


CR 2007/60 - Income tax: stapling of units in Australian Pipeline Trust with the units in Australian Pipeline Trust Investment Trust

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Class Ruling

Income tax: stapling of units in Australian Pipeline Trust with the units in Australian Pipeline Trust Investment Trust

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① This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, 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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45 of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- Division 104 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997;
- section 108-5 of the ITAA 1997;

- section 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997; and
- section 110-55 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is the unitholders in Australian Pipeline Trust (APT, as it was known) and Australian Pipeline Trust Investment Trust (APTIT) who hold their units on capital account and participate in the scheme that is the subject of this Ruling.

Qualifications

4. The Commissioner makes this Ruling on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 13 to 26 of this Ruling.

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

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- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to the income year ended 30 June 2007. The scheme was completed during that income year. However, the Ruling continues to apply after this date to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

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

13. The following description of the scheme is based on information provided by the applicant. The scheme that is the subject of this Ruling is based on the following documents. These documents, or the relevant parts of them, as the case may be, form part of and are to be read in conjunction with this description.

14. The relevant documents or parts of documents, to be read in conjunction with this description are:

- the application for Class Ruling (and appendixes) dated 6 February 2007 on behalf of Australian Pipeline Limited as Responsible Entity for APT and APTIT;
- the APT Interim Financial Report for the half year ended 31 December 2006; and
- further information supplied between 16 May 2007 and 24 May 2007.

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

15. APT is a unit trust, the units of which were originally traded on the Australian Stock Exchange (ASX) individually and which are now traded as part of the APA Group (APA) stapled security on the ASX.

16. APT is an Australian resident public trading trust. It is treated as a company for income tax purposes and is the head entity of the APT tax consolidated group (pursuant to Subdivision 713-C of the ITAA 1997).

17. APT was originally capitalised in early 2000 by two Australian resident companies. APT was listed on the ASX in June 2000, with the initial public offer made at \$2.00 per unit and with 60% of the 244 million units offered to the public.

18. At the annual general meeting of APT held on 20 October 2004, APT unitholders approved changes to the APT constitution to enable APT to staple the securities of another entity to APT units.

19. APT established a new unit trust, APTIT, in July 2005 which was established for the purpose of acquiring and holding a number of passive assets.

20. The number of units issued in APTIT was approximately 280 million units. A single investor subscribed for the units in APTIT for a nominal amount (\$0.00001 per unit), such that the total paid up capital in APTIT was approximately \$2,800.

21. On 1 September 2006 APT announced that it had successfully completed the placement of 37.4 million new ordinary units at an issue price of \$4.55 per unit.

22. On 16 November 2006 APT announced a pro-rata equity raising which took the form of a 2 for 7 renounceable rights issue of approximately 94.9 million ordinary units to raise approximately \$356 million. On 18 December 2006 APT announced that this raising had been fully subscribed.

23. APTIT was admitted to the official list of the ASX on 21 December 2006. Official quotation of the APA stapled securities commenced on 27 December 2006.

24. The units held in APTIT by the single investor were cancelled contemporaneously with the issue of new units in APTIT to APT unitholders (pro-rata to their APT holdings) following the application of a capital distribution from APT for that purpose. The units in APT and APTIT were then stapled and the stapled securities (trading as APA) commenced trading on the ASX.

25. On 4 January 2007 the new units in APTIT were issued to APT unitholders and were stapled to the APT units to form stapled securities in accordance with the renounceable rights issue product disclosure statement.

26. In order to appropriately capitalise APTIT, on 4 January 2007:

- APT returned capital of \$301,999,745 to APT unitholders. The total amount of the capital returned was debited to APT unitholders' funds account.

- APT unitholders then directed payment of this amount to capitalise APTIT. The APTIT units were then issued to the APT unitholders.

Ruling

Distribution not a dividend

27. As the proposed return of capital was debited to APT unitholders' funds account it is not a dividend as defined within subsection 6(1) of the ITAA 1936.

Anti-avoidance provisions

28. The Commissioner will not make a determination under sections 45A or 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to the return of capital. Accordingly, no part of the return of capital will be taken to be a dividend for income tax purposes.

Capital gains tax

APT Unitholders

29. CGT Event G1 happens as a result of the return of capital to APT unitholders (section 104-135 of the ITAA 1997).

30. Under subsections 104-135(3) and (4) of the ITAA 1997 the cost base and reduced cost base of each APT unit will be reduced (but not below nil) by the amount of the capital return (\$0.704761). An APT unitholder will make a capital gain from CGT Event G1 happening to the extent (if any) that the payment exceeds the unit's cost base in accordance with subsection 104-135(3).

Acquisition of APTIT units

31. An APT unitholder will be taken to have acquired the APTIT units on the day of the return of capital, being 4 January 2007 (section 109-10 of the ITAA 1997).

32. The first element of the cost base or reduced cost base of each APTIT unit is \$0.704761, being the amount paid by APT on behalf of the APT unitholders by way of subscription for each APTIT unit (subsection 110-25(2) and subsection 110-55(2) of the ITAA 1997).

Two CGT assets after the return of capital

33. Each APT unit and APTIT unit that make up each APT stapled security is a separate CGT asset for the purposes of section 108-5 of the ITAA 1997.

Stapling of securities

34. No CGT event in Division 104 of the ITAA 1997 happened as a result of the stapling of each APT unit to each APTIT unit.

Commissioner of Taxation

27 June 2007

Appendix 1 – Explanation

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

Treatment as a company

35. APT is an Australian resident public trading trust as defined in section 102R of the ITAA 1936.

36. For certain purposes of the ITAA 1936 and ITAA 1997 resident public trading trusts are treated as companies, with units in them being treated as shares. In particular, section 102T of the ITAA 1936 and Subdivision 713-C of the ITAA 1997 are authority for treating APT and the APT unitholders as a company and shareholders respectively, for the purposes of subsections 44(1) and 6(1) of the ITAA 1936 and sections 45A, 45B and 45C of the ITAA 1936.

Distribution not a dividend

37. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income a dividend, as defined in subsection 6(1) of the ITAA 1936, paid to the shareholder out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

38. The term 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, later paragraphs in this subsection exclude certain items from being a dividend for income tax purposes.

39. Relevantly, the specific exclusion in paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 provides:

... moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company.

40. The return of capital was debited against APT unitholders' funds account. Therefore, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies and the return of capital does not constitute a dividend.

Anti-avoidance provisions

Sections 45A and 45B

41. Sections 45A and 45B of the ITAA 1936 are anti-avoidance provisions which, if they apply, allow the Commissioner to make a determination that all or part of the return of capital received by shareholders is to be treated as an unfranked dividend.

Section 45A

42. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed to certain shareholders who derive a greater benefit from the receipt of capital (the advantaged shareholders) and it is reasonable to assume that the other shareholders have received or would receive dividends (the disadvantaged shareholders).

43. APT has provided its unitholders with a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936) under the return of capital. However, for section 45A of the ITAA 1936 to apply there must be both advantaged and disadvantaged shareholders as defined in subsection 45A(1) of the ITAA 1936. APT has returned capital to all unitholders. No dividends are payable as part of the stapling proposal and it cannot be said that advantaged and disadvantaged shareholders as defined in subsection 45A(1) existed within this arrangement.

44. Accordingly, section 45A of the ITAA 1936 has no application to the return of capital.

Section 45B

45. The purpose of section 45B of the ITAA 1936 is to ensure that the relevant amounts distributed to shareholders are treated as dividends for tax purposes if certain payments, allocations and distributions are made in substitution for dividends. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- under the scheme a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (other than an incidental purpose) of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

46. The arrangement involving the capital return by APT does constitute a scheme for the purposes of section 45B of the ITAA 1936.

47. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936 and includes a distribution to a person of share capital. As the return of capital was recorded by means of a debit to APT unitholders' funds, its unitholders are taken to have been provided with a capital benefit as defined in paragraph 45B(5)(b) of the ITAA 1936.

48. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the relevant circumstances (as outlined in subsection 45B(8) of the ITAA 1936) of the scheme with a view to determine whether it could be concluded that entities that entered into or carried out the scheme or any part of the scheme, did so for a purpose (other than an incidental purpose) of enabling the relevant taxpayer to obtain a tax benefit. On the basis of the information surrounding the return of capital as described in the ruling application, the financial reports and further information, the Commissioner has formed the view that the capital benefits provided to the relevant taxpayers have not been made for a more than incidental purpose of obtaining a tax benefit.

49. Accordingly, the Commissioner will not make a determination pursuant to subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the return of capital of APT.

Section 45C – deeming dividends to be paid where determinations under sections 45A or 45B are made

50. As the Commissioner will not make a determination under subsections 45A(2) or 45B(3) of the ITAA 1936 in relation to the scheme as described, section 45C will not deem any part of the return of capital to be an unfranked dividend for the purposes of the ITAA 1936 or the ITAA 1997.

Capital gains tax

CGT event G1 – section 104-135

51. CGT event G1 (section 104-135 of the ITAA 1997) happens if a company makes a payment to a shareholder in respect of their shares in the company and some or all of that payment is not a dividend as defined in section 995-1 of the ITAA 1997 or an amount that is taken to be a dividend under section 47 of the ITAA 1936 (non-assessable payment).

52. Under section 102T of the ITAA 1936 and Subdivision 713-C of the ITAA 1997, each APT unitholder is taken, for the purposes of section 104-135, to be a shareholder in a company. As a result of the return of capital, each APT unitholder received payment of \$0.704761 per share. This payment is neither a dividend nor an amount taken to be a dividend and is, therefore, a non-assessable payment under section 104-135 of the ITAA 1997. Accordingly, CGT event G1 happens as a result of the return of capital.

53. The cost base and reduced cost base of each APT unit will be reduced (but not below nil) by the amount of the return of capital of \$0.704761 (subsections 104-135(3) and (4) of the ITAA 1997). An APT unitholder will make a capital gain from CGT event G1 happening to each unit to the extent (if any) that the payment exceeds the cost base of the share (subsection 104-135(3) of the ITAA 1997).

Acquisition of APTIT units

54. Each APTIT unit acquired under the scheme is taken to be acquired by the APT unitholder at the time of the return of capital, being 4 January 2007 (section 109-10 of the ITAA 1997).

55. Subsections 110-25(2) and 110-55(2) of the ITAA 1997 state that the first element of the cost base or reduced cost base of a CGT asset is the total of any money paid, or required to be paid, and the market value of any other property given or required to be given in respect of acquiring the asset.

56. Accordingly, the first element of the cost base or reduced cost base of each APTIT unit is \$0.704761, being the amount paid by APT on behalf of the APT unitholders by way of subscription for each APTIT unit.

Two CGT Assets after the return of capital

57. After the return of capital, an APT unitholder holds two CGT assets: the original APT units (with an adjusted cost base as a result of CGT event G1 happening) and the APTIT units (section 108-5 of the ITAA 1997).

Stapling of securities

58. The effect of the stapling arrangement is to apply restrictions to the transferability of the individual securities that together make up the APA stapled security, such that they cannot be sold separately. Each individual security (that is, each APT unit and each APTIT unit) will retain its legal character without any change in beneficial ownership. There is no variation to the rights or obligations attaching to, or the beneficial ownership of, the individual securities comprising the APA stapled security as a consequence of stapling.

59. No CGT event in Division 104 of the ITAA 1997 happens as a consequence of the stapling of each APT unit to each APTIT unit.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital benefit
- capital gains
- capital reduction
- CGT cost base
- CGT events
- CGT reduced cost base
- return of share capital
- share capital
- stapled companies
- stapled structure
- time of CGT event

Legislative references:

- | | |
|-----------------------|----------------------------|
| - ITAA 1936 6(1) | - ITAA 1936 45B(2)(b) |
| - ITAA 1936 44(1) | - ITAA 1936 45B(2)(c) |
| - ITAA 1936 45 | - ITAA 1936 45B(3) |
| - ITAA 1936 45A | - ITAA 1936 45B(5) |
| - ITAA 1936 45A(1) | - ITAA 1936 45B(5)(b) |
| - ITAA 1936 45A(2) | - ITAA 1936 45B(8) |
| - ITAA 1936 45A(3)(b) | - ITAA 1936 45C |
| - ITAA 1936 45B | - ITAA 1936 47 |
| - ITAA 1936 45B(2)(a) | - ITAA 1936 102R |
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| | - ITAA 1997 104-135 |
| | - ITAA 1997 104-135(3) |
| | - ITAA 1997 104-135(4) |
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| | - ITAA 1997 Subdiv 713-C |
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ATO references

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