



Class Ruling

Income tax: capital gains: demergers involving Sydney Roads Group stapled securities and Macquarie Infrastructure Group stapled securities

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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 (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and 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 provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

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

- section 6 of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 44 of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45BA of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 128B of the ITAA 1936;
- section 177EA of the ITAA 1936;

- section 104-70 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997;
- section 115-30 of the ITAA 1997; and
- Division 125 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies are the holders of units in Macquarie Infrastructure Trust (I) (MIT(I)) and Macquarie Infrastructure Trust (II) (MIT(II)), and shares in Macquarie Infrastructure Group International Ltd (MIGIL) who:

- (a) participated in the scheme that is the subject of this Ruling; and
- (b) owned these units and shares on capital account at the time of the demergers.

Qualifications

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

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 13 to 41 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.

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Date of effect

8. This Ruling applies to the income year ended 30 June 2007 or where a substituted accounting period is used, the substituted accounting period in which the demerger occurs. However, 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.

9. If this Class 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)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class 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.

11. 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).

Withdrawal

12. This Class Ruling is withdrawn and ceases to have effect after 30 June 2007. However, the Ruling continues to apply after its withdrawal in respect of the tax provisions ruled upon, to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involvement in the scheme.

Scheme

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

- Class Ruling application dated 13 April 2006 from Mallesons Stephen Jaques;
- Correspondence from Macquarie Infrastructure Investment Management Limited (MIIML) (the Responsible Entity of MIT(I) and MIT(II)), and Mallesons Stephen Jaques between 13 April 2006 and 20 September 2006;
- Records of meetings and phone conversations between MIIML, Mallesons Stephen Jaques and the Tax Office between 13 April 2006 and 29 September 2006;
- Information Memorandum on the Demerger and In-specie Distribution of Sydney Roads Group; and
- Sydney Roads Group Prospectus and Product Disclosure Statement for Stapled Securities.

Note: certain information received from Mallesons Stephen Jaques and MIIML has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

MIG Stapled Securities

14. Units in MIT(I) and MIT(II) and shares in MIGIL are listed for quotation on the Australian Stock Exchange (ASX) as Macquarie Infrastructure Group stapled securities. MIT(I), MIT(II) and MIGIL are together referred to as MIG for the purposes of this Ruling.

15. The effect of stapling is that the interests comprising the staple may only be dealt with together as, in effect, one security.

16. At the time of the demerger there were approximately 2,475 million MIG stapled securities on issue. MIG stapled security holders have the same number of interests in each of MIT(I), MIT(II) and MIGIL. No non-resident MIG stapled security holder, either alone or together with their associates, beneficially owns at least 10% of the interests in the stapled entities.

17. MIT(I) is an Australian resident unit trust taxed under Division 6 of Part III of the ITAA 1936.

18. MIT(II) is an Australian resident public trading trust for the purposes of Division 6C of Part III of the ITAA 1936. MIT(II) is the head company of a consolidated group for income tax purposes. Generally, for the purposes of the income tax law, MIT(II) is treated as if it were a company.

19. MIGIL is a company incorporated in Bermuda and is not an Australian resident company.

Operations of MIG

20. MIG invests in concessions which allow for charging motorists a toll on roads which are the subject of the concessions. The business conducted by these entities involves operating and developing toll roads throughout the world.

21. The life cycle of an investment in a toll road concession can be divided into four distinct stages. Chronologically listed, they are: the construction phase, the ramp-up phase, the growth phase and the maturity phase.

22. The focus of the entities that comprise the MIG stapled security is on the development of toll roads in the construction and ramp-up phases. Once a toll road investment opportunity is identified, these entities concentrate on facilitating, planning and managing the investment and development of toll road projects in the early stages of their life cycle.

23. Prior to the demergers which are the subject of this Ruling, MIT(I) and MIT(II) owned a significant interest in the concessions for three Australian toll roads – the Eastern Distributor (ED), M4 Motorway (M4) and M5 Motorway (M5). These toll roads are all in the growth or mature phase of the life cycle.

Pre-demerger transactions

24. Prior to the demergers, MIG undertook a number of transactions, including the establishment of two new entities:

- Sydney Roads Trust (SRT), initially wholly owned by MIT(I) and whose Responsible Entity is Sydney Roads Management Limited (SRML); and
- Sydney Roads Ltd (SRL), initially wholly owned by MIT(II).

25. MIT(I) and MIT(II) transferred their interests in the toll road concessions for the ED, M4 and M5 toll roads to each of SRT and SRL respectively, at market value. The consideration provided for the transfer of these interests was partly by way of debt issue and partly by issue of equity.

26. With effect from the ASX listing date for SRG stapled securities, the units in SRT and the shares in SRL were stapled. The stapling was effected by a Stapling Deed governing the relationship between SRT, SRL, shareholders and unitholders.

27. SRT and SRL are together referred to as the Sydney Roads Group (SRG) for the purposes of this Ruling. An SRT unit and an SRL share together make up a Sydney Roads Group stapled security (SRG stapled security).

28. Following the stapling of the units in SRT and the shares in SRL, SRG stapled securities were offered to members of the public under an Initial Public Offering (IPO). The IPO raised \$125 million through the issue of 108.7 million SRG stapled securities (approximately 11.6% of the SRT units and SRL shares on issue just before the demergers).

29. The funds raised under the IPO of SRG stapled securities were used to repay debts owed to MIT(I) and MIT(II).

30. SRG stapled securities commenced trading on the ASX on 31 July 2006.

The demergers

31. Under the demergers, which took place on 1 August 2006, MIG stapled security holders received one SRT unit and one SRL share (an SRG stapled security) for every three MIT(I) and MIT(II) units they owned, respectively.

32. The demerger of SRT by MIT(I) was conducted by way of a capital reduction, effected by an in specie distribution of all of MIT(I)'s units in SRT to MIG stapled security holders on a one for three basis. MIT(I) accounted for the demerger by debiting its contributed equity account in the sum of \$44,600,247 (or approximately \$0.018 per MIT(I) unit).

33. The demerger of SRL by MIT(II) was conducted by way of a capital reduction and a distribution of accumulated surplus profits, effected by an in specie distribution of all of MIT(II)'s shares in SRL to MIG stapled security holders on a one for three basis. MIT(II) accounted for the demerger by debiting its contributed equity account in the sum of \$797,778,681 (or approximately \$0.322 per MIT(II) unit) and its retained earnings account in the sum of \$106,562,504 (or approximately \$0.043 per MIT(II) unit).

SRG – single purpose mandate

34. SRG was established as a single purpose structure to own and manage the portfolio of Australian toll road concessions (ED, M4 and M5 only). This means it is prohibited from further investment outside of the ED, M4 and M5 concessions without the passing of a special resolution by the SRG stapled security holders.

35. The management of SRG is focussed on maximising returns from the mature Australian assets under its control within a low cost business structure. Notwithstanding the single purpose mandate restriction, SRG has a number of growth opportunities available to it.

36. It is expected that after the demergers, SRL will pay franked dividends to SRG stapled security holders.

MIG stapled security – post demerger

37. After the demerger the focus of MIG is on the development of overseas toll roads - over 90% of MIG's investments are in toll road concessions in the ramp up phase of the life cycle and are located outside Australia.

Other matters

38. As at the time of the demerger, no transfers to MIT(II)'s capital account had resulted in it becoming 'tainted' within the meaning of section 197-50 of the ITAA 1997.

39. Just after the demerger, at least 50% of the market value of capital gains tax (CGT) assets owned by each of SRT and SRL and their respective demerger subsidiaries are used in the carrying on of a business by those entities.

40. At the date of demerger more than 50% of MIG stapled security holders were Australian residents.

41. MIT(II) did not make an election under subsection 44(2) of the ITAA 1936.

Ruling

CGT event E4 and G1

42. CGT event E4 (section 104-70 of the ITAA 1997) happened to each of the MIT(I) units held by the MIG stapled security holders at the time of the demerger.

43. CGT event G1 (section 104-135 of the ITAA 1997) happened to each of the MIT(II) units held by the MIG stapled security holders at the time of the demerger.

Demerger rollover

44. MIT(I) and its subsidiary, SRT, were part of a demerger group under subsection 125-65(1) of the ITAA 1997.

45. MIT(II) and its subsidiary, SRL, were part of a demerger group under subsection 125-65(1) of the ITAA 1997.

46. A demerger, as described under section 125-70 of the ITAA 1997, happened to each of the MIT(I) and MIT(II) demerger groups under the scheme.

47. The MIG stapled security holders (other than non-resident stapled security holders) are eligible to choose demerger rollover under subsection 125-55(1) of the ITAA 1997 for their units in each of MIT(I) and MIT(II).

MIG stapled security holders who choose demerger rollover

MIT(I)

48. MIG stapled security holders who choose demerger rollover for their MIT(I) units will disregard any capital gain made under the demerger in respect of CGT event E4 that happens to those MIT(I) units (subsection 125-80(1) of the ITAA 1997).

49. If a MIG stapled security holder chooses demerger rollover for their MIT(I) units, the first element of the cost base and reduced cost base of each MIT(I) unit and each corresponding SRT unit they acquire under the demerger is the sum of the cost bases (just before the demerger) of their MIT(I) units, apportioned over those MIT(I) units and SRT units on a reasonable basis having regard to the market values (just after the demerger) of the MIT(I) units and SRT units or a reasonable approximation of those market values (subsections 125-80(2) and (3) of the ITAA 1997).

MIT(II)

50. MIG stapled security holders who choose demerger rollover for their MIT(II) units will disregard any capital gain made in respect of CGT event G1 that happened to those MIT(II) units (subsection 125-80(1) of the ITAA 1997).

51. If a MIG stapled security holder chooses demerger rollover for their MIT(II) units, the first element of the cost base and reduced cost base of each MIT(II) unit and each corresponding SRL share they acquire under the demerger is the sum of the cost bases (just before the demerger) of their MIT(II) units, apportioned over those MIT(II) units and SRL shares on a reasonable basis having regard to the market values (just after the demerger) of the MIT(II) units and SRL shares or a reasonable approximation of those market values (subsections 125-80(2) and (3) of the ITAA 1997).

MIG stapled security holders who do not choose demerger rollover***MIT(I)***

52. MIG stapled security holders who do not choose demerger rollover for their MIT(I) units:

- are not entitled to disregard any capital gain made in respect of CGT event E4 that happened to their MIT(I) units under the demerger; and
- the first element of the cost base and reduced cost base of each of their MIT(I) units and their corresponding SRT units is calculated in the manner described in paragraph 49 of this Ruling (subsections 125-85(1) and (2) of the ITAA 1997).

MIT(II)

53. MIG stapled security holders who do not choose demerger rollover for their MIT(II) units:

- are not entitled to disregard any capital gain made in respect of CGT event G1 that happened to their MIT(II) units under the demerger, and
- the first element of the cost base and reduced cost base of each of their MIT(II) units and their corresponding SRL shares is calculated in the manner described in paragraph 51 of this Ruling (subsections 125-85(1) and (2) of the ITAA 1997).

Acquisition date of the SRT units and SRL shares for the purposes of the CGT discount

54. For the purposes of accessing the CGT discount, the SRT units and SRL shares received under the demergers are taken to have been acquired on the date that each MIG stapled security holder acquired their corresponding MIT(I) units and MIT(II) units (subsection 115-30(1) of the ITAA 1997 (item 2)).

Demerger dividend

55. The dividend paid to MIG stapled security holders under the MIT(II) demerger of SRL (described in paragraph 33 of this Ruling) is a demerger dividend (subsection 6(1) of the ITAA 1936).

56. The demerger dividend is neither assessable income nor exempt income of the MIG stapled security holders (subsections 44(3) and 44(4) of the ITAA 1936).

57. Non-resident MIG stapled security holders are not subject to withholding tax in respect of the demerger dividend paid under the MIT(II) demerger of SRL (subsections 128B(1) and 128B(3D) of the ITAA 1936).

Application of sections 45B and 45C of the ITAA 1936

58. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole, or any part, of any demerger benefit provided to MIG stapled security holders under the MIT(II) demerger of SRL.

59. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the capital benefit provided to MIG stapled security holders under the MIT(II) demerger of SRL.

Application of section 177EA of the ITAA 1936

60. The Commissioner will not make a determination under paragraphs 177EA(5)(a) or (b) of the ITAA 1936 in respect of the MIT(II) demerger of SRL.

Commissioner of Taxation

11 October 2006

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.*

CGT event E4

61. CGT event E4 (section 104-70 of the ITAA 1997) happens if the trustee of a trust makes a payment to a beneficiary, in respect of their unit or interest in the trust, which is not included in the beneficiary's assessable income. The payment can include the giving of property (subsection 104-70(2) of the ITAA 1997).

62. Where the payment is the giving of property, the amount of the payment is the market value of the property given (section 103-5 of the ITAA 1997).

63. CGT event E4 happens since MIT(I) distributes SRT units to MIG stapled security holders and the value of the SRT units is not included in the assessable income of the MIG stapled security holders.

64. MIG stapled security holders (other than non-resident stapled security holders) make a capital gain if the non-assessable payment made by the trustee in relation to their units exceeds the cost base of the units (subsection 104-70(4) of the ITAA 1997). In this case, the market value of the SRT units received by each MIG stapled security holders constitutes a non-assessable payment made by the trustee. MIG stapled security holders who make a capital gain from CGT event E4 happening to their MIT(I) units can choose demerger rollover (section 125-55 of the ITAA 1997) in order to disregard the capital gain relating to the demerger of SRT by MIT(I) (subsection 125-80(1) of the ITAA 1997).

CGT event G1

65. CGT event G1 (section 104-135 of the ITAA 1997) happens if a company makes a payment to a shareholder in respect of their interest in the company and some or all of that payment is not a dividend or an amount that is taken to be a dividend under section 47 of the ITAA 1936 (non-assessable payment). The payment can include the giving of property (section 103-5 of the ITAA 1997).

66. If CGT event G1 happens, a shareholder (other than non-resident stapled security holders) will make a capital gain if the non-assessable payment made by the company in relation to a share exceeds the cost base of the share (subsection 104-135(3) of the ITAA 1997).

67. MIT(II) is not a company. It is a trust taxed under Division 6C of Part III of the ITAA 1936 (this Division applies in relation to certain public trading trusts defined in section 102R of the ITAA 1936).

68. For certain purposes of the ITAA 1936 and ITAA 1997 those trusts are treated as companies and units in them are treated as shares. In particular, section 102T of the ITAA 1936 sets out the circumstances when a unit in a public trading trust will be treated as a share. Those circumstances do not include CGT event G1 in section 104-135 of the ITAA 1997. However, the note to subsection 102T(1) of the ITAA 1936 indicates that there is a different approach for a public trading trust that chooses to form a consolidated group. Essentially, if that choice has been made, then Subdivision 713-C of the ITAA 1997 applies to treat the trust as a company and units in it as shares.

69. As MIT(II) has made the choice to form a consolidated group, a unit in MIT(II) is treated as a share when applying section 104-135 of the ITAA 1997.

70. As a consequence, CGT event G1 happened when MIT(II) distributed to the MIG stapled security holders the capital reduction amount (subsection 104-135(2) of the ITAA 1997), since this amount is neither a dividend nor an amount taken to be a dividend under section 47 of the ITAA 1936.

71. A capital gain arose to MIG stapled security holders to the extent that the capital reduction amount of \$0.322 per unit, exceeded the cost base of their MIT(II) units at that time. MIG stapled security holders who made a capital gain from the CGT event G1 that happened to their MIT(II) units under the MIT(II) demerger of SRL may choose demerger rollover (section 125-55 of the ITAA 1997) in order to disregard this capital gain (subsection 125-80(1) of the ITAA 1997).

Demerger rollover

72. Subsection 125-55(1) of the ITAA 1997 provides that rollover may be chosen if:

- a security holder owns an ownership interest in a trust or company – this requirement is satisfied as MIG stapled security holders own units in each of MIT(I) and MIT(II) (with MIT(II) treated as a company for this purpose – refer to paragraphs 67 and 68 of this Ruling);
- the trust or company is the head entity of a demerger group – this requirement is satisfied as each of MIT(I) and MIT(II) are the head entities of their respective demerger groups (refer to paragraphs 74 to 77 of this Ruling);
- a demerger happens to the demerger group – this requirement is satisfied, as the following two demergers happened:
 - a demerger happened to the MIT(I) demerger group; and

- a demerger happened to the MIT(II) demerger group (refer to paragraph 78 of this Ruling); and
- under the demerger a CGT event happens to the original interest and a new or replacement interest is acquired in the demerged entity – this requirement is satisfied as:
 - CGT event E4 happened to each of the MIT(I) units (refer to paragraphs 61 to 64 of this Ruling) and MIG stapled security holders received SRT units under the demerger; and
 - CGT event G1 happened to each of and the MIT(II) units (refer to paragraphs 65 to 71 of this Ruling) and MIG stapled security holders received SRL shares under the demerger.

73. Therefore, MIG stapled security holders (other than non-resident stapled security holders) may choose rollover for the demerger of SRT by MIT(I) and for the demerger of SRL by MIT(II).

Are MIT(I) and MIT(II) the head entities of their respective demerger groups?

74. A demerger group comprises one head entity and at least one demerger subsidiary (subsection 125-65(1) of the ITAA 1997). The demerger groups in this case include:

- MIT(I) as head entity and SRT as a demerger subsidiary (the MIT(I) demerger group); and
- MIT(II) as head entity and SRL as a demerger subsidiary (the MIT(II) demerger group).

75. MIT(I) and MIT(II) are both head entities because at the time of the demergers:

- neither SRT nor SRL had ownership interests in MIT(I) and MIT(II) respectively (subsection 125-65(3) of the ITAA 1997); and
- there was no other company or trust capable of being a head entity of a demerger group of which either MIT(I) or MIT(II) could be a demerger subsidiary (subsection 125-65(4) of the ITAA 1997).

76. SRT was a demerger subsidiary of MIT(I), because, at the time of the demerger, MIT(I) owned ownership interests that carried the right to receive approximately 88.4% of any distribution of income or capital by SRML (the trustee of SRT) (subsection 125-65(7) of the ITAA 1997).

77. SRL was a demerger subsidiary of MIT(II), because at the time of the demerger, MIT(II) owned ownership interests that carried the right to:

- receive approximately 88.4% of any distribution of income or capital by SRL, and
- exercise approximately 88.4% of the voting power in SRL (subsection 125-65(6) of the ITAA 1997).

Has a demerger happened to the MIT(I) and MIT(II) demerger groups?

78. A demerger happened (subsections 125-70(1), (2) and (3) of the ITAA 1997) to each of the MIT(I) and MIT(II) demerger groups because:

- there was a restructuring of each of the demerger groups (paragraph 125-70(1)(a) of the ITAA 1997), under which:
 - MIT(I) disposed of 100% of its existing SRT units to the MIG stapled security holders (subparagraph 125-70(1)(b)(i) of the ITAA 1997);
 - MIT(II) disposed of 100% of its existing SRL shares to the MIG stapled security holders (subparagraph 125-70(1)(b)(i) of the ITAA 1997);
- under the restructurings a CGT event happened:
 - to MIT(I) units and MIG stapled security holders acquired new units in SRT and nothing else (subparagraph 125-70(1)(c)(i) of the ITAA 1997);
 - to MIT(II) units and MIG stapled security holders acquired new shares in SRL and nothing else (subparagraph 125-70(1)(c)(i) of the ITAA 1997);
- under the restructurings:
 - SRT units were acquired by MIG stapled security holders on the basis of their ownership of units in MIT(I) (paragraph 125-70(1)(d) and subparagraph 125-70(1)(e)(ii) of the ITAA 1997);
 - SRL shares were acquired by MIG stapled security holders on the basis of their ownership of units in MIT(II) (paragraph 125-70(1)(d) and subparagraph 125-70(1)(e)(i) of the ITAA 1997);
- paragraphs 125-70(1)(f) and 125-70(1)(g) of the ITAA 1997 are satisfied;

- each MIG stapled security holder acquired:
 - SRT units in the same proportion as they owned MIT(I) units just before the demerger (paragraph 125-70(2)(a) and subsection 125-70(3) of the ITAA 1997);
 - SRL shares in the same proportion as they owned MIT(II) units just before the demerger (paragraph 125-70(2)(a) and subsection 125-70(3) of the ITAA 1997),
- each MIG stapled security holder has, just after the demergers:
 - the same proportionate total market value of MIT(I) units and SRT units as they had in MIT(I) just before the demerger (paragraph 125-70(2)(b) and subsection 125-70(3) of the ITAA 1997);
 - the same proportionate total market value of MIT(II) units and SRL shares as they had in MIT(II) just before the demerger (paragraph 125-70(2)(b) and subsection 125-70(3) of the ITAA 1997); and
- subsections 125-70(4) and (5) of the ITAA 1997 do not apply.

Choosing demerger rollover for MIT(I) and MIT(II) units

79. MIG stapled security holders (other than non-resident stapled security holders) must separately choose demerger rollover for each of their MIT(I) units and for each of their MIT(II) units.

MIT(I)

80. For MIG stapled security holders who choose demerger rollover for their MIT(I) units, a capital gain made from CGT event E4 that happened on the return of capital made under the demerger is disregarded (subsection 125-80(1) of the ITAA 1997).

81. Each MIG stapled security holder is required to calculate the first element of the cost base and reduced cost base of each of their MIT(I) units and their corresponding new SRT units just after the demerger (subsections 125-80(2) and (3) of the ITAA 1997).

82. Section 125-80 of the ITAA 1997 requires security holders to apportion the total of the cost bases of their MIT(I) units over those units and the corresponding new SRT units. The apportionment must have regard to the relative market values of the MIT(I) units and SRT units (or anticipated reasonable approximations of those market values) just after the demerger.

MIT(II)

83. Each MIG stapled security holder is required to calculate the first element of the cost base and reduced cost base of each of their MIT(II) units and their corresponding new SRL shares just after the demerger (subsections 125-80(2) and (3) of the ITAA 1997).

84. Section 125-80 of the ITAA 1997 also requires security holders to apportion the total of the cost bases of their MIT(II) units over those units and the corresponding new SRL shares. The apportionment must have regard to the relative market values of the MIT(II) units and SRL shares (or anticipated reasonable approximations of those market values) just after the demerger.

Note: indexation of the cost bases is not included in the amount of the total cost base to be apportioned under this calculation.

However, if a security holder has MIG stapled securities that they acquired before 11.45am (by legal time in the ACT) on 21 September 1999 and they later dispose of those stapled securities, they may be entitled to include indexation in the cost base of their MIT(I) units and MIT(II) units (see Division 114 of the ITAA 1997).

Indexation cannot be included in the cost base of the SRT units and SRL shares since they were acquired at the date of the demerger (that is, after 11.45am (by legal time in the ACT) 21 September 1999 – see subsections 110-25(7) and (8) of the ITAA 1997).

Non-resident MIG stapled security holders

85. Section 136-10 of the ITAA 1997 states that a non-resident shareholder or unitholder will not make a capital gain on a capital payment for shares or units unless those shares or units have the necessary connection with Australia. A non-resident MIG stapled security holder and their associates must have (at any time during the five years immediately before the capital payment) held at least 10% by value of the interests in the stapled entities in order for the shares or units to have the necessary connection with Australia (section 136-25, categories 5 and 6). No non-resident MIG stapled security holder, either alone or together with their associates, beneficially held 10% or more of the MIG stapled securities, and therefore demerger rollover is not necessary.

MIG stapled security holders who do not choose demerger rollover

MIT(I)

86. For MIG stapled security holders who do not choose demerger rollover for their MIT(I) units, any capital gain made from CGT event E4 that happened to those MIT(I) units on the return of capital made under the demerger is not disregarded.

87. The method of calculating the first element of the cost base and reduced cost base for a MIG stapled security holder's MIT(I) units and corresponding new units in SRT is the same whether or not rollover is chosen (refer to paragraphs 81 and 82 of this Ruling and subsection 125-85(2) and Note 1 to subsection 125-80(2) of the ITAA 1997).

MIT(II)

88. For MIG stapled security holders who do not choose demerger rollover for their MIT(II) units, any capital gain made from CGT event G1 that happened to those MIT(II) units on the return of capital (capital reduction amount) made under the demerger is not disregarded.

89. The method of calculating the first element of the cost base and reduced cost base for a MIG stapled security holder's MIT(II) units and corresponding new shares in SRL is the same whether or not rollover is chosen (refer paragraphs 83 and 84 of this Ruling and subsection 125-85(2) and Note 1 to subsection 125-80(2) of the ITAA 1997).

Acquisition date of the SRT units and SRL shares for the purposes of the CGT discount

90. For the purpose of the 12 month ownership test for the CGT discount, MIG stapled security holders are taken to have acquired the SRT units and SRL shares received in relation to MIT(I) and MIT(II) units respectively, on the date they acquired their corresponding MIT(I) and MIT(II) units (item 2 in the table in subsection 115-30(1) of the ITAA 1997).

Demerger dividend

91. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income a dividend, as defined in subsection 6(1) of the ITAA 1936, paid to a shareholder out of company profits.

92. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders. However, paragraph (d) of the subsection 6(1) definition of a dividend excludes amounts debited against an amount standing to the credit of the share capital account of the company (as defined in section 6(1) of the ITAA 1936, which makes reference to the definition of that term in the ITAA 1997).

MIT(I)

93. MIT(I) is not a company, nor are there any provisions which deem it or its distributions to be that of a company. Therefore the distribution made by MIT(I) to MIG stapled security holders is not a dividend as defined in section 6(1) of the ITAA 1936.

MIT(II)

94. The value of the SRL shares distributed by MIT(II) to the MIG stapled security holders is a dividend paid out of profits, to the extent it is not debited to MIT(II)'s capital account, for the following reasons:

- subsection 102T(12) of the ITAA 1936 applies to deem a dividend as having been *paid* for the purposes of subsections 6(1) (dividend definition) and 44(1) of the ITAA 1997; and
- the table in subsection 713-140(2) of the ITAA 1997 provides for general modifications to references in the ITAA 1936 and ITAA 1997, including (at item 2) that a reference to a 'dividend' includes a reference to a distribution of a trust to the extent it is out of profits. Item 3 provides a reference to 'a share capital account' includes a reference to the amount of the trust estate that is not attributable to profits.

95. However, the dividend received by the MIG stapled security holders under the MIT(II) demerger of SRL is a demerger dividend and is neither an assessable income nor an exempt income amount (subsections 44(3) and (4) of the ITAA 1936) because:

- the dividend is a demerger dividend (as defined in subsection 6(1) of the ITAA 1936);
- the head entity (MIT(II)) did not elect that subsections 44(3) and (4) of the ITAA 1936 do not apply to the demerger dividend (subsection 44(2) of the ITAA 1936); and
- subsection 44(5) of the ITAA 1936 is satisfied.

96. As the dividend received by MIG stapled security holders under the MIT(II) demerger of SRL is a demerger dividend, non-resident MIG stapled security holders are not subject to withholding tax in respect of that demerger dividend (subsections 128B(1) and 128B(3D) of the ITAA 1936).

Application of sections 45B, 45BA and 45C of the ITAA 1936

97. Section 45B is an integrity measure relating to dividends and therefore only has application to company shareholders and unit holders of corporate unit trusts and public trading trusts. In the present circumstances therefore, it is only relevant to consider this provision in regard to the MIT(II) demerger of SRL (refer to comments in paragraph 68 of this Ruling in respect of the application of Subdivision 713-C of the ITAA 1997).

98. Section 45B of the ITAA 1936 applies to ensure that relevant amounts are treated as dividends for taxation purposes if:

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

99. Specifically, the provision applies where:

- there is a scheme under which a person is provided with a demerger benefit or capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- under the scheme a taxpayer, who may or may not be the person provided with the demerger benefit or the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into the scheme or carried out the scheme or any part of the scheme did so for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

100. Where the requirements of subsection 45B(2) of the ITAA 1936 are met, subsection 45B(3) empowers the Commissioner to make a determination under either section 45BA in relation to a demerger benefit, or section 45C in relation to a capital benefit.

Scheme, demerger and capital benefit

101. The restructure consisting of the MIT(II) demerger of SRL constitutes a 'scheme' within the broad meaning of that term (subsection 45B(10) of the ITAA 1936).

102. The provision of ownership interests to a security holder under a demerger constitutes their being provided with a demerger benefit (subsection 45B(4) of the ITAA 1936) and a capital benefit (subsection 45B(5) of the ITAA 1936) to the extent that the demerger benefit is not entirely a demerger dividend (subsection 45B(6) of the ITAA 1936).

103. In the present scheme, therefore, the provision of the SRL shares constitutes the MIG stapled security holders receiving a demerger benefit and a capital benefit.

Tax benefit

104. For most MIG stapled security holders, the tax payable on the demerger benefit and the capital benefit is less than it would be if they had been an assessable dividend or a dividend respectively. This arises because the CGT and dividend concessions ensure that the demerger was largely free of tax for security holders. As such, the provision of those benefits constitutes the security holders obtaining a tax benefit (subsection 45B(9) of the ITAA 1936).

Purpose

105. In this case, while the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 are met, the requisite purpose of enabling the MIG stapled security holders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) is not present. In other words, having regard to the relevant circumstances of the scheme, set out in subsection 45B(8) of the ITAA 1936, it would not be concluded that any of the parties to the demerger entered into or carried out the scheme to obtain a tax benefit in the form of a demerger benefit or a capital benefit.

106. The relevant circumstances listed in subsection 45B(8) of the ITAA 1936 include the tax and non-tax (that is, business) implications of the demerger, the latter covered in the main by the matters in paragraph 177D(b) of the ITAA 1936 which are included in subsection 45B(8) by paragraph (k). It is apparent, after having regard to all of the relevant circumstances in subsection 45B(8) of the ITAA 1936 including the matters in paragraph 45B(8)(k) of the ITAA 1936, that the substantial purpose of the demerger was to restructure the business of MIG into two businesses characterised and differentiated by their independent management, their business strategies, their commercial objectives and their risk profiles. Furthermore, the demerger's underlying aim of enhancing value for the security holders is consistent with the policy objective of the demerger measure.

107. It is also apparent from the circumstances of the demerger that the capital and profit components of the demerger allocation are consistent with the commercial circumstances of the transaction.

108. While the tax outcome for participating MIG stapled security holders is favourable, an objective determination of the circumstances of the scheme does not suggest that this favourable tax outcome is anything more than the natural incident of the business restructure.

109. Therefore, the Commissioner will not make a determination under either paragraph 45B(3)(a) or (b) of the ITAA 1936 that sections 45BA or 45C of the ITAA 1936 applies to the scheme.

Application of section 177EA of the ITAA 1936

110. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to schemes undertaken 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.

111. Specifically, subsection 177EA(3) of the ITAA 1936 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 the interest in 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, the 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.

112. In the present circumstances, the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied under the scheme which includes the MIT(II) demerger of SRL, since:

- there is a scheme (the demerger) under which MIT(II) disposes of its shares in SRL to MIG stapled security holders;
- SRL is expected to pay frankable distributions to its SRG stapled security holders;
- these distributions are expected to be franked distributions; and
- it is likely that the majority of security holders could be reasonably expected to receive imputation benefits in respect of those distributions by SRL.

113. However the requisite purpose of enabling the MIG stapled security holders to obtain franking credit benefits is not present (paragraph 177EA(3)(e) of the ITAA 1936).

114. In arriving at this conclusion the Commissioner had 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.

115. The purpose of the MIT(II) demerger of SRL is to separate two businesses – one focused on the development and management of toll roads in the early stages of their life cycle and the other managing Australian toll roads in the growth or mature phase of their life cycle. The demerger aims to maximise security holder value.

116. Accordingly the Commissioner will not make a determination under paragraph 177EA(5)(a) or (b) of the ITAA 1936 in respect of the MIT(II) demerger of SRL.

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References

Previous draft:

Not previously issued as a draft

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