


CR 2007/91 - Income tax: distribution of APA securities by Alinta Limited

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Class Ruling

Income tax: distribution of APA securities by Alinta Limited

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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, 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 provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

2. This Ruling gives certainty to shareholders in respect of the issues addressed in the Ruling section concerning the distribution of APA securities by Alinta Limited (Alinta). The Scheme of Arrangement in respect of the acquisition of Alinta by the Consortium (see paragraph 20 of this Ruling) does not form part of this Ruling.

Relevant provision(s)

3. The relevant provisions dealt with in this Ruling are:
- section 45B of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 177EA of the ITAA 1936; and
 - Division 1A of former Part IIIA of the ITAA 1936.

All subsequent legislative references are to the ITAA 1936 unless otherwise indicated.

Class of entities

4. The class of entities to which this Ruling applies is the holders of ordinary shares in Alinta who received an in specie distribution of APA securities pursuant to the arrangement described in the Scheme part of this Ruling.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme as 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 14 to 27 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.

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Date of effect

9. This Ruling applies for the income tax year for a participating shareholder in which that shareholder receives the distribution of APA securities. For participating shareholders that do not have a substituted accounting period, this will be the income tax year ending 30 June 2008. However, the Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling.

10. 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.

11. 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)).

12. 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.

13. 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

14. The following description of the scheme is based on a number of documents provided to the Commissioner.

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

15. Alinta was an Australian resident company listed on the Australian Securities Exchange (ASX). It was one of the largest listed energy infrastructure groups in Australia having operations and investments in Australia and New Zealand. As at 31 August 2007 only 2% of Alinta's total shareholders (who collectively owned 0.01% of Alinta's total shares) were non-residents of Australia.

APA securities

16. Alinta held 150,787,089 APA securities. Each APA security comprises one unit in the Australian Pipeline Trust (APT) and one unit in the APT Investment Trust (collectively the APA Group). Alinta's holdings, representing an interest of approximately 35% in the APA Group, were acquired as a consequence of its merger with the Australian Gas Light Company (the AGL Transaction), a further on market acquisition and through Alinta's participation in a renounceable rights issue.

17. The Australian Competition and Consumer Commission (ACCC) identified a number of concerns arising in the context of the interest Alinta acquired in the APA Group following the AGL Transaction. Pursuant to section 87B of the *Trade Practices Act 1974*, the ACCC had accepted Alinta's final undertaking which permitted Alinta to retain its interest in the APA Securities, providing APT ceased holding certain assets within a prescribed timeframe.

18. Alinta's on market acquisition was subject to challenge with a subsequent declaration being made by the Takeover Review Panel (TRP) that the on market acquisition of the APA securities was unacceptable. An order requiring those securities to be divested was made.

19. Alinta challenged the TRP's declaration and orders. On appeal, the Full Federal Court ruled that, inter alia, the entry into the Merger Implementation Agreement with AGL, and the subsequent on market purchase of a further stake in APA, breached section 606 of the *Corporations Act 2001*. On 29 June 2007 Alinta and APA announced that a negotiated settlement had been reached involving the distribution of the APA securities to Alinta shareholders under a Scheme of Arrangement.

Alinta takeover proposals

20. Babcock & Brown and three of its managed infrastructure funds, Babcock & Brown Infrastructure Limited, Babcock & Brown Power Limited and Babcock & Brown Wind Partners Limited, together with Singapore Power International Pte Ltd (the Consortium), proposed acquiring Alinta (the Share Scheme).

21. The offer from the Consortium to Alinta shareholders involved the provision of a combination of cash together with securities and exchangeable preference shares in the Babcock and Brown infrastructure funds. Shareholders could elect, via alternative options, to maximise their cash, securities or preference shares component. Small shareholders (those who held 1,000 Alinta ordinary shares or less) could elect a Cash Out Alternative under which all consideration was to be received in cash. The amount received was dependent upon the price that securities were sold for on behalf of the shareholder.

22. The Alinta shares were transferred to ES&L Pty Ltd (a subsidiary of Babcock & Brown Infrastructure Limited – one of the Consortium members) on the Implementation Date of the Scheme of Arrangement, being 31 August 2007.

In specie distribution of the APA securities

23. Against the background of the undertaking, the unfavourable Full Federal Court decision and the proposed takeover, Alinta decided to transfer ownership of the APA securities to its shareholders by way of an in specie distribution (the APA distribution). This would entail the transfer to participating shareholders of 0.301 APA securities for each Alinta share held. Where any participating shareholder was to receive a fraction of an APA security, that fraction would be replaced with cash (based on the value of APA securities on the Implementation Date).

24. On 15 August 2007 a General Meeting of shareholders was held which passed the resolution approving the capital reduction.

25. The APA distribution was made in conjunction with, rather than as part of, the Share Scheme consideration and comprised a dividend component and a capital reduction component. The capital reduction was an equal capital reduction under section 256B(2) of the *Corporations Act 2001*.

26. The APA distribution was made to each Alinta shareholder who held their shares as at the record date of 23 August 2007. It was satisfied by a fully franked dividend of \$0.93 and a capital return of \$0.2034 per Alinta share. The capital return component was debited to the untainted share capital account of Alinta.

27. If the Consortium's proposal had been rejected, the distribution of APA securities was likely to have occurred in any event as a consequence of the aforementioned undertaking and Full Federal Court decision.

Ruling**Qualified persons**

28. For the purposes of Division 1A of former Part IIIAA, participating shareholders will be considered to satisfy the holding period rule under section 160APHO and therefore be qualified persons (as long as the related payments rule is also met) in relation to the dividend component received if:

- their Alinta shares were acquired on or before 16 July 2007; and
- during the period when the shares or interest in the shares were held the shareholders had sufficient risks of loss or opportunities for gain in respect of the shares or interest in the shares (as defined in section 160APHM) for a continuous period of at least 45 days.

The anti-avoidance provisions

29. The Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the proposed return of capital.

30. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits received in relation to the dividend component of the APA distribution made to participating shareholders.

Commissioner of Taxation

3 October 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.***

Qualified persons

31. Paragraphs 207-145(1)(a) and 207-145(1)(f) of the *Income Tax Assessment Act 1997* provide that in relation to a franked distribution made, only a 'qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the *Income Tax Assessment Act 1936*' is entitled to a franking credit or tax offset.

32. Broadly speaking, to be a 'qualified person' in relation to the dividend component of the APA distribution, a participating shareholder must satisfy both the holding period rule and the related payments rule.

33. In general terms, a shareholder will not satisfy the related payments rule if the shareholder, or an associate of the shareholder, is under an obligation to make, or makes, a payment in respect of the dividend which passes the benefit of the dividend to another person.

34. The holding period rule requires shareholders to hold the shares or the interest in the shares on which the dividend is paid 'at risk' for a continuous period of at least 45 days. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk of loss or opportunities for gain in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

35. Under former subsection 160APHM(2), a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or an interest in shares if the 'net position' of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares.

36. There are 45 clear days between 16 July 2007 and the Implementation Date of 31 August 2007. Therefore a shareholder who acquired Alinta shares on or before 16 July 2007 satisfies the holding period rule as long as those shares were held at risk for at least 45 continuous days. A shareholder who acquired Alinta shares after 16 July 2007 is not a qualified person in relation to the dividend component of the APA distribution and may not qualify for the franking credits attached to that component.

The anti-avoidance provisions

Section 45B

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

38. The purpose of section 45B 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));
- 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)); 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)).

39. The arrangement involving the return of capital by Alinta constitutes a scheme for the purposes of section 45B.

40. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) and includes a distribution to a person of share capital. As the return of capital was recorded by means of a debit to Alinta's untainted share capital account, participating shareholders will be taken to have been provided with a capital benefit as defined in paragraph 45B(5)(b).

41. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the relevant circumstances (as outlined in subsection 45B(8)) 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 (participating shareholders) to obtain a tax benefit. On the basis of the information surrounding the return of capital as described in the Ruling application and further information, the Commissioner has formed the view that the capital benefits provided to the participating shareholders have not been made for a more than incidental purpose of obtaining a tax benefit.

42. Accordingly, the Commissioner will not make a determination pursuant to subsection 45B(3) that section 45C applies to the return of capital by Alinta.

Section 177EA

43. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares where a franked distribution is paid or payable in respect of the shares or an interest in shares.

44. Specifically, subsection 177EA(3) provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, a person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) 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 (whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

45. If section 177EA applies, the Commissioner may make a determination under subsection 177EA(5) that either a franking debit arises to the company in respect of each dividend paid to the relevant taxpayer or, in the alternative, that no franking credit benefit arises in respect of a dividend paid to the relevant taxpayer.

46. Alinta is a corporate tax entity. The sale of the ordinary shares in Alinta pursuant to a Scheme of Arrangement is a scheme for the disposition of membership interests.

47. In the present case, it is considered that the conditions of paragraphs 177EA(3)(a) to (d) are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(17)), it would be concluded that on the part of Alinta, its shareholders or any other relevant party, that there was a purpose of more than merely an incidental purpose of conferring a franking credit benefit under the scheme.

48. In arriving at a conclusion one must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17). The relevant circumstances listed there encompass a range of diverse matters which taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose. That is, that the delivery of the franking credit benefit is more than an incidental purpose of the scheme.

49. The relevant circumstances are that the disposition of the APA securities was made pursuant to a takeover offer made by the Consortium in addition to other legal and commercial requirements. The takeover of Alinta by way of a Scheme of Arrangement is one of the alternatives available under the *Corporations Act 2001* and which was voted upon by Alinta's shareholders. This particular Scheme of Arrangement, together with the legal and commercial reasons, is an ordinary commercial transaction. There is no intention evidenced in the scheme that the payment of the special dividend was to enable a particular shareholder or class of shareholders (current and future) to obtain imputation benefits.

50. Having regard to the relevant circumstances of the scheme, it cannot be concluded that Alinta or its shareholders entered into or carried out the scheme for the purpose of enabling the shareholders or any other relevant party to obtain a franking credit benefit.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Subject references:

- capital benefit
- dividend streaming
- return of share capital

Legislative references:

- ITAA 1936 45B
 - ITAA 1936 45B(2)(a)
 - ITAA 1936 45B(2)(b)
 - ITAA 1936 45B(2)(c)
 - ITAA 1936 45B(3)
 - ITAA 1936 45B(5)
 - ITAA 1936 45B(5)(b)
 - ITAA 1936 45B(8)
 - ITAA 1936 45C
 - ITAA 1936 160APHM
 - ITAA 1936 160APHM(2)
 - ITAA 1936 160APHO
 - ITAA 1936 177EA
 - ITAA 1936 177EA(3)
 - ITAA 1936 177EA(3)(a)
 - ITAA 1936 177EA(3)(b)
 - ITAA 1936 177EA(3)(c)
 - ITAA 1936 177EA(3)(d)
 - ITAA 1936 177EA(5)
 - ITAA 1936 177EA(5)(b)
 - ITAA 1936 177EA(17)
 - ITAA 1936 Div 1A of former Pt IIIAA
 - ITAA 1997 207-145(1)(a)
 - Copyright Act 1968
 - TAA 1953
 - TAA 1953 Sch 1 357-75(1)
 - Corporations Act 2001 256B(2)
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ATO references

NO: 2007/16532

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Entity specific matters ~~ franking of dividends - company matters