


CR 2004/80 - Income tax: scrip for scrip roll-over: merger of AusBulk Limited and ABB Grain Limited

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Class Ruling

Income tax: scrip for scrip roll-over: merger of AusBulk Limited and ABB Grain Limited

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Preamble

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law dealt with in this Ruling is Subdivision 124-M of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of persons

3. The class of persons to which this Ruling applies is the shareholders of AusBulk Limited (AusBulk) who:

- (a) are 'residents of Australia' within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- (b) are not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions in Subdivision 124-M of the ITAA 1997;
- (c) participate in the AusBulk Scheme of Arrangement for AusBulk shareholders under the planned merger of AusBulk and ABB Grain Limited (ABB); and
- (d) hold their AusBulk shares on capital account.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 9 to 15.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:
 - this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

8. This Class Ruling applies to the year ended 30 June 2005.

Arrangement

9. The arrangement that is the subject of the Ruling is described below. This description is based on the documents listed below. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:
 - (a) Class Ruling Application dated 19 May 2004 from Ernst & Young requesting the ATO make a Class Ruling in relation to the capital gains scrip for scrip roll-over provisions as they apply to the exchange of shares in AusBulk for ABB B class shares;

- (b) the documentation accompanying the application:
 - AusBulk Scheme of Arrangement;
 - Merger Agreement between ABB, AusBulk and United Grower Holdings Limited (UGH);
 - AusBulk Deed Poll;
 - Amendments to the Constitution of ABB;
 - Deed of Amendment to the Merger Agreement between ABB, AusBulk and UGH; and
- (c) letters from Ernst & Young dated 18 June 2004, 9 July 2004 and 19 July 2004 providing further clarification and information to the ATO.

10. The arrangement that is the subject of this Ruling involves a proposed merger of AusBulk and ABB pursuant to a scheme of arrangement (the AusBulk Scheme of Arrangement).

11. This arrangement is part of a wider transaction involving the proposed merger of ABB, UGH and AusBulk which will be undertaken pursuant to two schemes of arrangement. These are:

- (a) the UGH Scheme of Arrangement; and
- (b) the AusBulk Scheme of Arrangement.

12. The UGH Scheme of Arrangement will be implemented before the AusBulk Scheme of Arrangement. Under the UGH Scheme of Arrangement ABB will become the owner of all the shares in UGH. UGH owns 53.46% of the shares in AusBulk. The UGH Scheme of Arrangement does not form part of the arrangement that is the subject of this Ruling. For further information on this arrangement refer to CR 2004/79.

13. Under the AusBulk Scheme of Arrangement, ABB will acquire the remaining 46.54% of the shares in AusBulk. AusBulk shareholders will receive ABB B class shares in exchange for their AusBulk shares.

14. The number of ABB B class shares that AusBulk shareholders will receive for each AusBulk share they hold is calculated in accordance with a formula prescribed in the AusBulk Scheme of Arrangement.

15. Apart from UGH, no other company in the wholly-owned ABB group will own shares in AusBulk prior to the implementation of the merger.

Ruling

16. Subject to the qualifications in paragraphs 4 to 6 of this Ruling, AusBulk shareholders who are within the class of persons to which this Ruling applies can choose roll-over under Subdivision 124-M of the ITAA 1997 if:

- (a) apart from the roll-over for which Subdivision 124-M provides, they would make a capital gain in relation to the disposal of their AusBulk share; and
- (b) any capital gain that could be made upon a future CGT event happening in relation to a replacement share in ABB would not be disregarded (except because of a rollover).

17. Where a shareholder chooses roll-over in respect of an AusBulk share, the capital gain arising from the exchange of that share is disregarded.

18. The first element of the cost base of each ABB B class share will be equal to an amount which is reasonably attributable to the cost base of each AusBulk share for which it was exchanged and for which roll-over was obtained: subsection 124-785(2) of the ITAA 1997. The first element of the reduced cost base of each ABB B class share will be calculated similarly: subsection 124-785(4).

Explanation

Availability of scrip for scrip roll-over

19. Scrip for scrip roll-over enables a shareholder to disregard a capital gain they make from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives in exchange a replacement share. The capital gain is disregarded completely if the only capital proceeds the shareholder receives is a replacement share. The roll-over also provides that the cost base and reduced cost base of the replacement shares is based on the cost base and reduced cost base of the original shares at the time of the roll-over.

20. Subdivision 124-M of the ITAA 1997 contains a number of conditions for, and exceptions to, the eligibility of a shareholder to choose scrip for scrip roll-over. Below is an outline of the main conditions and exceptions which are relevant to the circumstances of the arrangement that is the subject of this Ruling.

Subparagraph 124-780(1)(a)(i) of the ITAA 1997 requires an entity to exchange a share in a company for a share in another company

21. This requirement will be satisfied by an AusBulk shareholder as under the AusBulk Scheme of Arrangement AusBulk shares are exchanged for ABB B class shares.

Paragraphs 124-780(1)(b) and 124-780(2)(a) of the ITAA 1997 require that shares in an original entity (AusBulk) be exchanged in consequence of a single arrangement that results in the acquiring entity (ABB), or members of the acquiring entity's wholly-owned group, becoming the owner of 80% or more of the voting shares in the original entity

22. In the context of the scrip for scrip provisions the merger of AusBulk and ABB under the AusBulk Scheme of Arrangement is considered to be a single arrangement.

23. This requirement is satisfied in this case as upon implementation of, the AusBulk Scheme of Arrangement, members of the wholly-owned ABB group will become the owner of 80% or more of the voting shares in AusBulk. Whilst ABB will only acquire 46.54% of the shares in AusBulk under the AusBulk Scheme of Arrangement, the 53.46% UGH shareholding in AusBulk may also be taken into account in satisfying the 80% threshold.

24. It is considered that ABB will become the owner of the shares in UGH at the time both of the following events have taken place:

- (a) the share transfer form for the shares in UGH is executed and delivered to UGH for registration; and
- (b) ABB gives consideration to the former UGH shareholders through the issue and allotment of ABB B class shares.

25. As the relevant documents provide that both of these events will take place prior to the time that ABB becomes the owner of the shares in AusBulk, the 53.46% UGH shareholding in AusBulk may be taken into account in satisfying the 80% threshold.

Paragraphs 124-780(1)(b) and 124-780(2)(b) of the ITAA 1997 require that the exchange of shares be in consequence of a single arrangement in which at least all owners of voting shares in the original entity (AusBulk) could participate apart from the acquiring entity or members of the acquiring entity's wholly-owned group

26. All shareholders in AusBulk, apart from UGH, are able to participate in the AusBulk Scheme of Arrangement. However, as UGH will be a member of the wholly-owned ABB group at the time ABB becomes the owner of the shares in AusBulk, this requirement will be satisfied.

Paragraphs 124-780(1)(b) and 124-780(2)(c) of the ITAA 1997 require that the exchange of shares is in consequence of a single arrangement in which participation was available on substantially the same terms for all of the owners of interests of a particular type in the original entity (AusBulk)

27. This requirement is satisfied as the same offer is made to all AusBulk shareholders who are able to participate in the AusBulk Scheme of Arrangement.

28. Issuing to a nominee for sale the ABB B class shares to which some foreign shareholders of AusBulk would otherwise be entitled does not prevent the arrangement being on substantially the same terms for all owners of shares in AusBulk.

Paragraphs 124-780(1)(c) and 124-780(3)(a) of the ITAA 1997 require the original interest holder (an AusBulk shareholder) to have acquired its original interest (an AusBulk share) on or after 20 September 1985

29. This requirement will be satisfied as all of the shares in AusBulk were issued on or after 20 September 1985.

Paragraphs 124-780(1)(c) and 124-780(3)(b) of the ITAA 1997 require that, apart from the roll-over, the original interest holder (an AusBulk shareholder) would make a capital gain from a CGT event happening in relation to the original interest (an AusBulk share)

30. Whether an AusBulk shareholder would, apart from the roll-over, make a capital gain from the disposal of any of its shares to ABB is a question of fact that is dependent on the specific circumstances of each shareholder – in particular on the cost base of each AusBulk share and the value of the capital proceeds received. This ruling is limited in this regard by paragraph 16(a).

Paragraphs 124-780(1)(c) and 124-780(3)(c) of the ITAA 1997 require that the replacement interest is in the acquiring entity (ABB) or the ultimate holding company of the wholly-owned group of which it is a member (ABB)

31. This requirement is satisfied as the replacement interest received by AusBulk shareholders will be in ABB which is the ultimate holding company of a wholly-owned group.

Paragraphs 124-780(1)(c) and 124-780(3)(d) of the ITAA 1997 require that the original interest holder (an AusBulk shareholder) choose to obtain the roll-over

32. Paragraph 16 limits this Ruling to shares in respect of which roll-over is chosen.

Additional requirements in subsection 124-780(5) of the ITAA 1997 must be satisfied if the original interest holder (an AusBulk shareholder) and the acquiring entity (ABB) did not deal with each other at arm's length and:

- (a) neither the original entity (AusBulk) nor the replacement entity (ABB) had at least 300 members just before the arrangement started: paragraph 124-780(4)(a) of the ITAA 1997; or**
- (b) the original interest holder (an AusBulk shareholder), the original entity (AusBulk) and the acquiring entity (ABB) were all members of the same linked group just before the arrangement started: paragraph 124-780(4)(b) of the ITAA 1997**

33. Paragraph 124-780(4)(a) of the ITAA 1997 will not apply because both AusBulk and ABB will have at least 300 members just before the arrangement started. Section 124-810 of the ITAA 1997 will not apply to either AusBulk or ABB as their ownership is not concentrated in the manner contemplated by that section.

34. Paragraph 124-780(4)(b) of the ITAA 1997 will also not apply. Even if AusBulk and ABB were members of the same linked group (within the meaning of section 170-260 of the ITAA 1997) just before the arrangement started, no AusBulk shareholder, apart from UGH, would have been a member of that group.

Exceptions to obtaining scrip for scrip roll-over

Paragraph 124-795(2)(a) of the ITAA 1997 provides that the roll-over is not available if any capital gain the original interest holder (an AusBulk shareholder) might make from their replacement interest (ABB share) would be disregarded

35. This exception may apply if, for example, the ABB B class shares are trading stock. Paragraph 16(b) limits this Ruling in this regard.

Paragraph 124-795(2)(b) of the ITAA 1997 provides that the roll-over is not available if the original interest holder (an AusBulk shareholder) and the acquiring entity (ABB) are members of the same wholly-owned group just before the original interest holder stops owning their original interest (an AusBulk share), and the acquiring entity is a foreign resident

36. Apart from UGH, the AusBulk shareholders and ABB were not members of the same wholly-owned group just prior to the exchange of shares. Therefore this exception does not apply.

Cost base and reduced cost base of ABB Shares

37. The first element of the cost base of each ABB B class share received under the arrangement will be equal to an amount which is reasonably attributable to the cost base of each AusBulk share for which it was exchanged and for which roll-over was obtained: subsection 124-785(2) of the ITAA 1997. The first element of the reduced cost base of each ABB B class share is worked out on a similar basis: subsection 124-785(4).

38. The following example provides guidance as to how shareholders of AusBulk may work out the first element of the cost base of their ABB B class shares. Where an AusBulk shareholder works out the first element of the cost base of their ABB B class shares in accordance with the approach adopted in the example, the ATO will accept that this represents a reasonable attribution of the cost base of each AusBulk share. However it is recognised that this approach may not give the only reasonable attribution.

39. Note: The example assumes that under the AusBulk Scheme of Arrangement an AusBulk shareholder will receive one ABB B class share for every two AusBulk shares they hold. This ratio of ABB B class shares to AusBulk shares is used for illustrative purposes only. The actual ratio of ABB B class shares to AusBulk shares will be calculated in accordance with a formula prescribed in the AusBulk Scheme of Arrangement.

Example

40. *Genevieve acquired shares in AusBulk after 20 September 1985. She acquired 500 AusBulk shares for \$2.10 per share (the first parcel) and several months later acquired a further 200 AusBulk shares for \$2.50 per share (the second parcel). Under the AusBulk Scheme of Arrangement, it is assumed that Genevieve received one ABB B class share for every two AusBulk shares exchanged for a total of 350 ABB B class shares in exchange for her AusBulk shares. Of these, 250 shares were attributable to the first parcel and 100 to the second parcel.*

41. *Genevieve may calculate the first element of the cost base of her ABB B class shares as follows:*

(a) *First parcel:*

Cost base of 500 AusBulk shares:

= 500 x \$2.10

= \$1,050

Cost base of 250 ABB B class shares:

= \$1,050/250

= \$4.20 per share

(b) *Second parcel:*

Total cost base of 200 AusBulk shares:

= 200 x \$2.50

= \$500

Cost base of 100 ABB B class shares:

= \$500/100

= \$5.00 per share

42. *The first element of the reduced cost base of Genevieve's ABB B class shares may be calculated in a similar manner.*

Detailed contents list

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Previous draft:

Not previously issued as a draft

*Related Rulings/Determinations:*TR 92/1; TR 97/16; CR 2001/1;
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- arrangement
- capital proceeds
- CGT event
- company
- cost base
- interests
- ordinary share
- original interest
- replacement interest
- resident
- roll-over
- roll-over relief
- scrip
- scrip for scrip
- share
- shareholder
- takeover

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780(1)(a)(i)
- ITAA 1997 124-780(1)(b)
- ITAA 1997 124-780(1)(c)
- ITAA 1997 124-780(2)(a)
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- ITAA 1997 124-780(3)(a)
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- ITAA 1997 124-780(5)
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(4)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 124-795(2)(b)
- ITAA 1997 124-810
- ITAA 1997 170-260
- Copyright Act 1968
- TAA 1953 Pt IVA

ATO references

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