



CR 2003/107 - Income tax: AMP Limited: Demerger, Capital Adjustment and Scheme of Arrangement

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Class Ruling

Income tax: AMP Limited: Demerger, Capital Adjustment and Scheme of Arrangement

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a **Ruling** is a 'public ruling' and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- Subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - Subsection 6(4) of the ITAA 1936;
 - Section 45A of the ITAA 1936;
 - Section 45B of the ITAA 1936;
 - Section 45C of the ITAA 1936; and
 - Division 125 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of persons

3. The class of persons to whom this Ruling applies are persons who hold shares in AMP Limited and who are registered on the AMP Share Register on the Record Date, being the date and time for determining entitlement to participate in the Demerger identified below in the Arrangement part of this ruling.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 9-20 is carried out in accordance with the details of the arrangement provided in this Ruling.
6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out, then:
 - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - (b) this Ruling may be withdrawn or modified.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 2004 unless and until it is withdrawn (see paragraph 9). However, this 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 this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 30 June 2004. The Ruling continues to apply, in respect of the tax

law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

10. The arrangement that is the subject of this Ruling is described below. This description is based on a number of documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- (a) The application letter from PricewaterhouseCoopers dated 30 July 2003 requesting a Class Ruling on behalf of AMP pursuant to Part IVAAA of the *Tax Administration Act 1953*.
- (b) Correspondence dated 11 September 2003 from PricewaterhouseCoopers in response to a request for further information from the Australian Taxation Office (ATO). The following documents accompanied that response and form part of it:
 - The Draft Explanatory Memorandum (EM) dated 5 September 2003;
 - a summary of the proposed demerger mechanics;
 - half year results of the AMP group;
 - a copy of the Reset Preferred Securities (RPS) prospectus.
- (c) Correspondence dated 23 September 2003 from PricewaterhouseCoopers which included an updated EM dated 19 September 2003.
- (d) The EM as sent to all AMP Shareholders.

11. The EM mentioned above is a document that was distributed to AMP Shareholders in late October 2003. Its purpose is to explain the essential steps of the proposed Demerger ('the Demerger') and contains further information that is meant to assist shareholders in making up their mind as to whether they should approve the Demerger of AMP as recommended by the Board of Directors.

12. The Board of Directors, after a strategic review of AMP's performance, announced on 1 May 2003 that in the opinion of the Board it is in the best interests of AMP to be split into two separate businesses: the Australian and New Zealand businesses (AMP Group) and the United Kingdom businesses (HHG Group).

13. The proposal broadly involves separating the AMP's interest in the United Kingdom businesses from the other businesses to form two independent listed companies. The result of the Demerger is that AMP shareholders will hold scrip in each of the demerged groups:

- AMP Limited (AMP) which will continue to own AMP's Australian and New Zealand businesses (the AMP Group); and
- HHG PLC (HHG) which will own AMP's United Kingdom businesses (the HHG Group).

14. Implementation of the Demerger depends on the outcome of a Scheme Meeting and a General Meeting of AMP Shareholders, both meetings to be held on 9 December 2003. It is also subject to a number of other conditions, including court approval.

The internal restructure

15. To facilitate the separation of the AMP Group and the HHG Group, a number of internal restructuring transactions have been or will be implemented on or before the Demerger Date.

16. At the same time that the Demerger was announced, AMP announced a \$1.5 billion institutional capital raising and Share Purchase Plan to facilitate the Demerger. The capital raised of \$1.72 billion will be used to reduce the level of external debt owed by the United Kingdom businesses, repay internal debt and to establish both AMP Group and HHG Group on a stand alone basis acceptable to the various regulatory authorities.

17. AMP Group will assume and repay approximately £1,041 million of corporate external debt currently held or issued by AMP's United Kingdom companies. The debt is currently owed by AMP (UK) Finance Services Plc; the proceeds of which were on-lent to HHG. The AMP Group will assume the debt and acquire the shares in AMP (UK) Finance Services Plc from the HHG Group. The AMP Group will capitalise the HHG Group, the proceeds of which will be used by HHG Group to repay its debts to AMP (UK) Finance Services Plc prior to the Demerger Date.

18. An indirect wholly owned subsidiary of AMP, AMP Financial Services Holdings Limited, will subscribe approximately £191 million for further shares in HHG. Part of this subscribed capital will be used by HHG to recapitalise AMP (UK) Services Limited.

19. AMP will make two further subscriptions for HHG Shares totalling £116 million to enable HHG to purchase certain companies from AMP Capital Investors (an AMP Group entity) and provide funds to another HHG Group entity, AMP Invest Plc, so it can repay intercompany debt. However, HHG will make payments back to AMP totalling £116 million, resulting in no change to AMP's overall cash resources position.

20. HHG is expected to acquire a controlling interest (between 50% and 60%) in AMP Invest Plc (the parent company of Henderson). This will enable HHG to acquire majority ownership and voting control of AMP Invest Plc and enable HHG's share of dividends from AMP Invest Plc to be distributed to HHG.

21. AMP Group entities will be released from various guarantees and other financial support that they have provided to the HHG Group entities.

22. After the Demerger, AMP will retain a shareholding of approximately 15% in HHG to compensate AMP, in part, for the capital it is providing to HHG. Certain restrictions will apply to AMP's ability to sell this shareholding.

The capital adjustment and scheme of arrangement

23. The Demerger will be effected by way of a Capital Adjustment and Scheme of Arrangement. Both the Capital Adjustment and Scheme of Arrangement are conditional upon each other.

24. The Capital Adjustment involves:

- The cancellation of a certain number of AMP Shares held by each of the AMP Shareholders calculated in accordance with a formula; and
- A share split of the remaining AMP Shares held by each AMP Shareholder so that each AMP Shareholder will hold the same number of AMP Shares they held before the cancellation.

25. Under the Scheme of Arrangement, each AMP Shareholder will be required to apply their Cancellation Entitlement (the capital distribution made to AMP Shareholders in consideration for the cancellation of their shares in AMP) for the subscription of HHG Shares equal in number to the original shares cancelled.

26. Certain ineligible overseas shareholders will not receive HHG Shares under the Scheme of Arrangement, rather the HHG Shares they would otherwise have received will be sold on market and the proceeds delivered to them.

27. AMP will debit its share capital account in respect of the entire capital distribution provided to shareholders.

28. If carried out, immediately after the Demerger, existing AMP shareholders (except certain ineligible overseas shareholders) will hold the same broad economic interests in AMP's assets as they do currently, but these will be held in two separately listed companies. They will hold the same number of shares in each of AMP and HHG as they currently hold in existing AMP.

Related matters

29. AMP will undertake a rights offer of new AMP Shares as part of the Demerger. The purpose of the AMP Rights Offer is to fund the cash redemption of the RPS after the Demerger becomes effective. The proceeds to be raised are expected to be approximately \$1.2 billion.

30. If the Demerger proceeds, it is proposed that all of the 11.5 million outstanding RPS will be redeemed for cash using the proceeds of the AMP Rights Offer.

31. HHG will be listed on the Australian Stock Exchange (ASX) and the London Stock Exchange (LSE). HHG intends to undertake an issue of new HHG Shares prior to 30 June 2004 to raise a net amount of at least £100 million to complete the recapitalisation of HHG. If the proposed equity raising does not occur there are arrangements for a third party investment bank to provide funds in the form of Convertible Loan Notes.

32. HHG intends to operate a sale facility, which will allow individual HHG Shareholders with holdings of less than a predetermined level to sell their entire HHG holding.

33. No transfers have taken place, or will take place under the Demerger, to taint the AMP share capital account as defined by subsection 160ARDM(1) of the ITAA 1936.

Ruling

34. The arrangement will not be a 'demerger' as defined for the purposes of Division 125 of the ITAA 1997 and therefore does not qualify for the taxation relief provided for under that Division.

35. Under the law in force at the date of this Ruling the capital distribution made to AMP Shareholders in consideration for the cancellation of their AMP Shares will not constitute a 'dividend' for the purposes of the ITAA 1936 or the ITAA 1997.

36. The Commissioner will not make a determination under either section 45A or 45B of the ITAA 1936 that section 45C of the ITAA 1936 will apply to deem any part of the capital distribution made to AMP Shareholders to be an unfranked dividend paid out of profits.

37. **Note:** Given the non-application of the above provisions, the arrangement will generally have the effect such that AMP shareholders will be subject to the tax provisions ordinarily applying to the disposal, cancellation and acquisition of shares.

Explanation

[All legislative references are to the Income Tax Assessment Act 1936 unless stated otherwise.]

Division 125 of the ITAA 1997

38. Division 125 was enacted to facilitate the demerging of entities by providing for capital gains tax roll-over relief and thus ensuring that capital gains tax considerations are not an impediment to restructuring a business. However the taxation relief provided for under that Division is only available if certain requirements are met (section 125-55 of the ITAA 1997). These requirements are not met in this case.

39. In particular, the proposed Demerger arrangement will not qualify as a 'demerger' for the purposes of Division 125. AMP is not a 'head entity' for the purposes of the demerger rules as another member of the AMP Group owns shares in AMP (subsection 125-65(3) of the ITAA 1997). Accordingly, the roll-over relief provided for in section 125-55 is not available.

Distribution is not a dividend

40. Broadly, section 44 of the ITAA 1936 requires a shareholder in a company to include in its assessable income any dividends paid to the shareholder by a company out of profits derived by the company from any source (if resident in Australia) or from an Australian source (if non-resident). In order for section 44 to have application, the amount paid must constitute a 'dividend' within the meaning of the ITAA 1936.

41. Subsection 6(1) of the ITAA 1936 defines a dividend to include:

- (a) any distribution made by a company to any of its shareholders, whether in money or other property; and

- (b) any amount credited by a company to any of its shareholders as shareholders.

42. However, paragraph (d) of the subsection 6(1) definition provides that a distribution does not constitute a dividend if the distribution is debited against the company's share capital account, provided subsection 6(4) does not apply.

43. Share capital account is defined in subsection 6(1) as having the meaning given by section 6D of the ITAA 1936. A share capital account is defined by subsection 6D(1) of the ITAA 1936 as an account which the company keeps of its share capital, or any other account created after 1 July 1998 where the first amount credited to the account was an amount of share capital.

44. Subsection 6D(3) states that an account (for 'dividend' definition purposes) is not a share capital account if it is tainted for the purposes of Division 7B of Part IIIAA of the ITAA 1936. An account, that would otherwise be a share capital account, is tainted for the purposes of Division 7B if an amount is transferred from another account except in the circumstances provided for by section 160ARDM of the ITAA 1936. AMP has confirmed that no transfers have taken place that would taint its share capital account.

45. However, this rule only applies to transfers before 1 July 2002; section 160AOAA of the ITAA 1936 states that (apart from certain transitional provisions) Part IIIAA does not apply to events that occur on or after that date.

46. Although the Government has expressed an intention to introduce laws dealing with the tainting of share capital accounts [Minister for Revenue and Assistant Treasurer's Press Release C104/02 of 27 September 2002], no such legislation had been enacted by Parliament as at the date of this Ruling.

47. Subject to any change in the law reflecting the Government's announcement, the capital proceeds paid to AMP Shareholders in consideration for the cancellation of their shares in AMP will be debited entirely against AMP's share capital account and therefore will not constitute a dividend pursuant to the exception in paragraph (d) in subsection 6(1).

Subsection 6(4)

48. Subsection 6(4) provides that paragraph (d) of the definition of dividend in subsection 6(1) as stated above does not apply if, under an arrangement, a company raises share capital from one person, credits its share capital account with the amount raised, and then makes a distribution to another person and debits its share capital account with the amount so distributed.

49. As noted earlier, after announcing the Demerger AMP raised \$1.72 billion through an institutional capital raising. These proceeds were credited to AMP's share capital account. Subsequently, AMP intends to debit to its share capital account the distribution it makes to AMP Shareholders in return for the cancellation of their AMP Shares. Thus, the circumstances of the Demerger raise the potential application of subsection 6(4).

50. However, in this case subsection 6(4) will not apply to deem the distribution debited to the share capital account as part of the Cancellation Adjustment to be a dividend for income tax purposes. The proceeds of the capital raising were used for a number of purposes, including to restructure debt and to establish both AMP and HHG Groups on a stand alone basis with appropriate credit ratings. There is nothing in the circumstances of this case to indicate that the capital raising was undertaken as part of an arrangement to return the subscribed funds to AMP Shareholders.

Section 45A

51. Section 45A is an anti-avoidance provision which, if it applies, allows the Commissioner to make a determination under section 45C that all or part of the capital distribution is treated as an unfranked dividend.

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

53. Although a 'capital benefit' as defined in paragraph 45A(3)(b) will be provided to AMP Shareholders, the capital distribution is to be effected by way of a share cancellation under which all shareholders will receive proportionately equal distributions of capital upon the cancellation of their AMP Shares, without any associated dividend payments and without any streaming of benefits to any particular shareholders or groups of shareholders. Accordingly, section 45A has no application to the capital distribution.

Section 45B

54. Section 45B is an anti-avoidance provision with the purpose of ensuring that relevant amounts are treated as dividends for tax purposes if:

- components of a demerger allocation as between capital and profit do not reflect the circumstances of a demerger; or
- certain payments, allocations and distributions are made in substitution for dividends.

55. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a demerger benefit or capital benefit by the company (paragraph 45B(2)(a));
- 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)); 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 a taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

56. As the Demerger does not qualify as a ‘demerger’ for the purposes of Division 125 of the ITAA 1997, there is no ‘demerger benefit’ being provided as that term is defined in subsection 45B(4) of the ITAA 1936. However, the conditions of paragraphs 45B(2)(a) and (b) are still satisfied, as the capital distribution will provide shareholders with a capital benefit and the shareholders will generally pay less tax on the returned capital than they would on an equivalent amount of dividend.

57. In this case, whilst the conditions of paragraphs 45B(2)(a) and (b) are met, the requisite purpose of enabling the AMP Shareholders to obtain a tax benefit (by way of a capital benefit) is not present. In other words, having regard to the relevant circumstances of the scheme, set out in subsection 45B(8), it would not be concluded that any of the parties to the Demerger entered into or carried out the scheme to obtain a tax benefit, in the form of a capital benefit.

58. Under the Demerger, AMP will effectively dispose of its United Kingdom businesses and therefore the assets employed in those businesses. The capital distribution cannot be said to be attributable to the profits (realised or unrealised) of AMP or its associates (paragraph 45B(8)(a)).

59. This is because, first, the distribution of capital is attributable entirely to the disposal by AMP of a significant part of its business, being the United Kingdom businesses, and not in any part to profits it

may have derived from its other interests or businesses. Second, the distribution is demonstrably not attributable to profits (realised or unrealised) derived in connection with the United Kingdom businesses. The second conclusion follows from the fact that AMP has made large losses in connection with its investment in the United Kingdom businesses such that its capital investment in those businesses has been written down, resulting in the consolidated distributable earnings of AMP Group as being negative. Accordingly, the capital distribution could not reasonably be regarded as other than the share capital invested in the United Kingdom businesses.

60. In addition, the internal restructure involves a considerable injection of capital by the AMP Group into the HHG Group to provide the HHG Group with the financial strength to exist independently from AMP. This was of essential importance to the United Kingdom regulator (FSA). Furthermore, the nature of the HHG Group business was such that HHG could not raise any substantial interest-bearing debt. The capital distribution to AMP Shareholders is not inconsistent with these circumstances.

61. Also, the pattern of dividend distributions to preference and ordinary shareholders does not indicate that the capital distribution is being paid in substitution for a dividend (paragraph 45B(8)(b)). Furthermore, as neither AMP nor the Commissioner is aware of the AMP Shareholder's tax attributes the relevant circumstances listed from paragraphs 45B(8)(c) to (g) do not incline for or against a conclusion as to requisite purpose. However, the fact that there is a reduction in each AMP Shareholder's interest in AMP also tends against the distribution of capital being in substitution for a dividend (paragraph 45B(8)(h)).

62. The form and substance of the arrangement coincide (paragraph 45B(8)(k)). In substance, the Demerger involves the separation of a substantial part of AMP's business and, therefore, the disposal of the assets employed in that business. The amount returned to AMP Shareholders represents the share capital invested in those assets and appropriately reflects the share capital of AMP devoted to the support and running of the HHG Group entities.

63. Accordingly, as section 45B will not apply to the capital distribution the Commissioner will not make a determination under section 45B that section 45C applies to deem the whole, or part, of the capital benefit provided to AMP Shareholders to be an unfranked dividend paid out of profits.

Detailed contents list

64. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

3 December 2003

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| Previous draft: | - ITAA 1936 44 |
| Not previously issued as a draft | - ITAA 1936 45A |
| | - ITAA 1936 45A(3)(b) |
| | - ITAA 1936 45B |
| Related Rulings/Determinations: | - ITAA 1936 45B(2)(a) |
| CR 2001/1; TR 92/1; TR 92/20; | - ITAA 1936 45B(2)(b) |
| TR 97/16 | - ITAA 1936 45B(2)(c) |
| | - ITAA 1936 45B(4) |
| Subject references: | - ITAA 1936 45B(8) |
| - Demerger | - ITAA 1936 45B(8)(a) |
| | - ITAA 1936 45B(8)(b) |
| Legislative references: | - ITAA 1936 45B(8)(c) |
| - ITAA 1936 6(1) | - ITAA 1936 45B(8)(d) |
| - ITAA 1936 6(1)(d) | - ITAA 1936 45B(8)(e) |
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| - ITAA 1936 45C | - ITAA 1997 Div 125 |
| - ITAA 1936 Div 7B | - ITAA 1997 125-55 |
| - ITAA 1936 Div 7B Pt IIIAA | - ITAA 1997 125-65(3) |
| - ITAA 1936 Div 125 | - Copyright Act 1968 |
| - ITAA 1936 160AOAA | - TAA 1953 Pt IVAAA |
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ATO references

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