


CR 2011/82 - Income tax: Australand Holdings Limited Capital Reallocation

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Class Ruling

Income tax: Australand Holdings Limited Capital Reallocation

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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, 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 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 tax laws dealt with in this Ruling are:

- section 44 of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997; and
- section 855-10 of the ITAA 1997.

Note: All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are the security holders of Australand Property Group (APG) who:

- participated in the arrangement that is the subject of this Ruling;
- owned their APG securities on the Record Date (22 September 2011) and continued to own them until the Payment Date (23 September 2011);
- held their APG securities on capital account; and
- are not subject to the Taxation of Financial Arrangements (ToFA) rules in Division 230 of the ITAA 1997 in relation to gains and losses on their APG shares.

(Note – Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

Qualifications

4. The Commissioner of Taxation makes this Ruling based on the precise arrangement 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 9 to 19 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 from 1 July 2011 to 30 June 2012. The Ruling continues to apply after 30 June 2012 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 in the application for class ruling dated 28 January 2011.

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

Background

10. APG is a major Australian diversified property group.

11. As at 5 September 2011 APG had approximately 576.8 million stapled securities on issue. Each stapled security consists of:

- a share in Australand Holdings Limited (AHL), and
- a unit in Australand Property Trust (APT), and
- a unit in Australand Property Trust No.4 (APT4), and
- a unit in Australand Property Trust No.5 (APT5).

Collectively these entities are known as the Australand Property Group.

Return of capital & capital contribution

12. On 15 March 2011 APG announced a return of capital of approximately \$250 million (the capital reduction amount), being 43.34 cents per AHL share, for its ordinary security holders under section 256B of the Corporations Act 2001.

13. The capital reduction amount will be wholly debited to the untainted share capital account of AHL.

14. APG security holders applied the capital reduction amount to APT as a capital contribution on 23 September 2011. This was to allow APG to realign its capital structure.

15. The return of capital and the capital contribution were approved by APG security holders at APG's Annual General Meeting on 14 April 2011. The Record Date was 22 September 2011 and the Payment Date was 23 September 2011.

Other matters

16. At 30 October 2010, the total equity of AHL was \$789 million, consisting of \$827 million of contributed equity, and a deficit to retained earnings of \$36 million.

17. At 14 January 2011, APG had a market capitalisation of approximately \$1.7 billion.

18. At the time the capital reduction amount was paid:

- there were no pre-CGT APG securities on issue;
- the sum of the market values of AHL's assets that constituted taxable Australian real property exceeded the sum of the market values of AHL's assets that did not constitute taxable Australian real property; and
- AHL and APT respectively had more than 300 members and beneficiaries.

19. This Ruling does not consider the taxation consequences for an APG security holder who owned their APG security at the Record Date (22 September 2011) but had ceased to own it by the Payment Date (23 September 2011).

Ruling

The application of sections 45B and 45C

20. The Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole or any part of the return of capital.

Capital gains tax

Share in AHL

Return of capital – CGT event G1

21. CGT event G1 happens for each APG security holder in respect of their AHL shares when the return of capital is paid in respect of those shares (subsections 104-135(1) and (2) of the ITAA 1997).

Foreign resident shareholders

22. A foreign resident APG security holder who is paid the return of capital disregards any capital gain made from CGT event G1 happening if their shares in AHL do not constitute 'taxable Australian property' (section 855-10 of the ITAA 1997).

Unit in APT***Capital Contribution***

23. The fourth element of the cost base and reduced cost base of an APG security holder's APT unit includes the amount of the capital contribution that is referable to that unit (subsections 110-25(5) and 110-55(2) of the ITAA 1997).

Commissioner of Taxation14 September 2011

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.*

Anti-avoidance provision

Section 45B – schemes to provide capital benefits

24. Section 45B is an anti avoidance provision which, if it applies, will allow the Commissioner to make a determination that section 45C applies to treat all or part of the return of capital amount received by security holders as an unfranked dividend.

25. Section 45B applies where certain capital payments, including a return of capital, are made to shareholders 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));
- under the scheme a taxpayer (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

Each of these conditions is considered in paragraphs 26 to 41 of the explanation.

Scheme

26. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1) of Part IVA. That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme, plan or proposal.

27. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). It states that a person is provided with a capital benefit if:

- an ownership interest in a company is issued to the person;
- there is a distribution to the person of share capital; or

- the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.

28. As the return of capital was debited to AHL's share capital account, AHL has provided the security holders with a capital benefit under paragraph 45B(5)(b) in the form of a distribution of share capital.

Tax benefit

29. A relevant taxpayer 'obtains a tax benefit' as defined in subsection 45B(9) if:

- an amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B, be less than the amount that:

- would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit instead had been a dividend.

30. The distribution to APG security holders includes a return of capital and therefore constitutes a capital benefit. In the event that the relevant distribution were a dividend rather than a capital benefit, it is likely that the amount of tax payable by APG security holders would be greater than is payable in respect of the return of capital payment (that payment being a capital benefit). Consequently, the receipt of the capital benefit is a 'tax benefit'.

31. Ordinarily, a return of capital would be subject to the CGT provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will only be a cost base reduction under CGT event G1 (section 104-135 of the ITAA 1997). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises. A capital gain may not arise at all for certain foreign shareholders. By contrast, a dividend would generally be included in the assessable income of a resident shareholder or, in the case of a foreign shareholder, would be subject to dividend withholding tax under section 128B. Therefore, APG security holders have obtained tax benefits from the return of capital.

Relevant circumstances

32. Paragraph 45B(2)(c) requires the Commissioner to consider the 'relevant circumstances' of the scheme as set out in subsection 45B(8). Considering these circumstances determines whether any part of the scheme was entered into for a purpose, other than an incidental purpose, of enabling the relevant taxpayer (an APG security holder) to obtain a tax benefit.

33. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer. This requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

34. Subsection 45B(8) lists the relevant circumstances. In this Scheme, because the return of capital was made to all security holders of APG, regardless of individual circumstances, paragraphs 45B(8)(c) and 45B(8)(d) and paragraphs 45B(8)(f) to 45B(8)(h) do not incline for or against a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) and 45B(8)(j), pertaining to the provision of ownership interest and demerger respectively, are not relevant. The relevant factors are those covered by the circumstances described in paragraphs 45B(8)(a), 45B(8)(b), 45B(8)(e) and 45B(8)(k).

35. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital and profits (realised or unrealised) of the company or an associate (within the meaning of section 318) of the company.

36. The return of capital is not attributable to the profits of AHL as AHL has a deficit of retained earnings at the time of the return of capital. Accordingly, the distribution is attributable to the capital of AHL.

37. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate (within the meaning of section 318) of the company. AHL has paid dividends for many years up until mid-2008. Since then, AHL has not had profits to be able to pay a dividend. In these circumstances, the pattern of distributions made by AHL does not suggest that the return of capital is being made in substitution for dividends.

38. While paragraph 45B(8)(e) refers to the relevant taxpayers being non-residents, and there are a large proportion of securities held by foreign security-holders, in the circumstances of this case this does not of itself give rise sufficiently to a more-than-incidental-purpose.

39. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to 177D(b)(viii). These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, the timing of the scheme, its form and substance, and the financial and other implications for the parties involved.

40. In this case, the return and reallocation of capital from AHL to APT is consistent with APG's revised business strategy which includes the realignment of its capital structure to enable APG to compete more readily with industry peers. Furthermore, as the return of capital is applied to all security holders of APG, it does not lead to a conclusion that the requisite purpose exists that the scheme was carried out for the purpose of enabling the relevant taxpayer to obtain a tax benefit.

41. It cannot be concluded that APG or participating APG security holders entered into or carried out the scheme for the purpose of enabling the security holders to obtain a tax benefit. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the whole or any part of the return of capital.

Section 45C

42. As the Commissioner will not make a determination under subsection 45B(3) 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

43. CGT event G1 happened when AHL paid the return of capital to an APG security holder in respect of a share owned in AHL by the security holder at the Record Date (22 September 2011) and which they continued to own when the return of capital is paid on the Payment Date (23 September 2011) (subsection 104-135(1) of the ITAA 1997).

44. An APG security holder makes a capital gain if the return of capital is more than the cost base of their AHL share. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

45. If an APG security holder makes a capital gain, the cost base and the reduced cost base of their AHL share is reduced to nil (subsection 104-135(3) of the ITAA 1997). You cannot make a loss from CGT event G1.

46. Where the return of capital is not more than the cost base of the AHL share at the time of the payment, the cost base and the reduced cost base of the share are reduced by the capital reduction amount (subsection 104-135(4) of the ITAA 1997).

47. If the AHL share was acquired by a security holder at least 12 months before the payment of the return of capital, a capital gain from CGT event G1 happening qualifies as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Division 115 of the ITAA 1997 are satisfied).

Foreign resident shareholders

48. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

49. Section 855-15 of the ITAA 1997 sets out when a CGT asset is 'taxable Australian property':

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2 or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

50. The AHL share is not 'taxable Australian real property' but it satisfies the 'principal asset test' in subsection 855-30(2) of the ITAA 1997 and will be 'an indirect Australian real property interest' under subsection 855-25(1) of the ITAA 1997 if it also passes the 'non-portfolio interest test' in section 960-195 of the ITAA 1997. The 'non-portfolio interest test' will be passed if the sum of the AHL shares held by the APG security holder and its associates is 10% or more of the total AHL shares. A capital gain may not be disregarded where the AHL share is an 'indirect Australian real property interest' (item 2 of the table in section 855-15 of the ITAA 1997).

51. If the AHL share is not an 'indirect Australian real property interest', a capital gain cannot be disregarded under subsection 855-10(1) of the ITAA 1997 if the AHL share:

- (a) has been used at any time by the foreign resident APG security holders in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15 of the ITAA 1997); or
- (b) is covered by subsection 104-165(3) of the ITAA 1997 (item 5 of the table in section 855-15 of the ITAA 1997).

Capital contribution

52. The return of capital on each AHL share has been applied to each APT unit as a capital contribution. This capital contribution represents capital expenditure incurred by an APG security holder for the purpose of increasing the value of their APT units.

53. The fourth element of the cost base and the reduced cost base of each APT unit includes the amount of the capital contribution that is referable to that unit (subsections 110-25(5) and 110-55(2) of the ITAA 1997).

Appendix 2 – Detailed contents list

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