


# ***CR 2007/107 - Income tax: scrip for scrip roll-over: acquisition of Alinta Limited by ES & L Pty Limited***

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## Class Ruling

### Income tax: scrip for scrip roll-over: acquisition of Alinta Limited by ES & L Pty Limited

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Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>13</b>
<b>Ruling</b>	<b>24</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<i>Explanation</i>	<b>26</b>
<b>Appendix 2:</b>	
<i>Detailed contents list</i>	<b>72</b>

**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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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

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

### Relevant provision(s)

2. The relevant provision dealt with in this Ruling is:

- Subdivision 124-M of the *Income Tax Assessment Act 1997* (ITAA 1997).

All subsequent references in this Ruling are to the ITAA 1997 unless otherwise stated.

## Class of entities

3. The class of entities to which this Ruling applies are the ordinary shareholders in Alinta Limited (Alinta) on the scheme record date (23 August 2007) that:

- (a) are 'residents of Australia' as that term is defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- (b) received BBI EPS Limited exchangeable preference shares (BBI EPS) as part consideration for the disposal of their shares in Alinta as announced on 11 May 2007 and as described in this Ruling;
- (c) held their Alinta shares on capital account; and
- (d) apart from the roll-over for which Subdivision 124-M provides, would have made a capital gain from the disposal of their Alinta shares.

## Qualifications

4. 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 13 to 23 of this Ruling. In this ruling these entities are referred to as Alinta shareholders.

5. In relation to the Scheme of Arrangement under which Alinta was acquired by ES & L Pty Ltd (ES&L), the Commissioner has not been asked to form a view, and has not formed a view on the application of Part IVA of the ITAA 1936, or any other matters in relation to the wider transaction. Part IVA is a general anti-avoidance rule that can apply if a particular taxpayer obtains a tax benefit in connection with an arrangement and it can be concluded that the arrangement, or any part of it, was entered into or carried out by any person for the dominant purpose of enabling a tax benefit to be obtained by that taxpayer. If Part IVA applies the tax benefit can be cancelled, for example, by including an amount in the taxpayer's assessable income even if it was not assessable under the ordinary provisions of the income tax law. Accordingly, this Ruling gives certainty to shareholders only in respect of the capital gains tax (CGT) roll-over relief that is available under the scrip for scrip roll-over provisions in relation to the disposal of their Alinta shares.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## **Date of effect**

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8. This Ruling applies from 1 July 2007 to 30 June 2008. However, the Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

9. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Scheme

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13. The following description of the scheme is based on information provided by the applicant.

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

14. The scheme that is the subject of this Ruling involved the exchange of Alinta shares for BBI EPS, cash, and certain other securities.

15. The acquisition of Alinta was effected by ES&L, a wholly owned subsidiary of BBI EPS Limited, which acquired all the ordinary shares of Alinta. The shares were acquired by ES&L on the Implementation Date, which was 31 August 2007.

16. Under the scheme, ES&L acquired all of the ordinary shares in Alinta for consideration of:

- cash;
- BBI EPS;
- shares in Babcock & Brown Infrastructure Limited (BBIL) and units in Babcock & Brown Infrastructure Trust (BBIT) that are stapled together to form BBI stapled securities;
- shares in Babcock & Brown Power Limited (BBPL) and units in Babcock & Brown Power Trust (BBPT) that are stapled together to form BBP stapled securities; and
- shares in Babcock & Brown Wind Partners Limited (BBWPL) and Babcock & Brown Wind Partners (Bermuda) Limited (BBWPB) and units in Babcock & Brown Wind Partners Trust (BBWPT) that are stapled together to form BBW stapled securities.

17. The default consideration offered for each Alinta share was a cash component, 1.599 BBI EPS, 0.752 BBI stapled securities, 0.669 BBP stapled securities and 0.260 BBW stapled securities. Alinta shareholders could have elected one of a number of alternative combinations to maximise the cash, BBI EPS or stapled securities they received. The total consideration received under each alternative was determined by the value of the default consideration, using the volume weighted average price of the stapled securities over the five business days immediately after the meeting of Alinta shareholders on 15 August 2007. The final components of the consideration depended on the extent of any scale back, which in turn depended on how many shareholders chose the consideration alternatives.

18. The number of stapled securities provided as consideration for the Alinta shares was based on the underlying value of the Alinta entities and assets. BBI and BBP acquired a substantial proportion of the Alinta entities and assets. BBW became entitled to receive a substantial proportion of the sale proceeds from the sale of a key Alinta asset before the Implementation Date.

19. Alinta shareholders with a registered address outside of Australia or New Zealand were eligible to participate in the scheme on the same basis as other Alinta shareholders. However, any shares and stapled securities that they chose to receive were issued to a nominee, appointed by ES&L and approved by Alinta, and sold on their behalf.

20. Alinta shareholders who owned one thousand or less Alinta shares on the record date could have chosen a 'cash out' alternative, which entitled them to receive the value of the default consideration in cash. Any shares and stapled securities that they chose to receive were issued to a nominee, and sold on their behalf.

21. The BBI EPS are shares with a face value of \$1, paying dividends, subject to reset and with the ability to be converted into BBI stapled securities or redeemed at maturity. The dividend, conversion and maturity terms may be altered on reset dates.

22. The applicant has advised that there was no 'significant stakeholder' or 'common stakeholder' within the meaning of those terms in Subdivision 124-M, in respect of the scheme.

23. After implementation of the scheme, Alinta was delisted from the Australian Securities Exchange.

## **Ruling**

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24. An Alinta shareholder can choose scrip for scrip roll-over under Subdivision 124-M for the BBI EPS received in exchange for each of their Alinta shares provided:

- (a) the shareholder made a capital gain from CGT event A1 happening to their Alinta share; and
- (b) any capital gain that may be made upon a future CGT event happening in relation to the BBI EPS they received under the scheme would not be disregarded (except because of a roll-over).

25. A capital gain or loss will arise in relation to the cash and stapled securities that are received for the disposal of the Alinta shares (the ineligible proceeds).

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**Commissioner of Taxation**

14 November 2007

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## Appendix 1 – Explanation

**ⓘ** *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.*

### **CGT event A1 happens**

26. CGT event A1 in section 104-10 happens if there is a change in the ownership of an asset from one entity to another. On the disposal of the Alinta shares to ES&L, a change of ownership of Alinta shares will occur and therefore CGT event A1 will happen.

### **Time of the event**

27. The time when CGT event A1 happens determines the income year in which any capital gain or loss is made and whether the CGT discount applies to any capital gain.

28. Subsection 104-10(3) provides that the time of CGT event A1 is when the person enters into a contract for the disposal of the shares or, if there is no contract, when the change of ownership occurs.

29. Under the Scheme, the disposal did not happen under a contract (see paragraph 9 of consolidated Taxation Determination TD 2002/4). Accordingly, Alinta shareholders disposed of their shares on the Implementation Date which was the date on which their shares were transferred to ES&L.

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

30. A capital gain was made on an Alinta share if the capital proceeds from the disposal of that share were more than its cost base. A capital loss was made if the capital proceeds from the disposal were less than the share's reduced cost base (subsection 104-10(4)).

31. Subsection 116-20(1) provides that capital proceeds from a CGT event are the total of the money and the market value of any property received or entitled to be received in respect of the event happening (worked out as at the time of the event).

32. The capital proceeds that Alinta shareholders received for the disposal of each Alinta share under the default consideration was therefore:

- the market value on the Implementation Date of 1.599 BBI EPS;
- the market value on the Implementation Date of 0.752 BBIL shares and 0.752 BBIT units;
- the market value on the Implementation Date of 0.669 BBPL shares and 0.669 BBPT units;

- the market value on the Implementation Date of 0.260 BBWPL shares, 0.260 BBWPB shares and 0.260 BBWPT units; and
- the cash received.

For each Alinta shareholder who chose one of the alternative considerations, the capital proceeds for each of their Alinta shares was the amount of cash and the market value on the Implementation Date of each of the BBI EPS and stapled securities issued to them for that share.

### **Choosing scrip for scrip roll-over**

33. Scrip for scrip roll-over in Subdivision 124-M enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange.

34. Alinta shareholders received BBI EPS, stapled securities in BBI, BBP and BBW and cash. Alinta shareholders will only be eligible for scrip for scrip roll-over relief to the extent they received BBI EPS. The balance of the capital proceeds (the ineligible proceeds) are subject to CGT on the sale of their Alinta shares.

### **Requirements for scrip for scrip roll-over – Subdivision 124-M**

35. Subdivision 124-M contains a number of conditions for, and exceptions to, scrip for scrip roll-over. Below is an outline of the main conditions and exceptions which are relevant to the circumstances of the scheme that is the subject of this Ruling.

### ***Shares are exchanged for shares in another company***

36. Subparagraph 124-780(1)(a)(i) requires an entity (an Alinta shareholder) to exchange a share in a company for a share in another company.

37. This requirement is satisfied to the extent that Alinta shareholders received BBI EPS for the disposal of their Alinta shares. Roll-over is not available in respect of the stapled securities and cash received by Alinta shareholders.

### ***The exchange occurs as part of a single arrangement***

38. Paragraph 124-780(1)(b) requires that shares in an entity (Alinta, the original entity) be exchanged in consequence of a single arrangement. In the context of the scrip for scrip roll-over provisions, the acquisition of all of the shares in Alinta by ES&L under the Scheme of Arrangement is considered to be a single arrangement. The arrangement must also satisfy the following conditions.

*(a) 80% ownership test*

39. Paragraph 124-780(2)(a) requires that shares in an entity (Alinta, the original entity) be exchanged in consequence of a single arrangement that results in another entity (ES&L, the acquiring entity) becoming the owner of 80% or more of the voting shares in the original entity (Alinta).

40. Subparagraph 124-780(2)(a)(ii) provides that this requirement will be satisfied if one or more companies that are members of a wholly-owned group increase the percentage of voting shares they hold in the original entity to 80% or more.

41. Under the scheme, all of the ordinary shares in Alinta were transferred to ES&L, increasing the percentage of ownership interests it holds in Alinta to more than 80%. These ordinary shares satisfy the definition of 'voting share' in subsection 995-1(1).

42. Therefore the requirements of subparagraph 124-780(2)(a)(ii) have been met under the scheme.

*(b) All voting share owners participate*

43. Paragraph 124-780(2)(b) requires 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 (apart from the acquiring entity or members of the acquiring entity's wholly-owned group) could participate.

44. This requirement is satisfied because all of the owners of Alinta shares were entitled to participate in the scheme.

*(c) Participation is on substantially the same terms*

45. Paragraph 124-780(2)(c) requires that the exchange is in consequence of a single arrangement in which participation in the arrangement was on substantially the same terms for all the owners of interests of a particular type in the original entity.

46. This requirement is satisfied because the scheme provided that all shareholders in Alinta were entitled to participate in the scheme on the same terms.

**Conditions for roll-over are satisfied**

47. Paragraph 124-780(1)(c) requires that the conditions for roll-over outlined in subsection 124-780(3) are met. These conditions must be met in relation to each Alinta share for which scrip for scrip roll-over is chosen. The conditions in subsection 124-780(3) are as follows.

*(a) The Alinta shares are post-CGT shares*

48. Paragraph 124-780(3)(a) requires the original interest holder (an Alinta shareholder) to have acquired its original interest (an Alinta share) on or after 20 September 1985.

49. All Alinta shareholders acquired their Alinta shares after 20 September 1985 for CGT purposes. Therefore, this condition is met for all Alinta shares.

*(b) An Alinta shareholder would otherwise make a capital gain*

50. Paragraph 124-780(3)(b) requires that apart from the roll-over, the original interest holder (an Alinta shareholder) would make a capital gain from a CGT event happening in relation to its original interest (an Alinta share).

51. As explained at paragraph 30 of this Ruling, a capital gain was made on an Alinta share if the capital proceeds from the disposal of that share were more than its cost base. Therefore, whether this condition is met will depend on the individual circumstances of each Alinta shareholder.

*(c) Alinta shareholders receive replacement interests in the acquiring entity or the ultimate holding company*

52. Paragraph 124-780(3)(c) requires that the replacement interest is in the acquiring entity (ES&L), or in the ultimate holding company of the wholly owned group which includes the acquiring entity.

53. This requirement is satisfied as Alinta shareholders received BBI EPS, which are preference shares in BBI EPS Limited, which in turn is the ultimate holding company of the acquiring company (ES&L).

*(d) An Alinta shareholder can choose scrip for scrip roll-over*

54. Paragraph 124-780(3)(d) requires that the original interest holder (an Alinta shareholder) chooses roll-over or, if section 124-782 applies to it for the scheme, the original interest holder and the replacement entity jointly choose to obtain the roll-over.

55. Section 124-782 has no application to the scheme since there were no significant stakeholders or common stakeholders under the arrangement (see paragraph 22 of this Ruling).

56. Subject to their eligibility (see paragraph 24 of this Ruling), whether an Alinta shareholder chooses to obtain roll-over in relation to the disposal of an Alinta share is a question of fact to be determined for each individual shareholder.

## ***Further conditions are not applicable***

57. Subsection 124-780(4) provides that the additional requirements in subsection 124-780(5) must be satisfied if the original interest holder (an Alinta shareholder) and the acquiring entity (ES&L) did not deal with each other at arm's length and:

- (a) neither the original entity (Alinta) nor the replacement entity (ES&L) had at least 300 members just before the arrangement started (paragraph 124-780(4)(a)); or
- (b) the original interest holder (an Alinta shareholder), the original entity (Alinta) and the acquiring entity (ES&L) were all members of the same linked group just before the arrangement started (paragraph 124-780(4)(b)).

58. Paragraph 124-780(4) does not apply as Alinta had at least 300 members just before the arrangement started and the parties are stated to be acting at arm's length.

## ***Exceptions to obtaining scrip for scrip roll-over***

59. Section 124-795 contains a number of exceptions where scrip for scrip roll-over cannot be chosen. The exceptions in section 124-795 are as follows.

### ***(a) Alinta shareholders are residents of Australia***

60. Subsection 124-795(1) provides that a roll-over is not available if, just before the disposal, the original interest holder was a foreign resident unless, just after the acquisition of the replacement interest, the replacement interest is taxable Australian property.

61. The class of entities to whom this Ruling applies is limited to Alinta shareholders who were residents of Australia at the time of the scheme. As a consequence, the exception in subsection 124-795(1) does not apply to limit this Ruling in this regard.

### ***(b) A capital gain cannot (apart from a roll-over) be otherwise disregarded***

62. Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain the original interest holder might make from their replacement interest would be disregarded (except because of a roll-over).

63. Whether the capital gain arising because of the disposal of an Alinta share is disregarded under another provision of the ITAA 1997 (for example, the shareholder held their Alinta shares as trading stock) is a question of fact to be determined in respect of each Alinta shareholder.

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

65. This exception does not apply as the Alinta shareholders and ES&L were not members of the same wholly-owned group just before the scheme was implemented. In addition, ES&L is not a foreign resident company.

*(c) No roll-over is available to Alinta shareholders under either Division 122 or Subdivision 124-G*

66. Subsection 124-795(3) provides that scrip for scrip roll-over is not available if a roll-over can be chosen under Division 122 or Subdivision 124-G.

67. This exception does not apply as neither of the roll-overs in Division 122 or Subdivision 124-G are available to the Alinta shareholders in respect of the disposal of their Alinta shares under the scheme.

### **Consequences of choosing roll-over**

#### ***Capital gain partly disregarded to the extent it relates to the BBI EPS consideration component***

68. Scrip for scrip roll-over enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange.

69. If the only capital proceeds the shareholder received in respect of the disposal are replacement shares, the requisite conditions are satisfied and the capital gain is disregarded completely (subsection 124-785(1)).

70. If the capital proceeds include something other than replacement shares (the ineligible proceeds), only part of the capital gain is disregarded. There is no roll-over for that part (the ineligible part) of the share for which the shareholder received ineligible proceeds (subsection 124-790(1)).

71. Under the scheme Alinta shareholders may have received BBI EPS, stapled securities in BBI, BBP and BBW and cash in respect of their original shares in Alinta. Those Alinta shareholders who chose the maximum cash consideration may have received no BBI EPS. In this case, an Alinta shareholder cannot disregard any of the capital gain made when CGT event A1 happened on the disposal of their Alinta shares. Other shareholders can disregard the capital gain arising on the disposal of their Alinta shares to the extent that the capital gain relates to the BBI EPS they received.

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

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>8</b>
<b>Scheme</b>	<b>13</b>
<b>Ruling</b>	<b>24</b>
<b>Appendix 1 – Explanation</b>	<b>26</b>
CGT event A1 happens	26
Time of the event	27
Capital gain or capital loss	30
Choosing scrip for scrip roll-over	33
Requirements for scrip for scrip roll-over – Subdivision 124-M	35
<i>Shares are exchanged for shares in another company</i>	36
<i>The exchange occurs as part of a single arrangement</i>	38
<i>(a) 80% ownership</i>	39
<i>(b) All voting share owners participate</i>	43
<i>(c) Participation is on substantially the same terms</i>	45
<i>Conditions for roll-over are satisfied</i>	47
<i>(a) The Alinta shares are post-CGT shares</i>	48
<i>(b) An Alinta shareholder would otherwise     make a capital gain</i>	50
<i>(c) Alinta shareholders received replacement interests     in the acquiring entity or the ultimate holding company</i>	52
<i>(d) An Alinta shareholder can choose     scrip for scrip roll-over</i>	54
<i>Further conditions are not applicable</i>	57

<i>Exceptions to obtaining scrip for scrip roll-over are not applicable</i>	59
<i>(a) Alinta shareholders are residents of Australia</i>	60
<i>(b) A capital gain cannot (apart from a roll-over) be otherwise disregarded</i>	62
<i>(c) No roll-over is available to Alinta shareholders under either Division 122 or Subdivision 124-G</i>	66
Consequences of choosing roll-over	68
<i>Capital gain partly disregarded to the extent it relates to the BBI EPS consideration component</i>	68
<b>Appendix 2 - Detailed contents list</b>	<b>72</b>

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TD 2002/4

*Subject references:*

- arrangement
- capital proceeds
- CGT event
- Company
- cost base
- interests
- ordinary share
- original interest
- replacement interest
- resident
- roll-over
- scrip for scrip roll-over
- share
- shareholder

*Legislative references:*

- ITAA 1936 6(1)
- ITAA 1936 Pt IVA
- ITAA 1997
- ITAA 1997 104-10
- ITAA 1997 104-10(3)
- ITAA 1997 104-10(4)
- ITAA 1997 116-20(1)
- ITAA 1997 Div 122

- ITAA 1997 Subdiv 124-G
- 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)
- ITAA 1997 124-780(2)(a)(ii)
- ITAA 1997 124-780(2)(b)
- ITAA 1997 124-780(2)(c)
- ITAA 1997 124-780(3)
- ITAA 1997 124-780(3)(a)
- ITAA 1997 124-780(3)(b)
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- ITAA 1997 124-780(4)(b)
- ITAA 1997 124-780(5)
- ITAA 1997 124-782
- ITAA 1997 124-785(1)
- ITAA 1997 124-790(1)
- ITAA 1997 124-795
- ITAA 1997 124-795(1)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 124-795(2)(b)
- ITAA 1997 124-795(3)
- ITAA 1997 995-1(1)
- TAA 1953
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