


# ***CR 2007/116 - Income tax: capital gains: restructure of International Catamarans (Tasmania) Unit Trust***

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## Class Ruling

# Income tax: capital gains: restructure of International Catamarans (Tasmania) Unit Trust

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### **ⓘ 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

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 provisions dealt with in this Ruling are contained within:

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

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

### Class of entities

3. The class of entities to which this Ruling applies consists of

- the International Catamarans (Tasmania) Unit Trust (the Unit Trust);

- all the unit holders of the Unit Trust whose ownership of units ends under the proposed restructure; and
- Incat Holdings Limited (Incat Holdings).

## 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 12 to 26 of this Ruling.

5. 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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7. 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.

8. 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.

9. 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)).

10. 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.

11. 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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12. The following description of the scheme is based on the information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling application from McCullough Robertson Lawyers (MRL) dated 28 August 2007;
- undated Draft Supplemental Deed;
- Trust Deed dated 20 April 1988;
- Supplemental Deed dated 29 July 1988;
- Deed of Appointment dated 30 June 1989;
- Deed of Variation dated 12 September 1995; and
- correspondence from MRL dated 11 September 2007, 21 November 2007 and 27 November 2007.

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

13. The Unit Trust and its Trustee are members of the Incat group of companies (Incat Group).

14. The Unit Trust was established on 20 April 1988 and is an Australian resident trust estate.

15. The Incat Group is considering a proposal to restructure the Unit Trust by:

- transferring all the assets of the Unit Trust to Incat Holdings (a new unlisted public company limited by shares); and
- issuing shares in Incat Holdings to the existing unit holders of the Unit Trust.

16. The unit holders of the Unit Trust do not hold their units as trading stock and they will not hold the shares in Incat Holdings as trading stock.

17. The proposed restructure of the Unit Trust will be effected by undertaking the following steps.

### ***Step One***

18. Incat Holdings will be registered with an initial shareholding identical to the current unit holding in the Unit Trust. The existing unit holders will be issued shares in proportion to their existing unit holdings.

19. The unit holders will receive the shares in Incat Holdings for no consideration.

### ***Step Two***

20. The trust deed of the Unit Trust is to be amended by inserting a new paragraph 27(h) empowering the Trustee to transfer all of the assets of the Unit Trust to Incat Holdings, an 'eligible company', for no consideration provided that, at the time of the transfer of the assets, the following conditions are satisfied:

- the shareholders in Incat Holdings are identical to the unit holders in the Unit Trust;
- the proportions in which the shareholders hold the shares in Incat Holdings is identical to the proportions in which they hold units in the Unit Trust; and
- all of the other requirements of Subdivision 124-N can be satisfied.

21. The proposed amendment will not give rise to a resettlement of the Unit Trust, that is, the Unit Trust will not come to an end and a new trust will not be created.

### ***Step Three***

22. The trustee of the Unit Trust will transfer all of the assets of the Unit Trust to Incat Holdings for no consideration.

### ***Step Four***

23. The Unit Trust will be terminated within six months from the date of the transfer of the assets to Incat Holdings.

**Step Five**

24. The Unit Trust and Incat Holdings will both choose to obtain the roll-over under Subdivision 124-N.

25. The unit holders of the Unit Trust will choose to obtain roll-over in relation to the ending of their ownership of units in the Unit Trust under Subdivision 124-N.

26. The above steps are collectively referred to as the restructure of the Unit Trust.

**Ruling**

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27. The Unit Trust is eligible to choose roll-over under Subdivision 124-N.

28. Incat Holdings is eligible to choose roll-over under Subdivision 124-N.

29. If both the Unit Trust and Incat Holdings choose roll-over under Subdivision 124-N, any capital gain or capital loss from CGT event A1 happening to the Trustee of the Unit Trust under the proposed restructure of the Unit Trust is disregarded under subsection 124-875(1) for CGT assets that are not disqualified by virtue of subsection 124-875(5) and subsection 124-875(6).

30. The unit holders' ownership of all the units in the Unit Trust will end under the proposed restructure of the Unit Trust at the time they are issued with shares in Incat Holdings in exchange for their units in the Unit Trust.

31. The unit holders, who are not disqualified by virtue of subsection 124-870(3), are eligible to choose the roll-over under Subdivision 124-N for the exchange of their units in the Unit Trust for shares in Incat Holdings (subsection 124-870(1))

32. If a unit holder chooses the roll-over, a capital gain or a capital loss they would otherwise make from their disposal of a unit in the Unit Trust is disregarded (subsection 124-15(2)).

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**Commissioner of Taxation**12 December 2007

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## Appendix 1 – Explanation

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❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### **Rollover relief: Subdivision 124-N**

33. Under subsection 124-855(1) a rollover may be available for a restructure if:

- a trust disposes all of its CGT assets to a company limited by shares;
- CGT event E4 in section 104-70 is capable of applying to all of the units and interests in the trust; and
- the requirements in section 124-860 are met.

34. Under the Scheme that is the subject of this ruling, the Unit Trust will dispose of all of its CGT assets to Incat Holdings, which is a company limited by shares. CGT event E4 is capable of applying to all of the units in the Unit Trust (see paragraph 104-70(1)(a)).

35. Therefore, subject to the requirements in section 124-860, rollover under subsection 124-855(1) is available.

### **Requirements for roll-over for the transferor and the transferee**

36. The transferor (the Unit Trust) and the transferee (Incat Holdings) are eligible to choose rollover if the requirements in section 124-860 are also met.

37. Subsection 124-860(1) requires that all of the CGT assets owned by the transferor (the Unit Trust) must be disposed of to the transferee (Incat Holdings) during the trust restructuring period, ignoring any CGT assets retained by the Unit Trust to pay existing or expected debts of the Unit Trust.

38. Subsection 124-860(2) states that the trust restructuring period:

- starts just before the first CGT asset is disposed of to the transferee (Incat Holdings) under the trust restructure; and
- ends when the last CGT asset of the transferor (the Unit Trust) is disposed of to the transferee (Incat Holdings).

39. Subsection 124-860(1) will be satisfied by Step 3 of the proposed restructure.

40. Subsection 124-860(3) requires that the transferee (Incat Holdings) must not be an exempt entity, as defined in section 995-1. Incat Holdings satisfies this requirement. It is not an entity whose ordinary income and statutory income is exempt from income tax because of a Commonwealth law; nor is it an untaxable Commonwealth entity.

41. Subsection 124-860(4) requires that the transferee (Incat Holdings) must be a company that:

- has never carried on commercial activities;
- has no CGT assets other than small amounts of cash or debt; and
- has no losses of any kind.

42. Incat Holdings will be a newly incorporated company. It will satisfy all of the requirements of subsection 124-860(4).

43. Subsection 124-860(6) requires that, just after the end of the trust restructuring period:

- each entity (unit holder) that owned interests (units) in the transferor (the Unit Trust) just before the start of the trust restructuring period must own replacement interests in the transferee (shares in Incat Holdings) in the same proportion as it owned those units in the Unit Trust; and
- the market value of the replacement interests (shares) each of those entities owns in the transferee (Incat Holdings) must be at least substantially the same as the market value of the interests (units) it owned in the transferor (the Unit Trust) just before the start of the trust restructuring period.

44. Just after the end of the trust restructuring period, the unit holders of the Unit Trust will own shares in Incat Holdings in the same proportion as they owned units just before the start of the trust restructuring period. Additionally, the market value of the shares owned by each shareholder in Incat Holdings will be at least substantially the same as the market value of the units which it owned in the Unit Trust just before the start of the trust restructuring period. Thus, subsection 124-860(6) will be satisfied.

45. Therefore, all the requirements in section 124-860 are met and both the Unit Trust and Incat Holdings can choose rollover relief.

46. Under section 124-865 roll-over is only available for the transferor (the Unit Trust) and transferee (Incat Holdings) if both the transferor and transferee choose to obtain it. Since both the Unit Trust and Incat Holdings will be choosing to obtain roll over, the roll over is available.

## Consequences of roll-over for the transferor and the transferee

47. Any capital gain or capital loss from CGT event A1 happening to the Unit Trust under the trust restructure is disregarded (subsection 124-875(1)) and the first element of the cost base and reduced cost base for Incat Holdings of each CGT asset that Incat Holdings acquires under the trust restructure is the same as the cost base and reduced cost base of that asset for the Unit Trust just before the acquisition (subsection 124-875(2)).

48. However, subsection 124-875(5) provides that section 124-875 does not apply to a CGT asset if:

- the asset was an item of trading stock (as defined in section 995-1) of the Unit Trust and becomes an item of trading stock of Incat Holdings; or
- the asset was not an item of trading stock of the Unit Trust but becomes an item of the trading stock of Incat Holdings when it acquired it.

49. Also, if Incat Holdings is a foreign resident, section 124-875 only applies to a CGT asset that is taxable Australian property (as defined in section 995-1) just after Incat Holdings acquires it under the trust restructure (subsection 124-875(6)).

## Requirements for roll-over for unit holders

50. Under subsection 124-870(1) a unit holder can choose to obtain a roll-over (whether or not the Unit Trust and Incat Holdings choose to obtain a roll-over) if:

- they own units or interests in the Unit Trust; and
- the ownership of all their units or interests ends under a trust restructure in exchange for shares in Incat Holdings.

51. The word 'exchange', which is used in paragraph 124-870(1)(b), is not specifically defined for income tax purposes in either the ITAA 1997 or the *Income Tax Assessment Act 1936*. The Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 4) 2002, which introduced Subdivision 124-N, does not discuss the meaning of the word 'exchange' in paragraph 124-870(1)(b). Therefore the ordinary meaning of 'exchange' applies.

52. The *Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne defines 'exchange' as:

- a. the act of or an instance of giving one thing and receiving another in its place.
- b. give or receive (one thing) in place of another.

The *Macquarie Dictionary*, 2001, revised 3<sup>rd</sup> edition, The Macquarie Library Pty Ltd, North Ryde defines 'exchange' as:

to part with for some equivalent, giving up (something) for something else

53. Therefore, 'exchange' in paragraph 124-870(1)(b) means giving up units or interests in the trust and receiving shares in the company in its place.

54. The proposed restructure involves:

- Incat Holdings issuing shares to the unit holders in identical proportions to their existing unit holdings in the Unit Trust;
- the Trustee of the Unit Trust transferring all of the assets of the Unit Trust to Incat Holdings for no consideration; and
- the Unit Trust terminating within 6 months from the date of the transfer of the assets (at which time the unit holders' ownership of units will also end).

55. Therefore, the unit holders' ownership of units in the Unit Trust will end in exchange for shares in Incat Holdings. Subsection 124-870(1) will be satisfied.

56. The unit holders must make the choice for each unit they own in the Unit Trust (subsection 124-870(2)).

57. However, a unit holder that is a foreign resident cannot choose roll-over under section 124-870 unless the replacement interests they acquire in the transferee (shares in Incat Holdings) are taxable Australian property (as defined in section 995-1) just after their acquisition.

58. Also, as per subsection 124-870(5) roll-over does not apply to a unit holder's ownership of a unit ending under the trust restructure if:

- the unit was an item of their trading stock (as defined in section 995-1) and the corresponding shares in Incat Holdings become items of their trading stock when they acquire them; or
- the unit was not an item of their trading stock but the corresponding shares in Incat Holdings became items of their trading stock when they acquired them.

59. As the unit holders of the Unit Trust do not hold their units as trading stock and they will not hold the shares in Incat Holdings as trading stock subsection 124-870(5) is not applicable.

60. Therefore, the unit holders who are not disqualified by subsection 124-870(3) are eligible to choose rollover.

61. Unit holders who choose rollover cannot make a capital loss from a CGT event that happens to their units during the trust restructuring period (subsection 124-870(4)).

### **Consequences of roll-over for the unit holders**

62. If a unit holder chooses to obtain the roll-over, a capital gain or a capital loss they make from the ending of their ownership of a unit in the Unit Trust is disregarded (subsection 124-15(2)).

63. Under subsection 124-15(3), the first element of the cost base for a unit holder of the shares in Incat Holdings that they acquire under the trust restructure is the total of the cost bases of all the units in the Unit Trust in respect of which they choose to obtain a roll-over (worked out when their ownership of the units ended) divided by the number of the shares in Incat Holdings. The first element of the reduced cost base of the shares in Incat Holdings is worked out similarly.

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

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Subject references:*

- capital gains tax
- CGT event
- resettlement
- roll-over
- shares
- trust
- units

*Legislative references:*

- ITAA 1936
- ITAA 1997 104-70
- ITAA 1997 104-70(1)(a)
- ITAA 1997 124-15(2)
- ITAA 1997 124-15(3)
- ITAA 1997 Subdivision 124-N
- ITAA 1997 124-855(1)
- ITAA 1997 124-860
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- ITAA 1997 124-860(4)
- ITAA 1997 124-860(6)
- ITAA 1997 124-865
- ITAA 1997 124-870

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- ITAA 1997 124-875(2)
- ITAA 1997 124-875(5)
- ITAA 1997 124-875(6)
- ITAA 1997 995-1
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

*Other references:*

- Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 4) 2002
- Australian Oxford Dictionary 1999, Oxford University Press, Melbourne
- Macquarie Dictionary 2002, rev 3<sup>rd</sup> edn, The Macquarie Library Pty Ltd, North Ryde

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ATO references

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