


CR 2014/8 - Income tax: demerger of McAleese Limited by TTG Pty Ltd

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Class Ruling

Income tax: demerger of McAleese Limited by TTG Pty Ltd

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

This publication (excluding appendices) 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 relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 44 of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45BA of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 115-30 of the ITAA 1997; and
- Division 125 of the ITAA 1997.

All subsequent 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 is the holders of ordinary shares in TTG Pty Ltd (TTG) who:

- (a) were listed on the share register of TTG as at the Record Date (28 November 2013) for the demerger of shares in McAleese Limited;
- (b) on the Record Date did not hold their TTG shares as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) – that is, they held their TTG shares broadly on capital account; and
- (c) are not subject to the taxation of financial arrangements (TOFA) rules in Division 230 in relation to gains and losses on their TTG shares.

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

4. In this Ruling, a person belonging to this class of entities is referred to as a 'TTG shareholder'.

Qualifications

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

6. 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 30 of this Ruling.

7. 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 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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 for this ruling.

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

TTG

10. TTG is an Australian resident company, incorporated on 19 March 2009. Its shares are not listed on any securities exchange. TTG is the head company of an income tax consolidated group for the purposes of Part 3-90.

11. TTG owns shares in companies that operate a transport business and a property business.

12. Immediately before the demerger, TTG had 578,670 ordinary shares on issue.

13. There were no other ownership interests (as defined in subsection 125-60(1)) in TTG just before the demerger.

McAleese Limited

14. McAleese Limited is an Australian resident company whose ordinary shares are listed on the Australian Securities Exchange (ASX). McAleese Limited is the head company of an income tax consolidated group for the purposes of Part 3-90.

15. McAleese Limited operates, through wholly owned subsidiaries, a transport business.

16. Immediately before the demerger, McAleese Limited had 1,630,232 fully paid ordinary shares on issue. TTG owned 578,670 of those shares.

17. There were no other ownership interests (as defined in subsection 125-60(1)) in McAleese Limited just before the demerger.

Pre-demerger transactions

18. On 27 October 2013, TTG's shareholders approved a restructure through the demerger of all of TTG's shares in McAleese Limited.

19. Prior to the demerger, McAleese Limited undertook certain transactions, including:

- convertible notes issued by McAleese Limited were converted into ordinary shares of McAleese Limited;
- an Initial Public Offering (IPO) was announced;

- McAleese Limited was admitted to the official list of the ASX and its shares commenced trading on a conditional and deferred settlement basis;
- McAleese Limited issued 19,081 ordinary shares at \$209.63 per share to raise a total of \$4,000,045.44.

The demerger of McAleese Limited shares

20. To effect the demerger by TTG of McAleese Limited shares, the shareholders of TTG voted at a special general meeting on 28 November 2013 to approve an ordinary resolution under section 256C of the *Corporations Act 2001* to reduce the share capital of TTG by \$1,379,065 (the capital reduction amount). This amount was debited to the share capital account of TTG. The capital reduction amount equates to \$2.38 per TTG ordinary share.

21. The market value of the shares in McAleese Limited demerged by TTG exceeded the capital reduction amount.

22. The capital reduction amount was satisfied by an *in specie* distribution to the shareholders of TTG of 552,831 ordinary shares in McAleese Limited held by TTG.

23. TTG implemented the demerger by distributing the relevant McAleese Limited shares to the shareholders of TTG on 28 November 2013. The shareholders of TTG received 0.9553 McAleese Limited shares for every 1 TTG share they owned at the Record Date for the demerger (28 November 2013). As a result of the demerger, the shareholders of TTG will own shares in both TTG and McAleese Limited.

Reasons for the demerger

24. TTG have advised that the key drivers for the demerger were:

- To separate the two businesses and thereby reduce the complexities and competing priorities to improve the business efficiency of both the property and transport businesses;
- To ensure TTG focuses purely on the continued growth of the separate and distinct property business without the need to consider the transport business;
- To enable the property business and the transport business to operate discreetly and independently, leading to more focussed decision making by expanding the separate boards of directors to analyse separate results and proposals without considering the requirements of the other business;
- To align the allocation of management to the separate businesses to ensure a more focused approach to each business and to eliminate instances where management have conflicting priorities;

- To provide improved financing opportunities to the property business and the transport business as financial institutions rate less complex structures better in terms of risks thus obtaining more favourable terms from financiers;
- To raise capital in TTG to pursue property initiatives without the directors needing to consider any fiduciary duties in regard to the transport business;
- To provide flexibility to each business in relation to any potential future acquisitions, joint ventures and mergers; and
- To facilitate McAleese Limited, as a listed company, maintaining the spread requirements of the ASX Listing Rules.

Accounting for the distribution to effect the demerger

25. TTG accounted for the distribution that effected the demerger by debiting its share capital account by the capital reduction amount of \$1,379,065.

26. The difference between the market value, at the time of the demerger, of the shares in McAleese Limited that were distributed and the capital reduction amount was debited by TTG to the Profit and Loss account in accordance with AASB Interpretation 17 (FP) – Distributions of Non-cash Assets to Owners.

Other matters

27. None of the TTG shareholders acquired their shares in TTG before 20 September 1985.

28. TTG has confirmed that no amounts have been transferred to its share capital account (as defined in section 975-300) from any of its other accounts, and accordingly its share capital account is not tainted (within the meaning of Division 197).

29. Just after the demerger, at least 50% of the market value of the CGT assets owned by McAleese Limited and its demerger subsidiaries (if any) were used in carrying on a business by those entities.

30. TTG will not elect under subsection 44(2) of the ITAA 1936 that subsections 44(3) and (4) of the ITAA 1936 will not apply to the demerger dividend.

Ruling

CGT consequences

CGT event G1

31. CGT event G1 happened in relation to each TTG ordinary share owned by a TTG shareholder at the time TTG made the payment of the capital reduction amount (satisfied by the *in specie* distribution of McAleese Limited shares) (section 104-135).

Capital gain

32. TTG shareholders will make a capital gain from CGT event G1 happening if the capital reduction amount (\$2.38 per TTG ordinary share) exceeds the cost base of the TTG ordinary share. The capital gain is equal to the amount of the excess. No capital loss can be made from CGT event G1 (subsection 104-135(3)).

Demerger roll-over

33. A demerger, as defined under section 125-70, happened to the TTG demerger group (which included TTG and McAleese Limited) under the scheme.

34. A TTG shareholder can choose demerger roll-over under subsection 125-55(1) for their TTG ordinary shares.

Consequences of choosing demerger roll-over

35. A TTG shareholder who chooses demerger roll-over will disregard any capital gain made when CGT event G1 happened in relation to each of their TTG ordinary shares under the demerger (subsection 125-80(1)).

36. If a TTG shareholder chooses demerger roll-over, they must also recalculate the cost base and reduced cost base of their TTG ordinary shares and calculate the cost base and reduced cost base of their new McAleese Limited shares.

37. The first element of the cost base and reduced cost base of each TTG share and corresponding McAleese Limited share received under the demerger is worked out as follows:

- total the cost bases of the TTG ordinary shares (just before the demerger); and
- apportion that sum over the TTG shares and corresponding new McAleese Limited shares received under the demerger.

38. The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the TTG shares and McAleese Limited shares, or a reasonable

approximation of those market values (subsections 125-80(2) and 125-80(3)).

39. For the purposes of determining the cost base and reduced cost base of TTG ordinary shares and McAleese Limited ordinary shares under subsections 125-80(2) and (3), the Commissioner accepts that a reasonable approximation of the market values (just after the demerger) will be provided by:

- the net asset value of TTG just after the demerger divided by the number of its ordinary shares on issue;
- the volume weighted average price of McAleese Limited ordinary shares as traded on the ASX over the five trading days after the date of the demerger (being the date on which TTG distributed the relevant shares it owned in McAleese Limited to the TTG shareholders).

Note: Shareholders will be advised of these prices by TTG and McAleese Limited after the date of the demerger.

TTG shareholders who do not choose demerger roll-over

40. A TTG shareholder who does not choose demerger roll-over will not disregard any capital gain made when CGT event G1 happened in relation to a TTG ordinary share under the demerger.

41. The first element of the cost base and reduced cost base of each TTG ordinary share and corresponding McAleese Limited share is calculated as described in paragraphs 37 to 39 of this Ruling (subsections 125-85(1) and (2)).

Acquisition date of the McAleese Limited shares for the purpose of making a discount capital gain

42. For the purpose of determining eligibility to make a discount capital gain, a McAleese Limited share received by a TTG shareholder will be taken to have been acquired on the date the shareholder acquired, for CGT purposes, the corresponding TTG ordinary shares (item 2 of the table in subsection 115-30(1)). This will be the case whether or not the shareholder chooses demerger roll-over.

Dividend consequences

Distribution debited to the share capital account is not a dividend for income tax purposes

43. To the extent that the *in specie* distribution to TTG shareholders of McAleese Limited shares under the scheme is debited to the share capital account of TTG, it is not a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

Balance of the distribution is a demerger dividend

44. To the extent that the balance of the *in specie* distribution to TTG shareholders of McAleese Limited shares is a dividend, it will be a demerger dividend (subsection 6(1) of the ITAA 1936).

45. TTG shareholders received a demerger dividend consisting of a pro rata share of the excess of the money value of the *in specie* distribution of McAleese Limited shares over the amount debited to the share capital account of TTG (see Taxation Ruling TR 2003/8).

46. The demerger dividend is neither assessable income nor exempt income of the TTG shareholders (subsections 44(3) and 44(4) of the ITAA 1936).

The application of sections 45B, 45BA and 45C of the ITAA 1936

47. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole, or any part, of the demerger benefit provided to TTG shareholders under the demerger of McAleese Limited shares.

48. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital benefit provided to TTG shareholders under the demerger of McAleese Limited shares.

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.*

49. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

The demerger of McAleese Limited shares

50. The demerger roll-over provisions in Division 125 contain a number of conditions for eligibility to choose roll-over. The main conditions that are relevant are:

- (a) a person owns a share in a company, or a unit or other interest in a trust (the original interest);
- (b) the company or trust is the head entity of a demerger group;
- (c) a demerger happens to the demerger group; and
- (d) under the demerger, a CGT event happens to the original interest and the person acquires a new or replacement interest in the demerged entity and nothing else.

51. Under the scheme, the conditions for choosing demerger roll-over under Division 125 of the ITAA 1997 were satisfied in respect of the demerger of McAleese Limited shares. As a consequence, the demerger concessions in Division 125 of the ITAA 1997, and in subsections 44(3) and (4) of the ITAA 1936, are available to the TTG shareholders in respect of the demerger of McAleese Limited shares.

Distribution debited to the share capital account is not a dividend for income tax purposes

52. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends, as defined in subsection 6(1) of the ITAA 1936, paid to the shareholders 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).

53. The term 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) excludes a distribution from the meaning of 'dividend' if the amount of a distribution is debited against an amount standing to the credit of the company's share capital account.

54. The term 'share capital account' is defined in section 975-300 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

55. Subsection 975-300(3) states that an account is not a share capital account if it is tainted.

56. The *in specie* distribution to TTG shareholders of McAleese Limited shares has been recorded as a debit to TTG's share capital account of \$1,379,065. As the share capital account of TTG is not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies. Accordingly the *in specie* distribution to TTG shareholders of McAleese Limited shares, being debited to the share capital account, is not a 'dividend' as defined in subsection 6(1) of the ITAA 1936. Therefore, it will not be included in the assessable income of TTG shareholders under subsection 44(1) of the ITAA 1936.

Balance of the distribution is a demerger dividend

57. TTG shareholders also received a dividend to the extent that the market value of the McAleese Limited shares distributed under the demerger exceeded the amount debited against the share capital account (see Taxation Ruling TR 2003/8).

58. This dividend is not assessable income or exempt income (subsections 44(3) and 44(4) of the ITAA 1936) if:

- the dividend is a 'demerger dividend' (as defined in subsection 6(1) of the ITAA 1936);
- TTG (as the head entity of the demerger group) does not elect that subsections 44(3) and 44(4) of the ITAA 1936 will not apply to the demerger dividend (subsection 44(2) of the ITAA 1936); and
- subsection 44(5) of the ITAA 1936 is satisfied.

59. As each of the conditions in paragraph 58 of this Ruling are satisfied, the demerger dividend received by TTG shareholders will not be assessable income or exempt income (subsection 44(4) of the ITAA 1936).

The application of sections 45B, 45BA and 45C of the ITAA 1936

60. Section 45B of the ITAA 1936 is an anti-avoidance provision which, if applicable, allows the Commissioner to make a determination that all or part of a demerger allocation or return of capital to be received by shareholders is to be treated as an unfranked dividend.

61. 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:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- (b) under the scheme a taxpayer, who may or may not be the person provided with the demerger benefit or the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- (c) 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).

62. The arrangement involving the *in specie* distribution to TTG shareholders of McAleese Limited shares constitutes a scheme for the purposes of section 45B of the ITAA 1936.

63. The phrase 'provided with a demerger benefit' is defined in subsection 45B(4) of the ITAA 1936 and includes a company providing a person with ownership interests in that or another company. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936 and includes the provision of ownership interests in a company to a person. The *in specie* distribution of McAleese Limited shares means that TTG shareholders will be taken to have been provided with a demerger benefit, and provided with a capital benefit.

64. 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 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 (TTG shareholders) to obtain a tax benefit (as defined in subsection 45B(9) of the ITAA 1936). On the basis of the information surrounding the *in specie* distribution of McAleese Limited shares as described in the Class Ruling application and further information, the Commissioner has formed the view that the demerger benefits and capital benefits provided to the TTG shareholders have not been made for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit.

65. Accordingly, the Commissioner will not make a determination:

- under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole, or any part, of the demerger benefit provided to TTG shareholders under the demerger of McAleese Limited shares;
- under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital benefit provided to TTG shareholders under the demerger of McAleese Limited shares.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2003/8; TR 2006/10

Subject references:

- capital benefit
- capital gains
- capital proceeds
- CGT event G1-G3 – shares
- cost base adjustments
- demerger
- demerger dividend
- return of capital on shares

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(1)
- ITAA 1936 44(2)
- ITAA 1936 44(3)
- ITAA 1936 44(4)
- ITAA 1936 44(5)
- ITAA 1936 45B
- ITAA 1936 45B(2)(a)
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- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)(a)
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- ITAA 1936 45B(8)
- ITAA 1936 45B(9)
- ITAA 1936 45BA
- ITAA 1936 45C
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 115-30(1)
- ITAA 1997 Div 125
- ITAA 1997 125-55(1)
- ITAA 1997 125-60(1)
- ITAA 1997 125-65
- ITAA 1997 125-70
- ITAA 1997 125-70(2)
- ITAA 1997 125-75
- ITAA 1997 125-75(1)
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- ITAA 1997 125-80(1)
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- ITAA 1997 125-80(3)
- ITAA 1997 Div 197
- ITAA 1997 Pt 3-90
- ITAA 1997 960-195
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- TAA 1953
- Corporation Act 2001 256C
- Copyright Act 1968

ATO references

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