

CR 2016/81 - Income tax: Asciano Limited - Scheme of Arrangement and Special Dividend



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Class Ruling

Income tax: Asciano Limited – Scheme of Arrangement and Special Dividend

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

Relevant provisions

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

- Division 1A of former Part IIIAA of the *Income Tax Assessment Act 1936* (ITAA 1936)
- subparagraph 44(1)(a)(i) of the ITAA 1936
- section 177EA of the ITAA 1936
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 104-10 of the ITAA 1997
- section 116-20 of the ITAA 1997
- section 204-30 of the ITAA 1997
- section 207-20 of the ITAA 1997, and

- section 207-35 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the shareholders of Asciano Limited (Asciano) who:

- were residents of Australia (within the meaning of subsection 6(1) of the ITAA 1936)
- received the Special Dividend
- do not hold their shares in Asciano as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) – that is, the shareholders hold their shares in Asciano broadly on capital account
- disposed of their shares in Asciano to the Joint Consortium under the scheme of arrangement pursuant to Part 5.1 of the *Corporations Act 2001 (Cth)* (Corporations Act) between Asciano and its shareholders (Scheme of Arrangement) and received Scheme Consideration for that disposal, and
- were not subject to the taxation of financial arrangement rules in Division 230 on financial arrangements under the scheme.

(**Note:** Division 230 will generally not apply to the financial arrangements of individuals, unless they have made an election for those rules to apply to them.)

The class of entities described in the above paragraph is referred to in this Ruling as Asciano shareholders.

Qualifications

4. This Ruling does not consider the position of Asciano shareholders who enter into arrangements that materially reduce their risks in relation to their shareholdings such as put options or other arrangements nor does it consider the provisions which govern the availability of franked distributions which are received indirectly e.g. through trusts.

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 8 to 30 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

7. This Ruling applies from 1 July 2016 to 30 June 2017. The Ruling continues to apply after 30 June 2017 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

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

- application for Class Ruling dated 18 May 2016
- Scheme Implementation Deed dated 15 March 2016 entered into by Asciano and the 'Rail Consortium' (SID)
- Ports Share Purchase Agreement dated 15 March 2016 with the 'Ports Consortium' (PortCo SPA)
- Bulk & Automotive Port Services (BAPS) Share Purchase Agreement dated 15 March 2016 with the 'BAPS Consortium' (BAPS SPA)
- Asciano Limited Commitment Letter dated 17 August 2015 – \$500 million Bridge Facility
- Asciano Limited half year financial report to 31 December 2015
- special purpose financial statements prepared for Asciano Limited for the period 1 July 2015 to 31 May 2016, and
- further correspondence and information provided by the applicant.

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

Joint Consortium

9. The Joint Consortium includes:

- Qube Holdings Limited (Qube)
- Global Infrastructure Partners (GIP)
- Canada Pension Plan Investment Board (CPPIB), and
- CIC Capital Corporation (CIC Capital) (together the Qube Consortium) along with
- Brookfield Infrastructure Partners L.P. (and certain of its affiliates) (Brookfield)
- GIC Private Limited (and certain of its affiliates) (GIC)
- British Columbia Investment Management Corporation (bcIMC), and
- Qatar Investment Authority (QIA) (together, the Brookfield Consortium).

10. Qube is Australia's largest integrated provider of import and export logistics services with national operations that provide a broad range of services.

11. GIP is a global, independent infrastructure investor that invests in infrastructure assets in the energy, transport and water/waste sectors.

12. CPPIB is a professional investment management organisation that invests the funds not needed by the Canada Pension Plan to pay current benefits on behalf of 18 million contributors and beneficiaries. It invests in public equities, private equities, real estate, infrastructure and fixed income instruments.

13. CIC Capital, together with CIC International Co., Ltd (CIC), manages China Investment Corporation, a vehicle used to diversify China's foreign exchange holdings and seeks maximum returns for its shareholder with acceptable risk tolerances.

14. Brookfield owns and operates long life infrastructure assets.

15. GIC is a sovereign wealth fund based in Singapore. It is a private company wholly-owned by the Government of Singapore and invests in infrastructure assets, among other asset classes.

16. bcIMC is an investment manager based in Canada that is wholly-owned by the Government of the Province of British Columbia. bcIMC invests in infrastructure assets, among other asset classes, on behalf of public sector clients in British Columbia.

17. QIA is Qatar's sovereign wealth fund, specialising in domestic and foreign investment.

Scheme of Arrangement

18. Australian Logistics Acquisition Investments Pty Limited (BidCo) is indirectly owned by GIP (27%), CPPIB (33%), CIC (16%), GIC (12%) and bclMC (12%) (the Rail Consortium).

19. Pursuant to clause 4.4(a) of the SID the consideration of \$9.15 provided by BidCo in respect of each Asciano share was reduced by the cash amount of any Special Dividend paid. Asciano is permitted as part of the transaction to pay a fully franked dividend of up to \$0.90 per Asciano share.

20. Under the PortCo SPA Asciano sold its shares in an entity holding the Ports businesses to Patrick Terminals BidCo Pty Ltd (Patrick BidCo) (an entity owned jointly by the Ports Consortium).

21. Under the BAPS SPA Asciano sold its shares in an entity holding the BAPS businesses to BAPS BidCo Pty Ltd (BAPS BidCo) (an entity jointly owned by the BAPS Consortium).

22. Subsequent to the sale of the Ports and BAPS businesses, in accordance with the SID, BidCo acquired 100% of the issued capital of Asciano at \$9.15 cash per Asciano share (reduced by the cash value of any Special Dividend) (Scheme Consideration).

Special Dividend

23. On the Special Dividend Payment Date (11 August 2016) Asciano paid a dividend to its shareholders (the Special Dividend) of \$0.87 per share, as declared by the Board of Directors on 27 July 2016. The Special Dividend was fully franked.

24. The payment of the Special Dividend was conditional upon satisfaction of the conditions precedent to the Scheme of Arrangement and was payable at the discretion of the Asciano Board.

25. The Special Dividend was sourced entirely from Asciano's profit reserve brought forward from 30 June 2015 and current year profit for the period from 1 July 2015 to 31 May 2016 (which included dividends received from subsidiaries of the company in the six months to 31 December 2015) as disclosed in its special purpose financial statements for the period from 1 July 2015 to 31 May 2016. Asciano did not debit the Special Dividend totalling \$848 million against its share capital account.

26. The Special Dividend of \$0.87 per Asciano share was funded by:

- existing bank facilities
- an underwritten bridge facility of \$500 million, and
- existing cash reserves of Asciano.

27. The underwritten bridge facility is a facility which Asciano will access based only on its existing financial capacity. The facility has no recourse to, and is not based on any commitment of, any of the entities owning BidCo (the acquirer under the Scheme).

28. The share capital account of Asciano is untainted for the purposes of Division 197.

29. The Special Dividend was a dividend that complied with the requirements of the Corporations Act, including section 254T of the Corporations Act.

30. The Special Dividend was a dividend paid in accordance with Asciano's Constitution.

Ruling

Assessability of Special Dividend

31. An Asciano shareholder who received the fully franked Special Dividend must include the Special Dividend in their assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Refundable tax offset

32. An Asciano shareholder who is a 'qualified person', and who received the fully franked Special Dividend directly will:

- include the amount of the franking credit attached to the Special Dividend in their assessable income, and
- be entitled to a tax offset equal to the amount of the franking credit,

under section 207-20.

33. Where the fully franked Special Dividend is received by an Asciano shareholder (not being an entity taxed as a corporate tax entity) who is a trustee of a trust (not being a complying superannuation fund) or a partnership, the trustee of the trust or the partnership will include an amount equal to the franking credit attached to the Special Dividend as assessable income under subsection 207-35(1), subject to the trustee or partnership being a 'qualified person'.

34. The franking credit allocated to the Special Dividend will be subject to the refundable tax offset rules in Division 67, provided the Asciano shareholder is not excluded by the operation of section 67-25.

Qualified persons

35. The payment of the Special Dividend as part of the Scheme of Arrangement constitutes a related payment within the meaning of former section 160APHN of the ITAA 1936.

36. An Asciano shareholder must have held their Asciano shares 'at risk' for a continuous period of 45 days in the secondary qualification period to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 in relation to the Special Dividend (former section 160APHO of the ITAA 1936).

Capital Gains Tax (CGT) consequences***CGT event A1***

37. CGT event A1 happened when an Asciano shareholder disposed of each of their Asciano shares to BidCo under the Scheme of Arrangement (subsections 104-10(1) and 104-10(2)).

38. The time of the CGT event A1 is the Scheme Implementation Date of 19 August 2016 (paragraph 104-10(3)(b)).

39. An Asciano shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an Asciano share exceed its cost base. The capital gain is equal to the amount of the capital proceeds less the cost base of the Asciano share. An Asciano shareholder will make a capital loss if those capital proceeds are less than the Asciano share's reduced cost base. The capital loss is equal to the amount of the difference (subsection 104-10(4)).

Capital proceeds

40. The capital proceeds received by an Asciano shareholder is the money and market value of any property received or entitled to be received in respect of the event happening (subsection 116-20(1)).

41. The capital proceeds will not include the Special Dividend as it is considered, having regard to all the circumstances of the arrangement, that the dividends are not paid in respect of the CGT event happening (subsection 116-20(1)).

Anti-avoidance provisions***Section 177EA of the ITAA 1936***

42. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend paid in relation to an Asciano share.

Section 204-30

43. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

Commissioner of Taxation

26 October 2016

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.*

Assessability of Special Dividend

44. Subparagraph 44(1)(a)(i) of the ITAA 1936 includes in the assessable income of an Australian resident shareholder dividends that are paid to the shareholder by the company out of profits derived by it from any source.

45. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders.

46. The payment of the Special Dividend is a distribution of money by Asciano to its shareholders.

47. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes from the definition of 'dividend' an amount that has been debited against an amount standing to the credit of the company's share capital account.

48. The Special Dividend was sourced from Asciano's profits and Asciano did not debit the Special Dividend totalling \$848 million against its untainted share capital account. Therefore, the exclusion in paragraph (d) of subsection 6(1) of the ITAA 1936 will not apply.

49. Accordingly, the Special Dividend will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936, and each Asciano shareholder is required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Refundable tax offset

50. Where the fully franked Special Dividend is received by an Asciano shareholder who is a 'qualified person', the Asciano shareholder will:

- include the amount of the franking credit attached to the Special Dividend in their assessable income, and
- be entitled to a tax offset equal to the amount of the franking credit (section 207-20).

51. Shareholders who are entitled to a tax offset under subsection 207-20(2), in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

52. Where the fully franked Special Dividend is received by an Asciano shareholder (not being an entity taxed as a corporate tax entity) who is a trustee of a trust (not being a complying superannuation fund) or a partnership subsection 207-35(1) applies,

subject to the trustee or partnership being a 'qualified person'.
Subsection 207-35(1) provides:

If:

- (a) a *franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a *corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust – the trust is not a *complying superannuation entity when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the *franking credit on the distribution.

53. Therefore, subject to satisfying the qualified person rule, the participating Asciano trustee or partnership shareholder will be required to include the amount of the franking credit attached to the Special Dividend in their assessable income under subsection 207-35(1).

54. Pursuant to section 67-25, there are a range of taxpayers who are specifically excluded from the operation of the refundable tax offset rules. This range of excluded entities includes:

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A))
- a trustee of a trust who is liable to be assessed under sections 98 or 99A of the ITAA 1936 (subsection 67-25(1B))
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the company on behalf of its shareholders (subsections 67-25(1C) and 67-25(1D)), and
- foreign resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

55. Accordingly, a holder of Asciano shares will be subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities under section 67-25.

Qualified persons

56. Paragraph 207-145(1)(a) provides that in relation to a franked distribution made by an entity, only a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 is required to include the amount of the franking credit in their assessable income and is entitled to claim the franking credit as a tax offset.

57. In broad terms, a person is a 'qualified person' under Division 1A of former Part IIIAA of the ITAA 1936 if they satisfy both the holding period requirement and the related payment rule contained in former subsection 160APHO(1) of the ITAA 1936:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a qualified person in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification period in relation to the dividend.

58. The holding period requirement, in former subsection 160APHO(2) of the ITAA 1936, requires the taxpayer to continuously hold the shares or interest in shares on which a dividend has been paid for at least 45 days if the shares are not preference shares, or at least 90 days if the shares are preference shares (excluding the day the shares were acquired, and, if relevant, the day on which disposal of the shares occurred).

59. Under former subsection 160APHO(3) of the ITAA 1936, any days on which the taxpayer has materially diminished risks of loss or opportunities for gain in respect of the shares or interests in the shares (within the meaning of former sections 160APHM and 160APHJ) are also excluded and not taken to break the continuity of the period for which the taxpayer held the shares or interest.

60. The related payments rule determines the relevant qualification period for which the holding period rule applies. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

61. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Former subsection 160APHN(2) of the ITAA 1936 states:

The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

62. Former paragraph 160APHN(3)(d) of the ITAA 1936 states:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other persons:

...

- (d) causing property to be transferred to, or in accordance with directions of, the other person or other persons; or

...

63. Former subsection 160APHN(4) of the ITAA 1936 states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to;

the amount of dividend or distribution.

64. Under the present Scheme of Arrangement, in considering whether the Asciano shareholders are under an obligation to make a related payment, it is considered that an integral part of the Scheme is the payment of the Special Dividend of \$0.87 per Asciano share. The consideration was reduced by the amount of the Special Dividend of \$0.87 per Asciano share declared by the Asciano Directors.

65. In these circumstances, in determining whether an Asciano shareholder is taken to have made or be likely to make a related payment in respect of the Special Dividend, it is considered that the circumstances surrounding the payment of the Special Dividend would constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936 by causing property (i.e., shares in Asciano) to be transferred to BidCo. In this case, the actual amount of the Special Dividend is effectively applied to the benefit of another person (i.e. BidCo). The benefit received by BidCo is effectively a decrease/set-off in the consideration by an amount equal to the Special Dividend. As such, it can be concluded that an Asciano shareholder will be taken to have made a related payment in respect of the Special Dividend.

66. As the Asciano shareholders will be taken, for the purposes of Division 1A of former Part IIIA of the ITAA 1936, to have made a related payment in respect of the Special Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

67. The secondary qualification period is defined in former section 160APHD of the ITAA 1936 as follows:

In relation to a taxpayer in relation to shares or an interest in shares, means:

- (a) if the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest becomes ex dividend...

68. The concept of 'ex-dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend

69. Eligibility for the Special Dividend is determined on the Special Dividend Record Date of 3 August 2016. This is the last day on which acquisition by a person of an Asciano share entitled the person to receive the Special Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 4 August 2016.

70. The secondary qualification period thus runs from 45 days before the ex-dividend date of 4 August 2016 and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 20 June 2016 to 18 September 2016. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Asciano shares are to be excluded.

71. Entitlement to participate in the Scheme of Arrangement will be determined on the Scheme Record Date of 12 August 2016. Asciano shareholders who dispose of their shares under the Scheme of Arrangement will no longer be considered to hold their Asciano shares 'at risk' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

72. Accordingly, for an Asciano shareholder who disposed of their shares under the Scheme of Arrangement, the secondary qualification period will run from 20 June 2016 to 11 August 2016 (inclusive). An Asciano shareholder who received the Special Dividend will need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936. Further, pursuant to former subparagraph 160APHO(2)(a) of the ITAA 1936, neither the date of acquisition nor the date of disposal is included in the relevant 45 day period.

CGT consequences

CGT event A1

73. CGT event A1 happens if there is a change in the ownership of an asset from one entity to another (section 104-10). The event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs (subsection 104-10(3)).

74. CGT event A1 happened when an Asciano shareholder disposed of an Asciano share to BidCo pursuant to the Scheme of Arrangement (subsections 104-10(1) and 104-10(2)). The disposal occurred on the Scheme Implementation Date of 19 August 2016 when the share was disposed of by an Asciano shareholder (paragraph 104-10(3)(b)).

75. An Asciano shareholder makes a capital gain from CGT event A1 happening if the capital proceeds from the disposal of an Asciano share are more than the cost base of the share. An Asciano shareholder makes a capital loss if those capital proceeds are less than the reduced cost base of the Asciano share (subsection 104-10(4)).

Capital proceeds

76. The capital proceeds received by an Asciano shareholder is the money and market value of any property received or entitled to be received in respect of the event happening (subsection 116-20(1)).

77. An Asciano shareholder was entitled to receive the Scheme Consideration being \$9.15 for each Asciano share disposed of under the Scheme of Arrangement less the cash amount of \$0.87 Special Dividend per share declared by Asciano.

78. The term 'in respect of the event happening' in subsection 116-20(1) of the ITAA 1997 requires the relationship between the event and the receipt of the money, or entitlement to receive the money, must be more than coincidental. An amount is not 'capital proceeds' of an event merely because it is received in association with the event.

79. Although payment of the Special Dividend was conditional upon Asciano shareholders approving the Scheme, the Special Dividend is not paid as a term of the Scheme of Arrangement. The Board of Asciano exercised their discretion in declaring the dividend. The Joint Consortium did not influence the decision to pay the Special Dividend or provide any funds to Asciano to finance the payment of the Special Dividend. It is therefore not received in respect of the disposal of Asciano shares under the Scheme of Arrangement.

80. Accordingly, the Special Dividend does not form part of the capital proceeds which a participating Asciano shareholder will receive in respect of CGT event A1 happening.

Anti-avoidance provisions

Section 177EA of the ITAA 1936

81. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes seeking 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.

82. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA of the ITAA 1936 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;
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit;
- (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.

83. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a) of the ITAA 1936) or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

84. Asciano is a corporate tax entity. The sale of Asciano shares pursuant to the Scheme of Arrangement is a scheme for the disposition of membership interests. The fully franked Special Dividend is a frankable distribution that was paid to Asciano shareholders (the relevant taxpayers) as a part of the Scheme of Arrangement. The relevant taxpayers could reasonably be expected to receive imputation benefits.

85. In the present case, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(17) of the ITAA 1936), it would be concluded that Asciano, its shareholders or any other relevant party entered into the scheme for a purpose (not including an incidental purpose) of enabling the relevant taxpayers to obtain an imputation benefit under the scheme.

86. In arriving at a conclusion the Commissioner 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) of the ITAA 1936. The relevant circumstances listed there encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may not be present at any one time in any one scheme.

87. The Special Dividend was fully franked and was paid to the existing shareholders of Asciano in proportion to their shareholding irrespective of their ability to utilise the relevant franking credits. The Special Dividend allowed Asciano shareholders to share in the accumulated profits of Asciano.

88. In considering the manner, form and substance of the Scheme of Arrangement, it is considered that the Scheme of Arrangement was not entered into by Asciano or the Asciano shareholders for more than an incidental purpose of enabling participating shareholders to obtain imputation benefits. The goal of providing imputation benefits to Asciano shareholders remained incidental, in the sense of being subservient to the purpose of disposing of their shares to BidCo.

89. Having regard to the relevant circumstances of the Scheme of Arrangement, the Commissioner has come to the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Special Dividend.

Section 204-30

90. Section 204-30 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a))
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)), and
- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

91. If section 204-30 applies, the Commissioner may make a determination in writing:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)), or
- (b) that no imputation benefit is to arise in respect of any distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

92. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

93. All Asciano shareholders received an imputation benefit as a result of the payment of the fully franked Special Dividend. Subject to being 'qualified persons', Australian resident Asciano shareholders received an imputation benefit in the form of a tax offset (paragraph 204-30(6)(a)). Non-resident Asciano shareholders received an imputation benefit in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). Resident Asciano shareholders derived a greater benefit from franking credits than the non-resident shareholders.

94. However, the fully franked Special Dividend was paid to all the shareholders of Asciano identified at the Special Dividend Record Date. Accordingly, it cannot be concluded that Asciano intended to direct the flow of distributions in such a manner as to stream the imputation benefits to members that derive a greater benefit from the franking credits attached to the Special Dividend, while other members received lesser or no imputation benefits.

95. As the conditions in subsection 204-30(1) are not met in respect of the Special Dividend, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in respect of the Special Dividend.

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Income tax ~~ Capital management ~~ 45 day rule
Income tax ~~ Capital management ~~ Qualified person rule

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