TD 2020/6 - Income tax: what is a 'restructuring' for the purposes of subsection 125-70(1) of the Income Tax Assessment Act 1997?

There is a Compendium for this document: **TD 2020/6EC** .

Taxation Determination

Income tax: what is a 'restructuring' for the purposes of subsection 125-70(1) of the *Income Tax Assessment Act 1997*?

Relying on this Determination

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

Further, if we think that this Determination disadvantages you, we may apply the law in a way that is more favourable to you.

Table of Contents **Paragraph**

What this Determination is about

1. For demerger relief to be available[1], there must be a 'demerger' as defined in subsection 125-70(1) of the *Income Tax Assessment Act 1997*.[2] The first element of that definition is that there is a 'restructuring' of the demerger group. This Determination sets out what constitutes a 'restructuring' of the demerger group for the purposes of subsection 125-70(1).

Ruling

2. In subsection 125-70(1), a restructuring of the demerger group has its ordinary business meaning. It refers to the reorganisation of a group of companies or trusts. What constitutes a particular restructuring is essentially a question of fact. However, all the steps which occur under a single plan of reorganisation will usually constitute the restructuring. The restructuring of a demerger group is not necessarily confined to the steps or transactions under paragraph 125-70(1)(b) that deliver the ownership interests in an entity to the owners of the head entity of the demerger group, but may include previous and / or subsequent transactions in a sequence of transactions. Commercial understanding and the objectively inferred plan for reorganisation will determine which steps or transactions form part of the restructuring of the demerger group.

3. Transactions which are to occur under a plan for the reorganisation of the demerger group may constitute parts of the restructuring of the demerger group even though those transactions are legally independent of each other, contingent on different events, or may not all occur. For example, if a transaction or step is subject to a separate decision-making process (such as separate votes by shareholders of the company that is the head entity of the demerger group) from the steps taken to separate an entity, it may still be part of the restructuring. Thus the planned transfer of interests in the separated entity by all the owners of those interests to a particular acquiring entity would generally be considered to form part of the restructuring where commercially the transfer of the interests would be understood to be a step in a plan for the owners to transfer their interests in the separated entity to the acquiring entity.

4. Conversely, a transaction is not necessarily part of the restructuring of the group merely because it is enabled by the restructuring of the group or is a consequence of the restructuring of the group. For example, independent decisions by some particular owners to dispose of new interests in a separated entity which is listed on a securities exchange immediately after the new interests have been acquired would generally not be considered part of the restructuring, although this is made possible by the restructuring and it is probable that such decisions will be made.

5. In determining the scope of the plan (and hence the restructuring), the Commissioner will look at all the facts and circumstances, including contracts and deeds executed by or affecting the relevant entities (including contracts and deeds that are given legal effect by a court decision, for example, pursuant to a scheme of arrangement under Part 5.1 of the *Corporations Act 2001*), statements in documents filed with regulators, commercial factors, internal deliberations by a company's directors or the directors of a trustee company, statements by directors or influential owners and announcements to any relevant securities exchange.

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[1] Demerger relief in the income tax legislation consists of demerger roll-over under Division 125 of the *Income Tax Assessment Act 1997* and demerger dividend treatment under subsections 44(3) and (4) of the *Income Tax Assessment Act 1936*.

[2] All legislative references in this Determination are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

6. A key factor in determining what transactions or steps form part of a single plan will be the proposal that is presented to the affected owners of original interests in the head entity of the demerger group (shareholders or unit holders). Statements by a company's directors or the directors of a trustee company to the affected shareholders or unit holders are made pursuant to statutory and general law duties, and represent the arguments made to persuade the affected shareholders or unit holders to support the necessary resolutions and other legal formalities that are required to implement the plan.

7. If a step or transaction forms part of the restructuring of the demerger group, the particular step or transaction may affect whether or not the conditions to qualify as a demerger in subsection 125-70(1) (which include, through paragraph 125-70(1)(h), the requirements of subsection 125-70(2)) can be satisfied.[3] Since under paragraph 125-70(1)(a) a demerger happens if there is a restructuring, the scope of the restructuring (including when it begins and ends) is also relevant to the 'nothing else' condition in paragraph 125-70(1)(c) (which examines what the owners of the original interests in the head entity may acquire under the restructuring) and the proportionate ownership test and proportionate market value test in subsection 125-70(2).

8. The purpose or object of the conditions in subsections 125-70(1) and (2) is to determine whether the identified restructuring has resulted in a change to the economic position of the owners of original interests in the head entity of the relevant demerger group.

9. The fact that transactions or steps are separated by several months does not automatically mean that they cannot form part of the same restructuring. Temporal proximity is a relevant factor, but is not decisive on its own, when establishing the objectively inferred plan for the reorganisation of a demerger group.

10. The fact that steps or transactions are included in the scope of a restructuring does not automatically mean that any of the conditions in subsections 125-70(1) and (2) will be failed. The most common situation where this will be the case is when transactions or steps in a restructuring are merely to prepare for the separation of a subsidiary, and do not affect either the existence, proportionality or value of ownership interests in the head entity of the demerger group, or the economic position of the owners of ownership interests in the head entity of the demerger group.

11. For example, transferring assets or forgiving debts between members of the demerger group, entering into new financing arrangements, novating contracts, shifting employees from one entity to another or incorporating a company or settling a trust that is intended to be the 'demerged entity' under subsection 125-70(6) are commonly part of the objectively inferred plan for the reorganisation of a demerger group. For this reason, they will form part of the restructuring of the demerger group. However, these steps or transactions will not generally affect any of the conditions in subsections 125-70(1) and (2).

12. If any steps or transactions happen within the demerger group that have the effect of causing a change in the economic position of the owners of ownership interests in the head entity of the demerger group before, at or after the time of the separation of the subsidiary from the demerger group (such as the variation of the rights attached to any shares, or entering into arrangements that affect or create ownership interests), those steps or transactions may affect, and cause a failure of, some of the conditions in subsections 125-70(1) and (2). However, the mere fact that ownership interests are transferred due to an independent decision by owners during the period of the

[3] Subsection 125-70(2) talks about proportionality 'under', 'just before' and 'just after' the 'demerger'. Since under paragraph 125-70(1)(a) a demerger happens if there is a restructuring, the scope of the restructuring (including when it begins and ends) is also relevant to the proportionality conditions in subsection 125-70(2).

restructuring (for example, through ordinary trading on a securities exchange) will not generally affect any of the conditions in subsections 125-70(1) and (2) as such transfers do not happen under the restructuring itself.

Example 1 – post-separation capital raising not part of restructuring

13. *Head Co is a listed public company that conducts Business X directly and Business Y through Sub Co, a wholly-owned subsidiary of Head Co. Business X and Business Y operate in unrelated business sectors.*

14. *The Board of Head Co is of the view that the current structure does not provide the kind of management attention and capital that Sub Co needs and, as a consequence, is limiting its growth. As a result, the Board announces a proposal to separate Sub Co by way of an in specie distribution of shares in Sub Co to Head Co shareholders and listing Sub Co on the Australian Securities Exchange (ASX). It is planned that major shareholders will hold their shares in Sub Co in escrow for 12 months after listing on the ASX. While there is a possibility of some other shareholders selling their Sub Co shares soon after the listing, the Board has not put in place any arrangement for shareholders to sell their shares.*

15. *Sub Co has sufficient operating profits and cash flows to fund its current operations if the separation is approved and implemented. However, Head Co has formed the opinion (before the separation of Sub Co) that additional capital would enable Sub Co to pursue further growth opportunities.*

16. *It is expected that Sub Co will undertake a capital raising following listing on the ASX to pursue specific acquisitions and expansion plans. It is proposed that the capital raising will be done at market value and underwritten by an independent party. The capital raising is open to any willing investor (subject to standard exclusions for legal reasons, such as under anti-money laundering legislation or where complying with foreign securities laws is too onerous) and participation is voluntary.*

17. *In these circumstances, the capital raising that is expected to occur following the in specie distribution will not form part of the restructuring for the purposes of subsection 125-70(1).*

18. *The outcome would be the same if the capital raising was done by way of a rights issue to existing shareholders of Sub Co, as long as the rights issue is done at market value, is underwritten by an independent party, is open to all existing shareholders of Sub Co (subject to standard exclusions for legal reasons, such as under anti-money laundering legislation or where complying with foreign securities laws is too onerous) and participation is voluntary. In this example, nothing suggests that the capital raising is, or could be, a step in a plan to alter the ownership of interests in any member of the demerger group.*

Example 2 – post-separation capital raising part of restructuring

19. *The facts are the same as in Example 1 of this Determination, except that:*

- *prior to the separation Head Co had negotiated with an unrelated third party interested in acquiring a substantial stake in Sub Co for that third party to acquire a significant proportion of the shares in Sub Co that would be issued under the capital raising, and*
- *certain shareholders of Sub Co (for example, those owning less than a certain number of shares) are specifically excluded from eligibility to participate in the capital raising.*

20. *The fact that the capital raising has one or more features that are certain to alter the shareholdings in Sub Co is significant. It suggests that the plan involves more than a capital raising that coincides with the separation of Sub Co, and is designed to change the economic position of the shareholders of Sub Co.*

21. *Consequently, it is reasonable to infer that the separation of Sub Co and the capital raising form integral parts of a commercial plan for the reorganisation of the demerger group. The capital raising therefore constitutes part of the restructuring for the purposes of subsection 125-70(1).*

22. *As a result, the proportionate ownership test and proportionate market value test in subsection 125-70(2) (which are relevant because of paragraph 125-70(1)(h)) will not be satisfied.*

Example 3 – sale of head entity after the separation of a subsidiary part of restructuring

23. *Food Co, a publicly listed company, operates a chain of supermarkets through its wholly-owned subsidiary Super Co.*

24. *In 2015, Food Co, through a wholly-owned subsidiary Organic Co, establishes a chain of organic and vegan speciality stores. In November 2016, Food Co commences discussions with Giant Co, a listed grocery company, regarding a possible acquisition of its supermarket chain.*

25. *In March 2017, the Board of Food Co announces a proposal for:*

- *the in specie distribution to Food Co shareholders of shares in Organic Co (by way of a scheme of arrangement) and the listing of Organic Co on the ASX, and*
- *Giant Co to acquire all Food Co shares (by way of a scheme of arrangement) for a combination of shares in Giant Co and cash, after the implementation of the in specie distribution of shares in Organic Co.*

26. *Prior to Food Co's proposed separation of Organic Co, Food Co commences discussions with Giant Co in relation to a possible acquisition, and the Board announcement includes a proposal to both separate and list Organic Co as well as a proposal for Giant Co to acquire Food Co after the demerger.*

27. *The in specie distribution is a condition precedent to the sale of Food Co shares to Giant Co, but the sale of Food Co shares to Giant Co is not a condition precedent to the in specie distribution. In theory, the in specie distribution scheme of arrangement could be approved, and the Food Co sale scheme of arrangement could be rejected, by the shareholders of Food Co.*

28. *The facts indicate that the in specie distribution and listing of Organic Co will be undertaken with the intention of preparing Food Co for acquisition by Giant Co. It can be objectively inferred that the in specie distribution of Organic Co shares will occur in preparation for the Giant Co takeover proposal. Indeed, the proposal as put forward by the Board is to both separate Organic Co and sell Food Co shares after the separation.*

29. *Therefore, the sale of Food Co shares to Giant Co objectively forms part of the connected plan to separate Organic Co, meaning it will form part of the restructuring for the purposes of subsection 125-70(1).*

30. *As a result, the nothing else condition in paragraph 125-70(1)(c) will not be satisfied.*

Example 4 – sale of head entity after the separation of a subsidiary not part of restructuring

31. *The facts are the same as in Example 3 of this Determination, except that:*

- *discussions with Giant Co to acquire Food Co terminate in February 2017 and are never resumed*
- *the in specie distribution of Organic Co shares is announced in March 2017 but there is no announcement of a scheme of arrangement to acquire shares in Food Co, and*
- *in October 2017 (after the implementation of the in specie distribution of Organic Co shares) Mid Co, another publicly listed grocery company, announces a proposed acquisition of Food Co under a takeover bid in return for shares in Mid Co.*

32. *Whereas in Example 3 the in specie distribution of Organic Co shares and sale scheme of arrangement are planned to occur in sequence, in these circumstances a takeover of Food Co by Mid Co is not planned or intended by Food Co at the time of the in specie distribution of Organic Co shares. At the latter time, Food Co intends to continue its supermarket business.*

33. *As Mid Co's takeover bid is legally and commercially independent of the in specie distribution of Organic Co shares, it will not form part of the restructuring for the purposes of subsection 125-70(1).*

Example 5 – sale facility

34. *Jigsaw Co is a company listed on the ASX whose shareholders are all residents of Australia. Jigsaw Co mainly carries on a toy manufacturing business, but through its wholly-owned subsidiary, Louis Co also operates a chain of furniture stores. Jigsaw Co has decided to separate Louis Co.*

35. *Louis Co will be listed on the ASX immediately after the separation and under the proposed scheme, non-executive shareholders have the choice to use a sale facility for the orderly disposal of their new shares. Under the sale facility, a sale agent will sell the relevant shares in the open market and remit the sale proceeds (free of brokerage costs). There is no compulsion on shareholders to use the facility, nor any incentive to do so, aside from the lack of brokerage costs.*

36. *Consistent with the principle discussed at paragraph 4 of this Determination, while the **provision** of the sale facility could be described as a component of the overall restructuring, on balance the actual **sale** by shareholders of shares through the facility would fall outside the restructuring. This is because the sale by particular shareholders could not be seen as part of the plan for reorganisation. The conclusion has regard to the independence of decisions made by shareholders from the restructuring, the broad availability of the facility to nearly all shareholders and the lack of any compulsion or significant incentive to use the sale facility, Accordingly, the fact that some shareholders use the sale facility will not mean that the selling shareholders breach the condition in paragraph 125-70(1(c) that shareholders of Jigsaw Co acquire a new interest in Louis Co and nothing else and the proportionality requirements in subsection 125-70(2) (which are relevant because of paragraph 125-70(1)(h)).*

Example 6 – separation by a closely-held corporate group

37. *A closely-held corporate group consists of two companies undertaking separate businesses, Family Operations Co 1 and Family Operations Co 2, both of which are wholly owned by Family Holding Co.*

38. *Two brothers, Robert and William, each hold 50% of the shares in Family Holding Co. The brothers have a falling out, and to resolve the dispute, it is proposed that each assume the full ownership and control of one business. Robert will take Family Operations Co 1, and William will take Family Operations Co 2.*

39. *To achieve this outcome, the brothers, as the controlling minds of Family Holding Co, propose that Family Holding Co will make an in specie distribution of the shares in Family Operations Co 1 and Family Operations Co 2 to Robert and William. After this, each brother will hold 50% of the shares in each company directly.*

40. *Robert will then exchange his shares in Family Operations Co 2 for William's shares in Family Operations Co 1. After the exchange, Robert will wholly own Family Operations Co 1, and William will wholly own Family Operations Co 2.*

41. *In these circumstances, the exchange of the shares forms part of an overarching plan to alter the economic ownership of the subsidiaries and the property of Family Holding Co. Since the exchange of the shares is an essential component of the plan starting with the in specie distribution, it will form part of the restructuring for the purposes of subsection 125-70(1).*

42. *As a result, both Robert and William acquire under the restructuring something other than the shares which were distributed by Family Holding Co. Consequently, the nothing else condition in paragraph 125-70(1)(c) will not be satisfied.*

Example 7 – preparatory steps and transactions

43. *Buckle Ltd is a construction and property development company whose shares are listed on the ASX. Buckle Ltd proposes to separate its residential property development business, for which it seeks demerger relief.*

44. *Before the separation was implemented, over several months Buckle Ltd incorporated a new wholly-owned subsidiary (Elysian Fields Pty Ltd), transferred land, cash and other assets to it in return for the issue of a large amount of share capital in it, substituted it as the applicant in various development applications with local councils and shifted various employees to it by novating their employment contracts with Buckle Ltd to Elysian Fields Pty Ltd.*

45. *After preparing Elysian Fields Pty Ltd to exist as a viable separate entity by means of these steps and transactions, Buckle Ltd transferred all of its shares in Elysian Fields Pty Ltd to the shareholders of Buckle Ltd.*

46. *The preparatory steps and transactions (in paragraph 44 in this Example) will form part of the restructuring of the demerger group, but will not (of themselves) cause the failure of any of the conditions in subsections 125-70(1) and (2) because they do not result in a change to the economic position of the owners of ownership interests in the head entity of the demerger group. This is the case even though individual owners of Buckle Ltd may, independently of the plans of Buckle Ltd, sell their shares on the ASX during the period that the preparatory steps and transactions take place. Under the restructuring, the owners of Buckle Ltd do not receive anything other than ownership interests in Elysian Fields Pty Ltd, and their ownership in Buckle Ltd and Elysian Fields Pty Ltd is maintained on a proportionate and market value basis. The preparatory steps and transactions are*

undertaken to ensure that Elysian Fields Pty Ltd will be a viable entity after the separation, by owning suitable assets and being completely independent of Buckle Ltd.

Date of effect

47. This Determination applies to years of income commencing both before and after 22 July 2020. However, this Determination will 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 Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*). Furthermore, see paragraph 71 of this Determination which sets out the Commissioner's compliance approach.

48. Any private rulings or class rulings issued by the Commissioner, which are inconsistent with this Determination, can be relied on by the affected taxpayers for the period of effect of those rulings, in accordance with subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953*.

Commissioner of Taxation
22 July 2020

Appendix 1 – Explanation

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.

Context of Division 125

49. Section 125-5 states that the object of Division 125 'is to facilitate the demerging of entities by ensuring that capital gains tax considerations are not an impediment to restructuring a business'. Relief is, however, subject to several conditions which qualify this general purpose, making it clear that it only extends to certain kinds of business restructuring.

50. Paragraph 125-70(1)(a) requires 'there is a restructuring of the demerger group'. This requirement is distinct from paragraphs 125-70(1)(b) and (c) which set out certain things that must happen or not happen 'under the restructuring'. It follows, then, that the events in paragraphs 125-70(1)(b) and (c) may not, of themselves, constitute the entire scope of the restructuring.

51. The other requirements in section 125-70, such as paragraph 125-70(1)(c) and subsection 125-70(2), are important in determining the scope of the restructuring. They refer to features of the plan which are significant to the economic position of owners of original interests in the head entity, and disqualify something from being a demerger if a restructuring changes the economic position of those owners. This indicates that, while demerger relief is intended to facilitate business restructuring, the statutory intention is that the relief should only be available where the economic position of the original owners remains the same before and after the restructuring.

52. Most obviously, there must be a restructuring of a demerger group before it can be said that a demerger has happened at all (paragraph 125-70(1)(a)). What happens 'under the restructuring' then determines what events, acts and transactions are relevant for satisfying the legislative requirements in relation to original interests in the head entity and interests in the demerged entity (paragraph 125-70(1)(b)) and satisfying the requirements for what owners of original interests in the head entity may acquire (paragraph 125-70(1)(c)).

53. As a demerger happens under the restructuring, the scope of the restructuring (including when it begins and ends) is also relevant to the conditions in subsection 125-70(2) that:

(a) the proportion of new interests acquired under the demerger by each original owner is the same as the owner's proportionate interest in the head entity 'just before the demerger' (paragraph 125-70(2)(a)), and

(b) each original owner's proportionate total market value of ownership interests in the head entity and the demerged entity 'just after the demerger' (which is also just after the restructuring ends) is the same as the original owner's proportionate total market value of ownership interests in the head entity 'just before the demerger' (paragraph 125-70(2)(b)).

54. It is only necessary to test the conditions in subsection 125-70(2) if all the other conditions in paragraphs 125-70(1)(a) to (g) are satisfied. For example, if owners of original interests receive something other than new interests in the demerged entity under the identified restructuring, there is no qualifying demerger and it is not necessary to test whether the conditions in subsection 125-70(2) are satisfied.

55. Accordingly, an interpretation of restructuring should be favoured which allows a proper evaluation of whether the specific conditions in Division 125 have been satisfied, and therefore whether or not the restructuring itself brings about a change in the economic position of original owners. This suggests that not only the delivery of the ownership interests referred to in paragraphs 125-70(1)(b) and (c) should be considered, but also any other previous or subsequent events, acts or transactions in a sequence of events, or acts or transactions sufficiently connected with those prescribed statutory steps to form part of a single plan. Commercial understanding and the objectively inferred plan for reorganisation determines which steps or transactions form part of the 'restructuring' of the demerger group.

Ordinary meaning of restructuring

56. Beginning with the word 'restructuring' in isolation, dictionary definitions indicate that the phrase is flexible in its ordinary and commercial senses. In respect of a business, these definitions share a common element of a change in the structure of a business.[4]

57. The word, taken alone, extends to a large variety of schemes and arrangements. Given this flexibility, the context in which it appears is essential in evaluating how the term should be understood in subsection 125-70(1).

58. The Review of Business Taxation, 1999, *A Tax System Redesigned* (Ralph report) which recommended demerger relief originally used the word 'reorganisation'.[5] The Commissioner considers that no particular significance should be attached to the change of wording, which occurred during the public consultation on the draft legislation. It should also be noted that the word 'restructure' or 'restructuring' is used in other parts of the *Income Tax Assessment Act 1997*[6] and, in the case of Division 615, is used with the concept of 'reorganising'.[7]

History of the provision – extrinsic and other materials

59. The interpretation of the word restructuring outlined at paragraphs 56 to 58 of this Determination, is also consistent with the extrinsic materials relevant to the enactment of Division 125.[8]

60. Division 125 is based on Recommendation 19.4 of the Ralph report.[9] Recommendation 19.4 called for tax relief for 'business demergers or deconsolidations':

> Demerger not to produce taxing event
>
> (a) That, where a widely held entity splits its operations into one or more new entities and issues membership interests in these entities to the original members in the same nature and proportion as their original membership interest:
>
> (i) there be no tax consequences for the members; and

[4] Macmillan Publishers Australia, The Macquarie Dictionary online, www.macquariedictionary.com.au, viewed 12 February 2020 (definition of 'restructure'); Peter Collin, *Dictionary of Business* (Bloomsbury Publishing PLC, 2009) 352 (definition of 'restructure'); 2009, *A Dictionary of Business and Management,* 5th edn, Law, J (ed), Oxford University Press (definition of 'corporate restructuring').
[5] Ralph report, p.619.
[6] For example, section 83A-130, Subdivision 124-N, Subdivision 328-G and Division 615.
[7] Paragraph 615-5(1)(c) and subsection 615-10(1).
[8] Reference is made to this material pursuant to sections 15AA and 15AB of the *Acts Interpretation Act 1901*.
[9] Paragraph 15.5 of the Revised Explanatory Memorandum to the New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Bill 2002.

(ii) the tax value of the membership interest be spread across the new and old interests.

61. The Ralph report expressed the two aspects of the policy rationale underpinning Recommendation 19.4 as[10]:

(a) in the absence of relief, members in an entity that reorganises its activities may face a range of tax consequences which act as an impediment to entities restructuring their operations, and

(b) where an entity undertakes a reorganisation of its operations, leaving members in the same economic position as they were immediately before the reorganisation, there should be no taxing event.

62. The second aspect of that rationale is particularly important. Many provisions providing relief from capital gains tax (CGT) have this in common – they operate where there has been a change in the legal or equitable ownership of property but no change in the underlying economic ownership of the property. That is, they operate where ownership does *not* change in substance. These are cases where CGT consequences will act as a disincentive to engage in otherwise commercial transactions without there being a countervailing economic rationale for imposing tax on the transaction. Conversely, there is a clear theme that CGT consequences are expected where there is both a legal and economic change in the ownership of property resulting from a transaction.

63. By removing certain tax consequences which act as impediments to entities restructuring their operations, demerger rollover relief, together with rollover relief for takeovers contained in Recommendation 19.3, was recommended to facilitate the realignment of businesses and improve economic efficiency.[11] Demerger rollover relief was recommended only in those circumstances that satisfy **both** aspects of the intended policy rationale.

64. Consistent with the Ralph report recommendations, Division 125 was introduced with a policy objective of increasing efficiency by allowing greater flexibility in structuring businesses, providing an overall benefit to the economy and enhancing the competitiveness of Australia's business sector.[12]

65. Providing tax relief to owners of the demerging entity was seen as appropriate where the owners will hold interests in the same proportion in both the demerging entity and the demerged entity just after the demerger. This was regarded as consistent with the policy basis for other rollovers in the tax law where there is a corporate restructure and ownership is maintained.[13]

66. In seeking to provide enough flexibility for entities to restructure their affairs, Division 125 went beyond the Ralph report recommendations in certain aspects.[14] However, the fundamental policy rationale articulated by the Ralph report continues to underpin the purpose and object of Division 125.

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[10] Ralph report. p. 619.
[11] Ralph report, p. 620.
[12] Paragraph 16.1 of the Revised Explanatory Memorandum.
[13] Paragraph 16.6 of the Revised Explanatory Memorandum. That the underlying ownership must be maintained before and after a demerger was reinforced in Second Reading Speeches for New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Bill 2002 - see Commonwealth, House of Representatives, *Debates,* 27 June 2002, 4543 (Mr Slipper) and Commonwealth, House of Representatives, *Debates,* 28 August 2002, 6017 (Mr Slipper).
[14] Paragraph 16.16 of the Revised Explanatory Memorandum.

Conclusion

67. Both the statutory text and the extrinsic materials relevant to Division 125 indicate that restructuring must be read with sufficient breadth to ensure that a demerger and the tax relief for demergers is limited to certain kinds of arrangements.

68. The preferred interpretation is that the restructuring requires identification of all the steps and transactions which are connected to, required to give effect to or are expected to result from, the disposal, ending or issue of ownership interests referred to in paragraphs 125-70(1)(b) and (c).

69. It may be relevant to refer to case law on the meaning of the more general terms 'scheme' and 'arrangement'. For example, whether a step forms part of a restructuring may be answered by asking whether the restructuring would make sense without that step.[15] This means that parts of a plan, whether or not legally interdependent or dependent on different contingencies, should not be considered in isolation and one must look at the entirety of the plan, and its effect, in identifying the restructuring of the demerger group that exists under an arrangement.

70. This interpretation best achieves the purpose or object of Division 125 because it ensures that only a restructuring that does not result in a change in the economic position of original owners will qualify for demerger relief.

[15] *Commissioner of Taxation (Cth) v Spotless Services Ltd* [1996] HCA 34, per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ.

Appendix 2 – Compliance approach

This Appendix sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow the advice in this appendix in good faith and consistently with the ruling section, the Commissioner will administer the law in accordance with this approach.

71. The Commissioner does not intend to devote resources to a specific compliance project to examine whether claims for demerger roll-over under Division 125 for CGT events occurring before 20 March 2019 (when this Determination issued as draft Taxation Determination TD 2019/D1) are compliant with this Determination. However, should that issue arise as part of the usual compliance activity undertaken by the Commissioner, or as a result of a request for a ruling, a request to amend an assessment, an objection against an assessment or in submissions by the Commissioner in litigation, then the Commissioner will act consistently with the views set out in this Determination.

References

Previous draft:
TD 2019/D1

Related Rulings/Determinations:
TR 2006/10

Legislative references:
- ITAA 1997 83A-130
- ITAA 1997 Subdiv 124-N
- ITAA 1997 Div 125
- ITAA 1997 125-5
- ITAA 1997 125-70
- ITAA 1997 125-70(1)
- ITAA 1997 125-70(1)(a)
- ITAA 1997 125-70(1)(b)
- ITAA 1997 125-70(1)(c)
- ITAA 1997 125-70(1)(d)
- ITAA 1997 125-70(1)(e)
- ITAA 1997 125-70(1)(f)
- ITAA 1997 125-70(1)(g)
- ITAA 1997 125-70(1)(h)
- ITAA 1997 125-70(2)
- ITAA 1997 125-70(2)(a)
- ITAA 1997 125-70(2)(b)
- ITAA 1997 125-70(6)
- ITAA 1997 Subdiv 328-G
- ITAA 1997 Div 615
- ITAA 1997 615-5(1)(c)
- ITAA 1997 615-10(1)
- ITAA 1936 44(3)
- ITAA 1936 44(4)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Acts Interpretation Act 1901
- Acts Interpretation Act 1901 15AA
- Acts Interpretation Act 1901 15AB
- Corporations Act 2001 Pt 5.1

Cases relied on:
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