CR 2010/43 - Income tax: destapling of the Asciano Group - Asciano Option and Rights Plan

Class Ruling

Income tax: destapling of the Asciano Group – Asciano Option and Rights Plan

Contents Para

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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

2. In this Ruling, Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936), as in force at the time occurring just before Schedule 1 to the *Tax Laws Amendment (2009 Budget Measures No. 2) Act 2009* commenced is referred to as 'former Division 13A' and the provisions in force at that time are referred to as 'former' provisions of the ITAA 1936.

Relevant provision(s)

3. The relevant provisions dealt with in this Ruling are:

- Section 83A-5 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997); and
- Section 83A-120 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of entities

4. The class of entities to which this Ruling applies consists of employees of the Asciano Limited group (the Group) who acquired rights to stapled securities in Asciano Limited and the Asciano Finance Trust (the stapled entity) under the Asciano Option and Rights Plan (the Plan). They are employees who:

- have not made an election under former section 139E of the ITAA 1936 covering their rights to stapled securities;
- have not had a cessation time happen in relation to their rights to stapled securities prior to 1 July 2009;
- have not had an ESS deferred taxing point happen in relation to their rights to stapled securities prior to the proposed corporatisation; and
- continue to be employed by the Group after the proposed corporatisation.

In this ruling an employee belonging to this class of entities is referred to as a participant.

Qualifications

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 9 to 21 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.

Date of effect

8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will 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 this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

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

- application for Class Ruling dated 17 May 2010;
- the Asciano Option and Rights Plan Rules, adopted on 4 June 2007;
- the Asciano Option and Rights Plan Employee Communication Booklet, dated September 2009;
- the Asciano Option and Rights Plan: 2009-2010 Offer;
- Asciano – letter to option holders; and
- letter from the applicant dated 25 June 2010.

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

The Asciano Group

10. The Group is comprised of Asciano Limited (the Company) and its related entities including the Asciano Finance Trust (the Trust). Shares in the Company and units in the Trust are jointly listed on the Australian Securities Exchange (ASX) by means of stapled securities, each security consisting of a share in the Company and a unit in the Trust.

The Plan

11. In 2007, the Group established the Plan. Under the Plan, selected employees of the Group are granted options or rights (rights) to acquire stapled securities in the stapled entity. Rights to stapled securities were granted in 2007, 2008, 2009 and 2010.

12. The rights to stapled securities were granted for nil consideration and are subject to certain performance-based and time-based vesting conditions measured over a performance period of 3 to 4 years.

13. The applicant has advised that:

- rights to stapled securities granted before 1 July 2009 are qualifying rights within the meaning of former section 139CD of the ITAA 1936; and
- rights to stapled securities granted on or after 1 July 2009 meet the conditions in Subdivision 83A-C of the ITAA 1997.

The proposed corporatisation of the Group

14. The Group proposes, subject to the approval of its stapled security holders, to corporatise its capital structure by converting it to a single publicly listed company.

15. Under the proposed corporatisation stapled securities in the stapled entity will be de-stapled so that shares in the Company and units in the Trust can be dealt with separately.

16. Once the shares and units are de-stapled, the Company will acquire 100% of the issued units in the Trust from the unitholders. As consideration for disposing of their units to the Company, the unit holders will be offered shares in the Company. Immediately after the issue of the shares by the Company and before they can be dealt with or traded, the Company will undertake a share consolidation so that the former stapled security holders will hold the same number of shares after the destapling as they held before. As a result, the former stapled security holders will have the same proportional interest in the Company as they had before the destapling.

17. Once the proposed corporatisation has been completed, the Trust will be delisted from the ASX.

18. As part of the proposed corporatisation, participants in the Plan will be asked to enter into a deed under which they will waive their right to acquire or subscribe for units in the Trust on the exercise of the rights they acquired under the Plan.

19. Accordingly participants will cease to hold rights to stapled securities in the stapled entity and will instead hold rights to shares in the Company.

20. The applicant anticipates that the value of the rights held by participants after the proposed corporatisation will be the same as that before. After the proposed corporatisation, the Company will wholly own the Trust and therefore any decline in the value of rights to acquire units in the Trust as a result of the waiver should be offset by a corresponding increase in the value of the rights to acquire shares in the Company.

21. The proposed corporatisation will not change the vesting conditions, the disposal restrictions or the exercise price under which the rights were granted.

Ruling

22. Where the proposed corporatisation of the Group occurs and a participant continues to be employed by the Group, the participant will not have an ESS deferred taxing point occur (section 83A-5 of the IT(TP)A 1997; section 83A-120 of the ITAA 1997).

Commissioner of Taxation
18 August 2010

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.

ESS interests

23. The rights to stapled securities acquired by a participant under the Plan are ESS interests (section 83A-10 of the ITAA 1997 and section 83A-335 of the ITAA 1997).

Where rights acquired pre 1 July 2009

24. Where the rights acquired by the participant were acquired prior to 1 July 2009, Subdivision 83A-A of the IT(TP)A 1997 provides that:

- Subdivision 83A-C of the ITAA 1997 (and the rest of Division 83A of the ITAA 1997 to the extent that it relates to Subdivision 83A-C of ITAA 1997) will apply to the rights; and
- the ESS deferred taxing point for the rights will be the cessation time mentioned in former subsection 139B(3) of the ITAA 1936 (subparagraph 83A-5(4)(b)(i) of the IT(TP)A 1997).

25. Therefore, whether a deferred taxing point arises as a consequence of the proposed corporatisation will depend on whether a cessation time as mentioned in former subsection 139B(3) of the ITAA 1936 happens.

26. The cessation time in former subsection 139B(3) of the ITAA 1936 is defined by section 995-1 of the ITAA 1997 and has the meaning given by former sections 139CA, 139CB and 139DSH of the ITAA 1936.

27. Former section 139DSH of the ITAA 1936 provides that the cessation time in relation to a participant's rights to stapled securities in the stapled entity will be the earlier of:

- the time when any of the interests forming the stapled security cease to be stapled together, and
- the time when the stapled security ceases to be listed for quotation in the official list of ASX Limited,

if that time is earlier than:

- the earliest time when a cessation event described in any of former paragraphs 139CB(1)(a) to (e) of the ITAA 1936 happens.

28. Thus, as participants:

- they will not have had a cessation event happen prior to the proposed corporatisation (because the class of entities to which this Ruling applies excludes those who have had an ESS deferred taxing point happen prior to the proposed corporatisation);
- they will have a cessation time happen when the corporatisation occurs and stapled securities in the Group are destapled.

29. However where the participant's rights to shares in the Company are for the purposes of former Division 13A treated as a continuation of their rights to stapled securities in the stapled entity, the cessation time will not happen as a consequences of the proposed corporatisation, provided the participant does not cease employment within the meaning of former section 139CB(2) of the ITAA 1936.

30. Former Division 13A extended the application of employee share schemes to stapled securities acquired on or after 1 July 2006. Paragraph 3.38 of the Explanatory Memorandum to the Tax Laws Amendment (2007 Measures No. 1) Bill 2007, provides that the restructure relief in former Division 13A can apply to rights to acquire stapled securities.

31. Former subsection 139DQ(1) of the ITAA 1936 relevantly provides that where as a result of a restructure

- an employee acquires matching rights to shares in a new company to replace rights to shares in an old company that were acquired under an employee share scheme; and
- the conditions specified in former section 139DR of the ITAA 1936 are met,

the rights to matching shares will be treated for the purposes of former Division 13A as if they are a continuation of the rights to shares the employee held in the old company.

32. The Commissioner accepts that the proposed corporatisation will constitute a restructure for the purposes of former section 139GCC of the ITAA 1936.

33. The Commissioner also accepts that, for the purposes of former Division 13A, when the participant ceases to hold rights to stapled securities acquired under the Plan and instead holds rights to shares in the Company, the participant will be regarded as having acquired matching rights to shares in a new company (the Company) that replace rights to shares in an old company (the stapled entity) that were acquired under an employee share scheme.

34. The conditions in former section 139DR of the ITAA 1936 that must be met are:

- immediately before the proposed corporatisation the participant must hold rights to stapled securities in the stapled entity under the Plan;
- the participant must at or about the time they acquire their replacement rights to shares in the Company be an employee of the Group;
- the rights to shares in the Company must be rights to ordinary shares in the Company; and
- at the time, the participant acquires their rights to shares in the Company:
  - they do not hold a legal or beneficial interest in more than 5% of the shares in the Company; and
  - they are not in a position to cast, or control the casting of more than 5% of the maximum number of votes that may be cast at a general meeting of the Company.

35. As the Commissioner accepts that:

- the proposed corporatisation will be a restructure for the purposes of former section 139GCC of the ITAA 1936;
- the participant acquires matching rights to shares in a new company (the Company) that replace rights to shares in an old company (the stapled entity) that were acquired under an employee share scheme; and
- the conditions specified in former section 139DR of the ITAA 1936 will be met,

the former subsection 139DQ(1) of the ITAA 1936 will apply to the participant's replacement rights to shares in the Company. Thus, for the purposes of the former Division 13A, the replacement rights to shares in the Company will be treated as if they are a continuation of the participant's rights to stapled securities.

Continuation of employment

36. As participants will continue to be employed by the Group after the proposed corporatisation, they will not cease their employment within the meaning of the former subsection 139CB(2) of the ITAA 1936.

37. Thus the proposed corporatisation will not of itself trigger a cessation time and thus a deferred taxing point.

Where rights acquired on or after 1 July 2009

38. Where a participant acquires rights to stapled securities after 1 July 2009:

- subsection 83A-5(1) of the IT(TP)A 1997 provides that Division 83A will apply to the rights; and
- the ESS deferred taxing point for the rights is determined under section 83A-120 of the ITAA 1997.

39. Whilst section 83A-120 of the ITAA 1997 does not specifically provide for an ESS deferred taxing point to occur on the destapling of a stapled security, a deferred taxing point may occur on the disposal of an ESS interest.

40. When, under the proposed corporatisation a participant ceases to hold rights to stapled securities in the stapled entity and instead holds rights to shares in the Company, the participant will for the purposes of Division 83A of the ITAA 1997 be taken to have disposed of their rights to stapled securities. Thus a deferred taxing point will be triggered by the proposed corporatisation. (Subsection 83A-120(3) of the ITAA 1997.)

41. However where the participant's rights to shares in the Company are for the purposes of Division 83A of the ITAA 1997 treated as a continuation of their rights to stapled securities in the stapled entity, the ESS deferred taxing point will not happen as a consequence of the proposed corporatisation, provided the participant continues the employment in respect of which they acquired their rights to stapled securities.

42. Section 83A-130 of the ITAA 1997 relevantly provides that where as a result of a restructure (including the structure of the ownership) of a company (the old company):

- an employee stops holding ESS interests in the old company that were acquired under an employee share scheme;
- the employee acquires replacement ESS interests in a new company that can reasonably be regarded as matching the old ESS interests;
- the replacement ESS interests relate to ordinary shares;
- the employee is employed by the new company, or a subsidiary of the new company, or a holding company of the new company, or a subsidiary of a holding company of the new company at or about the time of the restructure; and
- the employee at the time they acquire the replacement ESS interests:
  - does not hold a beneficial interest in more than 5% of the shares in the new company; or

- is not in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of the new company.

the replacement ESS interests will, for the purposes of Division 83A of the ITAA 1997, be treated as a continuation of the employee's ESS interests in the old company.

43. Thus, as the Commissioner accepts that the proposed corporatisation will be a restructure for the purposes of Division 83A of the ITAA 1997 and that as a result a participant will:

- stop holding ESS interests in an old company that were acquired under an employee share scheme;
- be regarded as acquiring replacement ESS interests in a new company:
  - that can reasonably be regarded as matching their old ESS interests; and
  - that relate to ordinary shares;
- be employed by the new company, or a subsidiary of the new company, or a holding company of the new company, or a subsidiary of a holding company of the new company at or about the time of the proposed corporatisation; and
- at the time they acquire their replacement ESS interests:
  - not hold a beneficial interest in more than 5% of the shares in the Company, or
  - not be in a position to cast or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of the Company.

the participants replacement rights to shares in the Company will for the purposes of Division 83A of the ITAA 1997 be treated as a continuation of their rights to stapled securities in the stapled entity.

Continuation of employment

44. As participants will continue to be employed by the Group after the proposed corporatisation, they will not cease the employment in respect of which they acquired their rights to stapled securities within the meaning of section 83A-330 of the ITAA 1997.

45. Thus an ESS deferred taxing point will not happen as a consequence of the proposed corporatisation.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- employee share schemes
- cessation time
- ESS deferred taxing point
- stapled securities
- corporate restructure

Legislative references:

- ITAA 1936
- ITAA 1936 Pt III Div 13A
- ITAA 1936 139B(3)
- ITAA 1936 139CA
- ITAA 1936 139CB
- ITAA 1936 139CB(1)(a)
- ITAA 1936 139CB(1)(b)
- ITAA 1936 139CB(1)(c)
- ITAA 1936 139CB(1)(d)
- ITAA 1936 139CB(1)(e)
- ITAA 1936 139CB(2)
- ITAA 1936 139CD
- ITAA 1936 139DQ(1)
- ITAA 1936 139DSH
- ITAA 1936 139DR
- ITAA 1936 139E
- ITAA 1936 139GCC
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-130
- ITAA 1997 83A-330
- ITAA 1997 83A-335
- ITAA 1997 995-1
- IT(TP)A 1997 Subdiv 83A-A
- IT(TP)A 1997 83A-5
- IT(TP)A 1997 83A-5(1)
- IT(TP)A 1997 83A-5(4)(b)(i)
- TAA 1953
- Copyright Act 1968

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2007 Measures No. 1) Bill 2007

ATO references

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