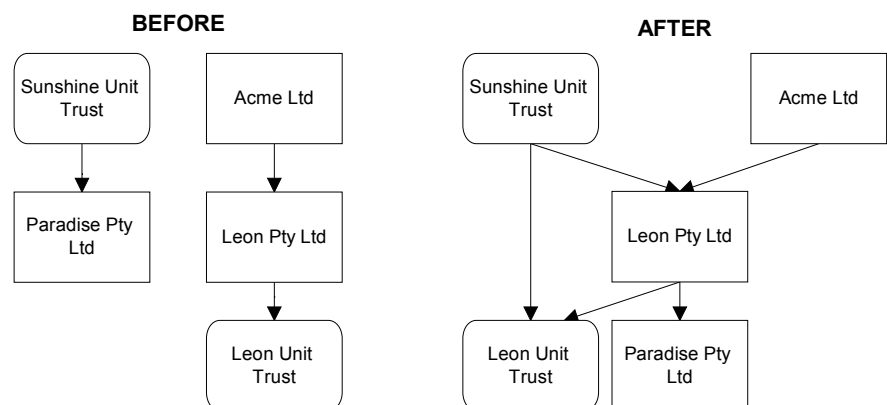
	Units	%	Units times 0.49	Rounded down (Shares)	%
Jack	10	13.3	4.9	4	11.4
Ted	15	20	7.35	7	20
Patricia	50	66.7	24.5	24	68.6
Total	75	100		35	100

Example 5

108. Sunshine Unit Trust wholly owns the asset-rich company Paradise Pty Ltd. Acme Ltd wants to acquire Paradise Pty Ltd from Sunshine Unit Trust. It uses a shelf company, Leon Pty Ltd, as the acquisition vehicle.

109. The steps in acquisition of Paradise Pty Ltd involve the cancellation of the shares held by Sunshine Unit Trust in Paradise Pty Ltd and the replacement of those shares with Leon Pty Ltd shares stapled to units in a unit trust (Leon Unit Trust) wholly owned by Leon Pty Ltd. The shares and units are able to be traded as a single security, or may be traded independently.

110. Following the reorganisation Acme Ltd and Sunshine Unit Trust will have effectively merged (due to the merging of the securities). The unitholders in Sunshine Unit Trust and the shareholders in Acme Ltd will have acquired new interests.

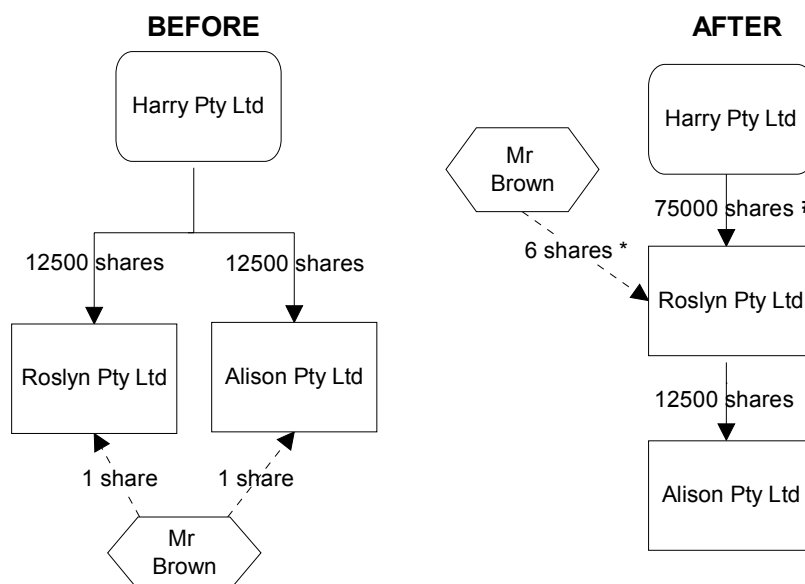


111. This scenario does **not** qualify for roll-over relief as three requirements of subsection 160ZZPB(1) have not been satisfied. Paragraphs 160ZZPB(1)(b) [only non redeemable shares], 160ZZPB(1)(e) [the exchanging taxpayers do not hold all the Leon Pty Ltd shares] and 160ZZPB(1)(m) [market value ratios] have not been satisfied.

Example 6

112. The Harry Group reorganises its internal structure in order to facilitate the acquisition of key assets. The details of the actions of the group are:

- Dec 1989 Harry Pty Ltd purchased a shelf company Roslyn Pty Ltd by acquiring the two shares on issue;
- Oct 1990 Alison Pty Ltd issued 12501 shares: 12500 shares to Harry Pty Ltd and 1 share to Mr Brown who is acting as trustee for Harry Pty Ltd;
- June 1991 Roslyn Pty Ltd issued 12499 shares, 12498 shares to Harry Pty Ltd and 1 share to Mr Brown who is acting as trustee for Harry Pty Ltd;
- July 1991 Roslyn Pty Ltd's board of directors approved that company's acquisition of Alison Pty Ltd. The consideration for the acquisition consisted of 5 shares in Roslyn Pty Ltd for every share in Alison Pty Ltd held.



* 1 share was held prior to the arrangement and 5 shares are replacement shares

12500 shares were held prior to the arrangement and the other 62500 shares are replacement shares

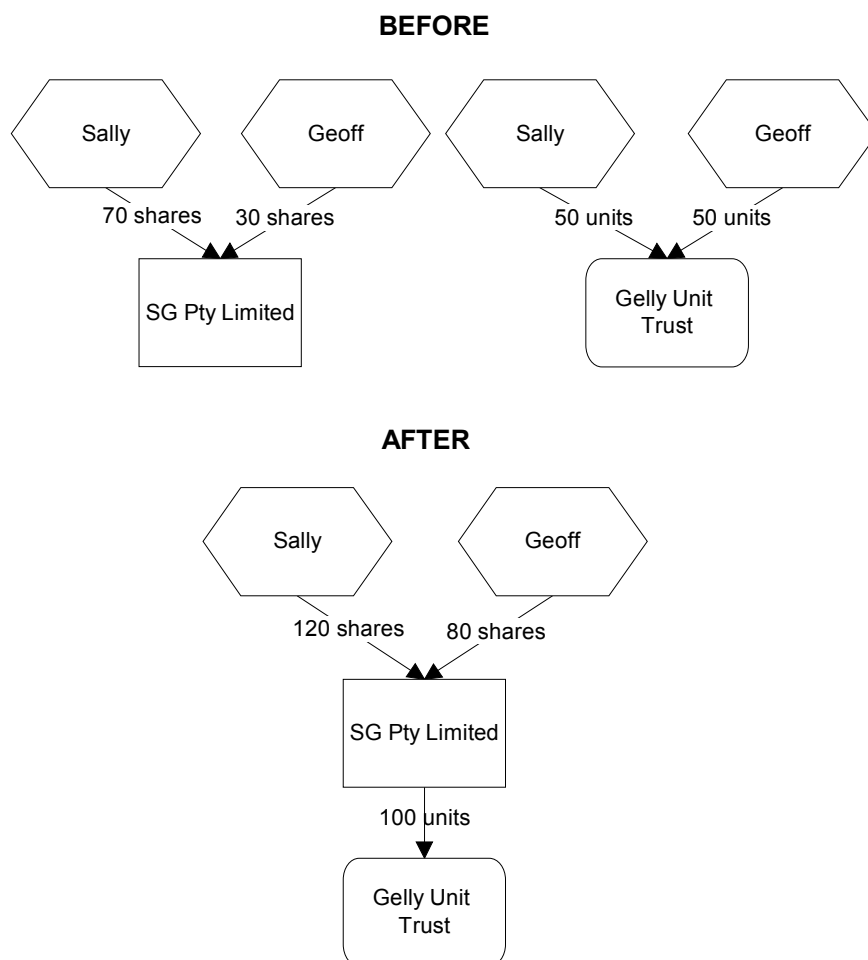
113. In these circumstances roll-over relief is **not** available, as the proportions test contained in paragraph 160ZZPC(1)(k) has not been satisfied (refer to paragraph 18 of this Ruling). Not all shares on issue by Roslyn Pty Ltd are replacement shares.

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NOTE: Provided the conditions of section 160ZZO have been satisfied, roll-over relief is available under that section for this scheme.

Example 7

114. Sally and Geoff are the shareholders in SG Pty Limited with Sally holding 70 shares and Geoff 30 shares. There are 100 units on issue in the Gelly Unit Trust with Sally and Geoff each holding 50 units. Under an arrangement, they are to dispose of their units in the Gelly Unit Trust to SG Pty Limited, the consideration being the issue of 50 shares to each of Sally and Geoff in SG Pty Limited.



115. In this case, the economic interests held by Sally and Geoff in the underlying assets of both the unit trust and the company will have changed, with Sally holding a 60% interest and Geoff a 40 % interest. Roll-over relief under section 160ZZPA is **not** available as the scheme is not one for the reorganisation of the affairs of the unit trust. Even if it was a reorganisation, the scheme does affect two entities and

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therefore that requirement of subparagraph 160ZZPA(1)(a)(i), that the scheme be for the reorganisation of the affairs of a unit trust, is not satisfied. Further, the operative requirements of paragraph 160ZZPA(1)(k) are not satisfied.

Commissioner of Taxation

17 September 1997

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<i>legislative references</i>		- ITAA 160ZZPC(1)(k)
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- ITAA 160ZZO		- ITAA Pt IVA
- ITAA 160ZZPA		- AIA 15AA(1)
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- ITAA 160ZZPA(1)(a)		- CL Pt 6.8
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