



Class Ruling

Income tax: Macquarie Group Employee Retained Equity Plan: share consolidation and in specie distribution: Macquarie Group Limited

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1 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 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:
- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 44 of the ITAA 1936;
 - section 45A of the ITAA 1936;
 - section 45B of the ITAA 1936;
 - section 45C of the ITAA 1936;
 - section 128B of the ITAA 1936;
 - section 128D of the ITAA 1936;

- former section 160APHE of the ITAA 1936;
- former section 160APHJ of the ITAA 1936;
- former section 160APHM of the ITAA 1936;
- former section 160APHN of the ITAA 1936
- former section 160APHO of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 6-5 of *the Income Tax Assessment Act 1997* (ITAA 1997);
- Division 67 of the ITAA 1997;
- Division 83A of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- section 104-75 of the ITAA 1997;
- section 104-85 of the ITAA 1997;
- section 104-135 of the ITAA 1997;
- section 109-5 of the ITAA 1997;
- Division 110 of the ITAA 1997
- section 112-20 of the ITAA 1997;
- section 112-25 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- Subdivision 115-C of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- Subdivision 130-D of the ITAA 1997;
- section 202-40 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 207-35 of the ITAA 1997; and
- section 207-75 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 employees (including directors) of Macquarie Group Limited (MGL) or its subsidiaries who:

- hold one or more of the following types of Macquarie Group Employee Retained Equity Plan (MEREP) awards on the record date of 20 December 2013 (Record Date): 'Restricted Share Units' (RSUs), 'Deferred Share Units' (DSUs) or 'Performance Share Units' (PSUs) (together, MEREP awards);
- have their Sydney Airport (SYD) Securities either registered in their own name, registered in the name of the 'Nominee' or sold under the 'Sale Facility';
- have their MEREP awards affected by the consolidation of MGL ordinary shares (MGL shares) immediately after the Record Date;
- are residents of Australia for the purposes of the Australian income tax legislation, including by virtue of the operation of any double tax agreement between Australia and any other country, on both the Record Date and the Distribution Date;
- are not temporary residents within the meaning of subsection 995-1(1);
- hold their MEREP awards neither as revenue assets (as defined in section 977-50) nor trading stock (as defined in subsection 995-1(1)) – that is, broadly on capital account for income tax purposes; and
- are not subject to the taxation of financial arrangements in Division 230 in relation to gains and losses on their MEREP awards.

(Note: Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them).

In this Ruling, a person belonging to this class of entities is referred to as a Holder.

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 9 to 69 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 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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).

Previous Rulings

8. Class Ruling CR 2010/73 - Income Tax: Macquarie Group Employee Retained Equity Plan and Class Ruling - CR 2014/10 – Income tax: share consolidation and in specie distribution: Macquarie Group Limited.

Scheme

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

- application for Class Ruling dated 12 November 2013;
- all other correspondence from the applicant in relation to this Ruling;
- Notice of General Meeting and Explanatory Memorandum dated 1 November 2013; and
- the unaudited MGL company statement of financial position as at 30 September 2013.

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

Background***MGL Group***

10. The MGL Group is a global provider of banking, financial, advisory, investment, and funds management services.
11. The MGL Group's main business focus is making returns by providing a diversified range of services to clients. The MGL Group acts on behalf of institutional, corporate, and retail clients and counterparties around the world.
12. The MGL Group is regulated by the Australian Prudential Regulation Authority.

MGL

13. MGL is an Australian resident company with shares listed on the Australian Securities Exchange (ASX).
14. The only shares that MGL has issued are ordinary shares.
15. MGL is the head entity of the Macquarie tax consolidated group (TCG). Subsequent references to MGL are references to MGL as the head entity of the MGL TCG.
16. Members of the MGL TCG had held a significant number of Sydney Airport stapled securities (SYD Securities).

Scheme steps

17. The scheme comprised the following:
 - on 12 December 2013 MGL's Constitution was amended to facilitate the Distribution;
 - on 13 January 2014 (Distribution Date), MGL distributed SYD Securities to MGL shareholders on a one for one basis as at the record date of 20 December 2013 (Record Date); and
 - with effect immediately after Record Date, the consolidation of the share capital of MGL through the conversion of 1 MGL share into 0.9438 MGL shares with any resulting fraction of a share rounded up to the next whole number of shares on a per registered shareholder basis (Consolidation).

Relevant MGL attributes

Dividends

18. MGL has a long history of regularly paying dividends on its ordinary shares in July (final dividend) and December (interim dividend) of each year. MGL's current dividend policy is as follows:

'MGL targets an annual ordinary dividend payout ratio in the range of 60 per cent to 80 per cent of net earnings. Franking is subject to composition of income.'

19. The dividends paid on the ordinary shares in July and December 2013 had a franking percentage of 40% and the remainder of the dividend was declared to be conduit foreign income (CFI).

20. MGL currently expects that regular dividends on the ordinary shares will continue to be paid in accordance with its current dividend policy.

21. MGL paid an interim dividend on the ordinary shares on 12 December 2013 and expects to pay a full year dividend in July 2014 in accordance with its dividend policy.

22. MGL bought back 9,809,049 ordinary shares for \$251 million via on-market buy-back transactions between 21 June 2012 and 26 September 2012.

MGL's retained earnings and contributed equity

23. The unaudited MGL company statement of financial position as at 30 September 2013 disclosed Contributed Equity of \$8,629 million and adjusted Retained Earnings of \$3,930 million. This Retained Earnings amount includes a proforma adjustment for the unrealised accounting profit after tax on distribution of the SYD Securities. The unrealised (as at 30 September 2013) accounting profit was calculated by reference to their fair value as at 30 September 2013.

SYD Securities

24. SYD Securities are stapled securities that are listed on the ASX.

25. Each stapled security consists of a unit in Sydney Airport Trust 1 (SAT1) stapled to a share in Sydney Airport Limited (SAL).

Reasons for the distribution

26. MGL's management decided to exit the investment in SYD by making an in specie distribution to MGL shareholders because:

- an in specie distribution was an equitable way to distribute the value in SYD to MGL shareholders so that they can directly participate in the ownership of SYD. Eligible MGL shareholders are able to decide whether to maintain an ongoing investment in SYD based on their individual circumstances;
- the Distribution facilitated a return of capital. MGL will continue to maintain a strong balance sheet position and a level of shareholders' equity for prudent and efficient capital management;
- the Distribution is expected to increase MGL's return on shareholders' equity; and
- the Consolidation was intended to reflect the expected impact of the Capital Component, based on information current at the time of the Notice of General Meeting, and facilitates comparison of MGL's financial metrics before and after the Distribution.

The Distribution

27. The closing price of SYD Securities on ASX on the last trading day before the Distribution Date (10 January 2014) was \$3.73.

28. On the Distribution Date MGL made an in specie distribution of SYD Securities to MGL shareholders, comprising a special dividend (Dividend Component of \$1.1563 per MGL share on a pre-Consolidation basis), representing 31% of the Distribution amount and a return of capital (Capital Component of \$2.5737 per MGL share on a pre-Consolidation basis), representing 69% of the Distribution amount.

29. The sum of the Dividend Component and the Capital Component equalled the market value of each SYD Security (\$3.73) received by MGL shareholders per MGL share on a pre-Consolidation basis under the Distribution.

30. The Capital Component was delivered through an equal capital reduction in respect of MGL shares pursuant to section 256B of the *Corporations Act 2001*(Cth),(CA).

31. No MGL shares were cancelled in connection with the Distribution.

Accounting for the Distribution

32. The accounting for the Distribution was as follows:

- the Dividend Component was debited to MGL's retained earnings; and

- the Capital Component was debited to MGL's contributed capital.

Franking and Conduit Foreign Income (CFI)

33. MGL franked the Dividend Component of the Distribution at 40% being the same rate as the regular December 2013 MGL dividend and declared the remaining unfranked part of the Dividend Component to be CFI.

34. That is, the entire Dividend Component was either franked or CFI.

Sale Facility

35. A Sale Facility was put in place for RSU Holders that:

- held 500 or fewer RSUs on the Record Date and elected to participate; or
- were categorised as an Ineligible Shareholder in relation to the Distribution,

(the Sale Facility).

36. For RSU Holders that participated in the Sale Facility, their SYD Securities have been distributed to a broker appointed by MGL (Sale Agent) to be sold on their behalf.

37. The amount of money received by each RSU Holder whose SYD Securities are sold under the Sale Facility would be calculated on an average basis so that all MGL Shareholders including RSU Holders would receive the same price for each SYD Security sold on their behalf, subject to rounding down to the nearest whole Australian cent (Sale Facility Proceeds).

Nominee Arrangements

38. A Nominee Arrangement was put in place to ensure that legal title to the SYD Securities was only transferred to those persons who agreed to become members of SYD.

39. In summary, the Nominee Arrangements only changed the manner in which title to the SYD Securities passed to RSU Holders, in that beneficial ownership rather than legal title passed to RSU Holders who did not complete and return the Holder Election Form or made the online election by the Election Date. In all cases, the market value of the SYD Securities would be the same regardless of whether they were subject to the Nominee Arrangement.

MEREP

40. MEREP was established in 2009.

41. Under the MEREP, the following awards are issued by MGL:
- Restricted shares, which are MGL shares with vesting being subject to certain requirements (these are not the subject of this ruling request);
 - RSUs, which are beneficial interests in MGL shares held in the Macquarie Group Employee Retained Equity Plan Trust (MEREP Trust) with vesting being subject to certain requirements. An RSU is granted when the Trustee of the MEREP Trust allocates to the RSU Holder the MGL share to which the RSU relates;
 - DSUs, which are zero exercise price options to acquire MGL shares that are subject to restrictions as to exercise; and
 - PSUs, which have performance hurdles and may be in the form of RSUs or DSUs. To date, only PSUs that are in the form of DSUs have been issued.
42. MGL has established the MEREP Trust in 2010 for the purpose of subscribing for or acquiring, delivering, allocating, and holding ordinary shares for MEREP participants under the terms and conditions set out in the Trust Deed and MEREP Plan Rules.

MEREP awards and the Distribution

RSU Holders

43. RSU Holders participated in the Distribution on the same basis as MGL shareholders. That is, pursuant to the MEREP Plan Rules and Trust Deed ('MEREP Rules') they were entitled to receive one SYD Security for each RSU held on the Record Date.
44. The SYD Securities were initially registered in the name of the Trustee on the Distribution Date. If the RSU Holder completed and returned the Holder Election Form by the Election Date (6 January 2014), their SYD Securities were immediately registered in their name on the Distribution Date. Otherwise, the SYD Securities were immediately registered in the name of the Nominee on the Distribution Date pursuant to the Nominee Deed Poll.
45. In both cases, MGL determined that SYD Securities were not subject to any vesting conditions or disposal restrictions for the purposes of the MEREP Rules.
46. The Sale Facility was in place for RSU Holders that held 500 or fewer RSUs on the Record Date and elected to participate or who were categorised as Ineligible Shareholders in relation to the Distribution.

DSU Holders

47. DSU Holders did not receive SYD Securities under the Distribution as they did not have a beneficial interest in MGL shares.

48. Rather, pursuant to the MEREP Rules, the DSU Holders received a payment of salary and wages equal to the value of the Distribution (Cash Equivalent Payment), less any tax that was required to be withheld.

49. The Cash Equivalent Payment was determined by reference to the actual average selling price realised by the Sale Facility.

PSU Holders

50. PSU Holders did not receive SYD Securities under the Distribution as they did not have a beneficial interest in MGL shares.

51. PSU Holders did not receive the Cash Equivalent Payment, as the terms of the PSUs did not provide for such a payment.

Share Consolidation

52. MGL shares were consolidated with effect immediately after the Record Date on a ratio of 0.9438 MGL shares for every one MGL share.

53. The Consolidation occurred pursuant to section 254H of the CA and involved consolidation of the ordinary shares on issue as at the Record Date.

54. Any partial shares at a shareholder level were rounded up.

55. Further as the Consolidation occurred pursuant to section 254H of the CA:

- a shareholder's original MGL shares were not cancelled or redeemed;
- there was no change in the total amount allocated to MGL's share capital account; and
- the proportion of equity owned by each MGL shareholder in the share capital account was maintained.

RSUs

56. An RSU is a beneficial interest in a MGL share held by the Trustee for an RSU Holder. When the MGL shares were consolidated, the number of MGL shares held by every registered MGL shareholder (including the Trustee) were consolidated in the same ratio.

57. Accordingly, under the Consolidation, the number of MGL shares held by the Trustee for a particular RSU Holder was reduced correspondingly and so the number of MGL shares that the RSU Holder has a beneficial interest in was correspondingly reduced.

58. That is, RSU Holders had no contractual or equitable right to receive any additional MGL shares beyond those that the Trustee allocated to them (the number of which was reduced under the Consolidation).

59. The effect of the Consolidation is that for each RSU held by a RSU Holder before the Consolidation, they now hold 0.9438 RSUs after the Consolidation (subject to rounding on the same basis as each registered MGL Shareholder) and each RSU relates to one MGL Share.

DSUs

60. Under the MEREP Rules, the DSUs were consolidated in the same ratio as MGL shares.

61. These provisions replicate requirements under the ASX Listing Rules for the treatment of options under a consolidation (DSUs are options for the purpose of the ASX Listing Rules).

62. The effect of the consolidation of DSUs is that for each DSU held by a Holder before the consolidation, they now hold 0.9438 DSUs after the Consolidation (subject to rounding on the same basis as each registered MGL Shareholder).

63. Each DSU still confers the right to acquire one MGL share upon exercise.

64. The consolidation of the DSUs (as with the Consolidation of MGL shares) did not involve the rescission and creation of new contractual rights.

PSUs

65. All of the PSUs that are on issue are in the form of DSUs.

66. As such, the PSUs held on the Record Date were consolidated on the same basis as the DSUs as above.

Other relevant matters

67. The profile of existing MGL shareholders based on the beneficial ownership as at 1 April 2013 was approximately Australian residents 66% and Non-Australian residents 34%.

68. This ruling is prepared on the basis that immediately before the Distribution MGL's share capital account was not tainted for Division 197 purposes.

69. The applicant contends that the MEREP Trust will have a positive amount of net income for the income year ending 30 June 2014.

Ruling

Part 1: RSU Holders

Amount of Distribution

70. The amount of the Distribution by MGL was equal to the market value of the SYD Securities distributed in respect of each MGL share. The Commissioner accepts that the closing ASX price on the last trading day before the Distribution Date (10 January 2014) may be used to determine the market value of the SYD Securities at the Distribution Date (\$3.73 per SYD Security received).

The Distribution

ESS deferred taxing point under section 83A-115 for RSU Holders

71. The in specie Distribution of SYD Securities will not cause an ESS deferred taxing point under section 83A-115 in respect of MGL shares held by the MEREP Trust for the RSU Holders.

SYD Securities are not ESS interests

72. The SYD Securities acquired by RSU Holders as a result of the Distribution are not ESS interests provided under an employee share scheme within the meaning of subsection 83A-10(2).

Dividend Component included in resident's assessable income

73. The Dividend Component (\$1.1563 per MGL share on a pre-Consolidation basis of the Distribution, being a dividend as defined in subsection 6(1) of the ITAA 1936, must be included in the assessable income of a resident RSU Holder (section 97 of the ITAA 1936).

Gross up and tax offset

74. The Dividend Component of the Distribution is a frankable distribution under section 202-40.

75. A RSU Holder who received the Dividend Component satisfies the residency requirement in section 207-75, and is a 'qualified person' in relation to the franked distribution:

- must include in their assessable income the amount of the franking credit attached to the Dividend Component (subsection 207-35(1)) and;

will be entitled to a tax offset equal to the franking credit received on the Dividend Component (section 207-45).

Qualified persons

76. A RSU Holder will be a 'qualified person' in relation to the Dividend Component of the Distribution for the purposes of Division 1A of former Part IIIA of the ITAA 1936 if pursuant to former section 160APHO of the ITAA1936:

- the RSU Holder held their interest in MGL shares at risk for a period of at least 45 days (excluding the day the acquisition of the interest in shares, the day (if any) on which the interest in shares was disposed of, and any days on which they have materially diminished risks of loss or opportunities for gain in respect of the interest in shares within the former sections 160APHM and 160APHJ of the ITAA 1936) during the primary qualification period;

and:

- neither the RSU Holder, nor any associates, have made, are under an obligation to make, or are likely to make, a related payment (within the meaning of former section 160APHN of the ITAA 1936) in respect of the Dividend Component of the Distribution.

77. The following will not affect whether an interest in MGL shares is held 'at risk' for the purposes of Division 1A of former Part IIIA of the ITAA 1936:

- RSU Holders' interests in MGL shares arise in their capacity as beneficiaries of the MEREP Trust;
- the Distribution;
- the Nominee Arrangements; and
- the availability of a Sale Facility for small parcels of SYD Securities and the Ineligible Shareholders.

Refundable tax offset

78. The franking credit tax offset that a RSU Holder is entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, unless it is specifically excluded under section 67-25.

Imputation integrity provisions

79. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits in relation to the Dividend Component received by RSU Holders.

80. 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 in relation to the Dividend Component received by RSU Holders.

Capital Component is not ordinary income or a dividend

81. The Capital Component is not ordinary income under section 6-5.

82. The Capital Component is not a dividend, as defined in subsection 6(1) of the ITAA 1936.

The application of sections 45A, 45B and 45C of the ITAA 1936 to Capital Component

83. The Commissioner will not make a determination under either subsection 45A(2) or subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to any part of the Capital Component of the Distribution. Accordingly, no part of the Capital Component will be taken to be a dividend for income tax purposes.

CGT consequences

CGT Event G1

84. CGT event G1 (section 104-135) happened, to the extent of the Capital Component (\$2.5737 per MGL share on a pre-Consolidation basis), when MGL distributed the SYD Securities to a RSU Holder in respect of a MGL share that they are taken to have owned (subsection 130-85(2)) at the Record Date and continued to own at the date the Distribution was made.

CGT Event C2

85. CGT event C2 (section 104-25) happened when MGL distributed the SYD Securities to a RSU Holder in respect of a MGL share that they are taken to have owned (subsection 130-85(2)) at the Record Date, but which they have ceased to have a beneficial interest in before the date the Distribution was made.

86. Any capital gain made by a resident RSU Holder as a result of CGT event C2 happening is reduced under section 118-20 by the amount of the Dividend Component of the Distribution that is included in the assessable income of the RSU Holder under section 44 of the ITAA 1936.

CGT Discount

87. Where the Distribution occurs after the ESS deferred taxing point, provided that the ESS deferred taxing point (being the deemed date of acquisition sections 83A-125 and 109-60) occurred at least 12 months before the Distribution Date and the other conditions in Subdivision 115-A are satisfied, any gain from CGT event C2 or G1 will be a discount capital gain.

88. Where the Distribution occurs before the ESS deferred taxing point, provided that the RSU holder was granted their RSUs (acquiring an interest in the MGL shares for CGT purposes) at least 12 months before the Distribution Date, and the other conditions in Subdivision 115-A are satisfied, any gain from CGT event C2 or G1 will be a discount capital gain.

CGT event E5 and CGT event E7 and other CGT aspects in respect of the Distribution

89. CGT event E5 occurs when a RSU Holder becomes absolutely entitled to a SYD Security as against the trustee. The time of the event is when the RSU holder becomes absolutely entitled to the SYD Security (section 104-75).

90. Any capital gain or capital loss made by the RSU Holder as a result of CGT event E5 will be disregarded: paragraph 104-75(6)(a).

91. Where CGT event E5 does not happen, CGT event E7 happens when the trustee disposes of the SYD securities to the RSU Holder in satisfaction of the RSU Holder's interest, or part of it, in the trust capital (subsection 104-85(1)).

92. A capital gain or capital loss that a RSU Holder makes when CGT event E7 happens is disregarded as the RSU Holders acquired the CGT asset that is the interest for no expenditure (subsection 104-85(6)).

93. RSU Holders will not be required to include any other capital gain in their assessable income under Division 102, as adjusted by Subdivision 115-C as a consequence of the *in-specie* distribution.

Cost base and reduced cost base of the SYD Securities

94. The first element of the cost base and reduced cost base of the units in SAT1 and the first element of the cost base and reduced cost base of the shares in SAL which comprise a SYD stapled Security, are their market value (subsection 112-20(1), section 110-25 and section 110-55).

95. The market value of a SYD stapled security must be apportioned between the units in SAT1 and shares in SAL on a reasonable basis. The Commissioner accepts that it is reasonable to have regard to the net asset values of SAT 1 and SAL at the end of the month during which the Distribution was made.

96. RSU Holders acquired the units in the SAT1 and shares in SAL on the Distribution Date. The units in SAT1 and shares in SAL were acquired when RSU Holders became the owners of the units in SAT1 and SAL on the Distribution Date (section 109-5(1)).

Sale Facility and Nominee Arrangements

97. The above outcomes will equally apply to RSU Holders whose SYD Securities were sold under the Sale Facility or were subject to the Nominee Arrangements.

Share Consolidation

ESS deferred taxing point

98. The share consolidation did not cause an ESS deferred taxing point under section 83A-115 for RSU Holders.

CGT event

99. A CGT event did not occur as a result of the consolidation of shares in MGL (section 112-25).

100. Each element of the cost base and reduced cost base of the consolidated MGL shares is the sum of the corresponding element of each original MGL share held before the Consolidation.

101. The MGL shares after the Consolidation have the same date of acquisition for CGT purposes as the MGL shares held before the Consolidation to which they relate.

Part 2- DSU and PSU Holders

The Share Consolidation

ESS deferred taxing point

102. The share consolidation did not cause an ESS deferred taxing point under section 83A-115 for DSU Holders or PSU Holders.

CGT event

103. The share consolidation did not result in a CGT event happening for DSU Holders or PSU Holders.

Cash Equivalent Payment

104. The Cash Equivalent Payment received by DSU Holders is assessable under section 6-5 as salary and wages in the income year in which it was received.

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.*

PART 1—RSU Holders

Distribution of SYD Securities

ESS deferred taxing point

105. Section 83A-115 provides that the 'ESS deferred taxing point', if the ESS interest is a beneficial interest in a share, is the earliest of:

- (a) when there is no real risk of forfeiting or losing the ESS interest and any disposal restrictions which existed at the time the ESS interest was acquired no longer apply;
- (b) when the employment in respect of which the ESS interest was acquired ends; or
- (c) the end of the 7 year period starting when the ESS interest was acquired.

106. As none of these occurred at the time of the Distribution for a RSU Holder, the Distribution does not cause an ESS deferred taxing point at that time in respect of RSU Holder's RSUs.

SYD Securities are not ESS interests provided under an employee share scheme

107. An ESS interest is acquired under an employee share scheme only if the ESS interest is acquired in relation to the employee's employment (subsection 83A-10(2)).

108. The distribution of SYD Securities was available to all MGL shareholders. Accordingly the distribution to RSU Holders was not a result of their employment, but as a consequence of their existing interest in the MGL shares.

109. Therefore, SYD Securities acquired by RSU Holders under the Distribution are not ESS interests acquired under an employee share scheme. Furthermore, the capital gain and loss provisions as they apply to employee share schemes do not apply to the SYD Securities (Subdivision 130-D).

Dividend Component included in resident's assessable income

110. Section 44(1) of the ITAA 1936 provides that the assessable income of a resident shareholder in a company includes dividends, as defined in subsection 6(1) of the ITAA 1936, that are paid to the shareholder out of profits derived by the company from any source.

111. The definition of 'dividend' in subsection 6(1) of the ITAA 1936 has the effect that any distribution made by the company to any of its shareholders, whether in money or property, is a dividend except where the distribution is debited against an amount standing to the credit of the share capital account of the company (paragraphs (a) and (d) of the definition).

112. The Dividend Component of the *in specie* distribution made by MGL to its shareholders has been debited against MGL's retained earnings. It is a dividend for the purposes of subsection 6(1) of the ITAA 1936. Accordingly, the MEREP Trust must include the amount of the Dividend Component in its trust net income. Each RSU Holder must include their share of the MEREP Trust net income (which will include the Dividend Component in respect of MGL shares allocated to them) in their assessable income pursuant to section 97 of the ITAA 1936.

Gross-up and tax offset

113. The Dividend Component was franked at 40%. In accordance with subsection 207-35(3), if they satisfy the qualified person rules, a RSU Holder will include any franking credits in their assessable income and will be entitled to a tax offset as set out in section 207-45.

Qualified person

114. Subdivision 207-F can operate to cancel the effect of the gross-up and tax offset rules if a distribution is made to an entity in certain circumstances, including where the entity is not a 'qualified person' in relation to the dividend for the purposes of former Division 1-A of Part IIIA of the ITAA 1936.

115. An entity is a 'qualified person' for the purposes of Division 1A of former Part IIIA of the ITAA 1936 if, generally speaking, they satisfy the holding period rule and the related payments rule (former section 160APHO of the ITAA 1936).

116. The holding period rule applies where neither the taxpayer nor an associate has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend and requires the shares (or interest in the shares) to have been continuously held 'at risk' for at least 45 days or 90 days (depending on whether the shares are preference shares) during the 'primary qualification period' (former paragraph 160APHO (1)(a) of the ITAA 1936).

117. The related payments rule applies where the taxpayer or an associate has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend and requires the shares (or interest in the shares) to have been continuously held 'at risk' for at least 45 days or 90 days (depending on whether the shares are preference shares) during the 'secondary qualification period' (former paragraph 160APHO(1)(b) and former section 160APHN of the ITAA 1936).

118. A RSU Holder who received the Dividend component of the Distribution will be capable of being a 'qualified person' if:

- they have held their interest in MGL shares at risk for a period of at least 45 days (excluding the day of acquisition of the interest in shares, the day (if any) on which the interest in shares was disposed of, and any days on which they had materially diminished risks of loss or opportunities for gain in respect of the interest in shares), in the primary qualification period
 - (a) beginning on the day after the day on which the shareholder acquired their interest in MGL shares; and
 - (b) ending on the 45th day after the day on which the shares became *ex dividend* in relation to the entitlement to receive the Dividend Component of the Distribution

(former subsections 160APHO(2) and 160APHO(3) and former sections 160APHM, 160APHJ and 160APHE of the ITAA 1936);

and:

- neither the RSU holder, nor an associate, have made, is under an obligation to make, or are likely to make, a related payment in respect of the Dividend Component of the Distribution (former paragraph 160APHO(1)(a) and former section 160APHN of the ITAA 1936).

119. If either or both of the above two requirements are not met by an RSU Holder they will not be a 'qualified person' for the purposes of Division 1A of former Part IIIA of ITAA 1936. Subdivision 207-F will create the appropriate adjustment to cancel the effect of the gross-up and tax offset rules in relation to the Dividend Component of the Distribution.

Refundable tax offset

120. The franking credit tax offset that a resident RSU Holder is entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, unless it is specifically excluded under section 67-25.

121. The refundable tax offset rules in Division 67 ensure that certain taxpayers are entitled to a refund, once their available tax offsets have been utilised to reduce their income tax liability to nil.

122. Entities excluded by Division 67 include corporate tax entities (such as companies, corporate limited partnerships, corporate unit trusts and public trading trusts), unless they satisfy the requisite conditions set out in subsections 67-25(1C) or 67-25(1D).

Imputation benefits streaming

123. Subdivision 204-D broadly enables the Commissioner to make a determination where distributions with attached imputation benefits are streamed to a member of a corporate tax entity in preference to another member.

124. Section 204-30 prescribes the circumstances that are required to exist before the Commissioner may make such a determination. Section 204-30 applies where an entity 'streams' the payment of distributions in such a way that:

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

125. 'Streaming' is not defined for the purposes of Subdivision 204-D. However, the Commissioner has understood it to refer to a company 'selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits' (paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002).

126. The 40% franked Dividend Component is received by all MGL shareholders listed on the share register as at the Record Date, regardless of their tax attributes or their individual tax position.

127. The Commissioner has considered the information provided and concluded that the requisite element of streaming does not exist in relation to the Dividend Component paid by MGL to its shareholders. Accordingly, based on the information provided, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny imputation benefits to MGL shareholders.

Capital Component is not ordinary income or a dividend

128. Paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes a distribution from the meaning of 'dividend' if the amount of a distribution is debited against an amount standing to the credit of the company's share capital account.

129. The term 'share capital amount' is defined in section 975-300 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

130. Subsection 975-300(3) states that an account is not a share capital account if it is tainted.

131. The Capital Component was debited against an amount standing to the credit of MGL's contributed capital account. On the Distribution Date the share capital account of MGL was not tainted within the meaning of Division 197. Therefore, paragraph (d) of the definition of 'dividend' as defined in subsection 6(1) of the ITAA 1936 will apply and the Capital Component will not constitute a dividend under subsection 6(1) of the ITAA 1936.

132. Further, in the present circumstances there is no characteristic of the Capital Component that would suggest that it would constitute income according to ordinary concepts.

Anti-avoidance provisions

The application of sections 45A, 45B and 45C of the ITAA 1936 to the Capital Component of the Distribution

Section 45A streaming of dividends and capital benefits

133. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed to certain shareholders ('the advantaged shareholders') who derive a greater benefit from the receipt of capital and it is reasonable to assume that the other shareholders ('the disadvantaged shareholders') have received or will receive dividends.

134. MGL provided ordinary shareholders with a 'capital benefit' (as defined in paragraph 45A(3)(b) of the ITAA 1936) and the capital benefit was provided to all shareholders in direct proportion to their individual shareholding. As all shareholders benefit equally from the receipt there is no 'streaming' of capital benefits to some shareholders and not to others.

135. Accordingly, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to any part of the Capital Component of the Distribution.

Section 45B schemes to provide capital benefits

136. The purpose of Section 45B of the ITAA 1936 is to ensure that the relevant amounts distributed to shareholders are treated as dividends for taxation purposes if certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

137. Specifically, subsection 45B(2) of the ITAA 1936 provides that the section applies if:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company (paragraph 45B(2)(a));

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

138. The arrangement involving the in specie distribution to MGL shareholders of the SYD Securities constitutes a scheme for the purposes of section 45B of the ITAA 1936.

139. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936. It states that a person is provided with a capital benefit if:

- (a) an ownership interest in a company is issued to the person;
- (b) there is a distribution to the person of share capital or share premium; or
- (c) the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same ownership interest) held by that person.

140. The in specie distribution of the SYD Securities to MGL shareholders resulted in an amount of \$2.5737 per MGL share on a pre-Consolidation basis being debited against the share capital account of MGL. As there is a debit against the share capital account of MGL, the MGL shareholders will have been provided with a capital benefit under paragraph 45B(5)(b) of the ITAA 1936.

141. For the purposes of paragraph 45B(2)(c) of the ITAA 1936, the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) of the ITAA 1936, to determine whether it could be concluded that entities that entered into or carried out the scheme or any part of the scheme did so for a purpose, other than an incidental purpose, of enabling the relevant taxpayer (MGL shareholders) to obtain a tax benefit.

142. On the basis of the arrangement as described in the application for Class Ruling and additional information supplied, the Commissioner has formed the view that the requisite purpose is not present, such that the capital benefits provided to MGL shareholders have not been provided for a more than incidental purpose of obtaining a tax benefit.

143. Accordingly, 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 MGL shareholders under the scheme.

Section 177EA of the ITAA 1936

144. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of the scheme is to obtain an imputation benefit. In these circumstances, subsection 177EA(5) of the ITAA 1936 enables the Commissioner to make a determination with the effect of either:

- imposing franking debits or exempting debits on the distributing entity's franking account; or
- denying the imputation benefit on the distribution that flowed directly or indirectly to the relevant taxpayer.

145. Having regard to the features of the present scheme, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 that would deny the imputation benefits attached to the partially franked Dividend Component of the Distribution to MGL shareholders.

CGT consequences**CGT event G1**

146. CGT event G1(section 104-135) happens when:

- a company makes a payment to a shareholder in respect of a share they own in a company;
- some or all of the payment is not a dividend (as defined in subsection 995-1(1)) or an amount that is taken to be a dividend under section 47 of the ITAA 1936; and
- the payment is not included in the shareholder's assessable income.

147. The Capital Component is not a dividend. Accordingly, CGT event G1 happened when MGL made the Distribution to a RSU Holder in respect of a MGL share that they are taken to own at the Record Date and continued to own at the date the Distribution was made (subsection 130-85(2) and section 106-50).

148. If the Capital Component is not more than the cost base of the MGL share at the date the Distribution is made, the cost base and reduced cost base of the share will be reduced (but not below nil) by the amount of the Capital Component (subsection 104-135(4)).

149. A RSU Holder makes a capital gain if the Capital Component is more than the cost base of the MGL share (subsection 104-135(3)). The amount of the capital gain is equal to that excess.

150. If a RSU Holder makes a capital gain from CGT event G1 happening, the cost base and reduced cost base of the MGL share are reduced to nil. A RSU Holder cannot make a capital loss from CGT event G1 happening (subsection 104-135(3)).

151. Where the Distribution occurs after the ESS deferred taxing point in respect of the RSUs, the first element of the cost base of a MGL share for the purpose of calculating a capital gain from CGT event G1 is its market value immediately after the ESS deferred taxing point (sections 83A-125 and 112-15 and subsection 110-25(2)).

152. Where the Distribution occurs before the ESS deferred taxing point, the first element of the cost base of a MGL share to which an RSU relates for the purpose of calculating a capital gain from CGT event G1 is worked under subsection 110-25(2) but the market value substitution rule in section 112-20 does not apply (subsection 130-80(4)). As the RSU's are acquired for nil consideration, the cost base of a MGL Share to which an RSU relates where the Distribution occurred before the ESS deferred taxing event will likely be nil.

CGT event C2

153. The right to receive the Distribution is one of the rights inherent in a MGL share at the Record Date. If, after the Record Date but before the date the Distribution is made, a RSU Holder ceased to have an interest in a MGL share, the right to receive the Distribution in respect of each of the shares disposed would have been retained by the shareholder and is considered to be a separate CGT asset.

154. CGT event C2 (section 104-25) happens when the Distribution is made. The right to receive the Distribution (being an intangible CGT asset) will end by the right being discharged or satisfied when the Distribution is made. The Distribution is made by an in specie distribution at a ratio one unit in SAT1 and a share in SAL (forming one SYD Security) for every ordinary share held as at the Record Date (on a pre-Consolidation basis).

155. A RSU Holder will make a capital gain if the capital proceeds from the ending of the right are more than its cost base. The capital gain is equal to the amount of the excess. A RSU Holder will make a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right. The capital loss is equal to the amount of the difference (subsection 104-25(3)).

156. However, any capital gain made by a resident RSU Holder as a result of CGT event C2 happening is reduced under the anti-overlap rule in section 118-20 by the amount of the Dividend Component of the Distribution. The Dividend Component is included in the assessable income of a resident RSU Holder under section 97 of the ITAA 1936.

157. In working out the capital gain or capital loss made when CGT event C2 happens, the capital proceeds will be the amount (market value) of the Distribution (\$3.73 per MGL share on a pre-Consolidation basis) (subsection 116-20(1)).

158. The cost base and reduced cost base of a RSU Holder's right to receive the Distribution is worked out under Division 110 (modified by Division 112). The cost base and reduced cost base of the right does not include the cost base and reduced cost base of the share taken to be previously owned by the RSU Holder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the share - for example, when the RSU Holder disposed of the MGL share after the Record Date.

159. Therefore, if the full cost base and reduced cost base of a MGL share has been previously applied in working out a capital gain or capital loss made when a CGT event happened to that share, the right to receive the Distribution is likely to have a nil cost base.

160. As the right to receive the Distribution was inherent in the MGL share during the time it was owned, the right is considered to have been acquired at the time when the share was taken to be acquired (section 109-5 and subsection 130-85(2)).

Discount Capital Gains

161. Where the Distribution occurs after the ESS deferred taxing point, provided that the ESS deferred taxing point (being the deemed date of acquisition sections 83A-125 and 109-60) occurred at least 12 months before the Distribution Date and the other conditions in Subdivision 115-A are satisfied, any gain from CGT event C2 or G1 will be a discount capital gain.

162. Where the Distribution occurs before the ESS deferred taxing point, provided that the RSU holder was granted their RSU's (acquiring an interest in the MGL shares for CGT purposes) at least 12 months before the Distribution Date, and the other conditions in Subdivision 115-A are satisfied, any gain from CGT event C2 or G1 will be a discount capital gain.

CGT event E5

163. CGT event E5 occurs when an RSU Holder becomes absolutely entitled to a SYD Security as against the Trustee. The time of the event is when the RSU holder becomes absolutely entitled to the SYD Security (section 104-75).

164. The deemed absolute entitlement does not extend to the SYD Securities as they are not ESS interests (section 83A-10).

165. Any capital gain or capital loss made by the RSU Holder as a result of CGT event E5 will be disregarded: paragraph 104-75(6)(a).

CGT event E7

166. Where CGT event E5 does not happen, CGT event E7 happens when the trustee disposes of the SYD securities to the RSU Holder in satisfaction of the RSU Holder's interest, or part of it, in the trust capital (subsection 104-85(1)).

167. A capital gain or capital loss that a RSU Holder makes when CGT event E7 happens is disregarded as the RSU Holders acquired the CGT asset that is the interest for no expenditure (subsection 104-85(6)).

Trust capital gains

168. RSU Holders will not be required to include any other capital gain in their assessable income under Division 102, as adjusted by Subdivision 115-C as a consequence of the in-specie distribution. In this instance, the Trustee's cost base and capital proceeds for the relevant SYD Securities are identical and therefore, no capital gain or loss arises to the trustee in respect of the Distribution of SYD Securities to RSU Holders.

Share consolidation

ESS deferred taxing point

169. RSUs acquired under the MEREP and held by the Trustee on behalf of the RSU Holders, are ESS interests acquired under an 'employee share scheme' as they are beneficial interests in MGL shares granted to RSU Holders in relation to their employment:

170. Section 83A-115 provides that the 'ESS deferred taxing point', if the ESS interest is a beneficial interest in a share, is the earliest of:

- (a) when there is no real risk of forfeiting or losing the ESS interest and any disposal restrictions which existed at the time the ESS interest was acquired no longer apply;
- (b) when the employment in respect of which the ESS interest was acquired ends; or
- (c) the end of the 7 year period starting when the ESS interest was acquired.

171. The share Consolidation occurs pursuant to section 254H of the CA such that the MGL shares are not cancelled. The RSUs (each RSU having a beneficial interest in a MGL share) are not cancelled either, and do not otherwise come to an end. The RSUs are consolidated in the same proportion as the MGL shares such that they retain the proportionate interest in MGL shares before and after the consolidation (subject to rounding on the same basis as a registered MGL shareholder). The RSUs continue to be subject to a real risk of forfeiture and disposal restrictions. Accordingly, the consolidation does not constitute a disposal of the RSUs.

172. Therefore, an ESS deferred taxing point does not arise because of the consolidation and no amount will be included in the assessable income of RSU Holders under section 83A-115.

CGT Consequences

173. The share consolidation occurs pursuant to section 254H of the CA. No shares in MGL will be cancelled as a result of the consolidation, and there will be no change in the total amount allocated to MGL's share capital account.

174. In addition, the proportion of equity owned by each MGL shareholder in the share capital account is maintained (subject to rounding on the same basis as a registered MGL shareholder). Therefore, there will be no change to the proportionate interests held by each RSU Holder (subject to rounding on the same basis as a registered MGL shareholder). RSU Holders will not receive any capital proceeds for the reduction in the number of shares on issue.

175. Therefore, no CGT event will occur as a result of the share consolidation (section 112-25).

PART 2- DSU and PSU Holders***The share Consolidation******ESS deferred taxing point***

176. DSUs and PSUs acquired under the MEREP and held by the Trustee on behalf of the DSU and PSU Holders, are ESS interests acquired under an 'employee share scheme' as they are beneficial interests in rights to acquire MGL shares granted to DSU and PSU Holders in relation to their employment (section 83A-10(1)(b)).

177. Section 83A-120 of the ITAA 1997 provides that the 'ESS deferred taxing point', if the ESS interest is a beneficial interest in a share, is the earliest of:

- (a) when there is no real risk of forfeiting or losing the ESS interest and any disposal restrictions which existed at the time the ESS interest was acquired no longer apply;
- (b) when the employment in respect of which the ESS interest was acquired ends; or
- (c) there are no genuine restrictions on exercising the right, and the shares acquired on exercise are not subject to a real risk of forfeiture or a genuine disposal restrictions; and
- (d) the end of the 7 year period starting when the ESS interest was acquired.

178. The DSUs and PSUs will be consolidated in the same ratio as MGL Shares (subject to rounding on the same basis as a registered MGL shareholder).

179. The consolidation does not result in the cancellation of the DSUs and PSUs, such that it does not result in a new contract, or give rise to a disposal of either DSUs or PSUs.

180. As none of these events occur at the time of the consolidation for DSU or PSU Holders with MGL shares, there is no ESS deferred taxing point at that time in respect of those MGL shares.

181. Therefore, the consolidation will not cause an ESS deferred taxing point under section 83A-120 for DSU and PSU Holders.

CGT Consequences

182. A CGT event will not happen if a company converts its shares into a larger or smaller number of shares (the converted shares) in accordance with section 254H of the CA in that:

- (a) the original shares are not cancelled or redeemed in terms of the CA;
- (b) there is no change in the total amount allocated to the share capital account of the company; and
- (c) the proportion of equity owned by each shareholder in the share capital account is maintained.

183. In this case, the consolidation of the DSUs and PSUs occurs pursuant to the MEREP Rules so as to satisfy the ASX Listing Rule requirements that where shares in a company (i.e. MGL shares) are consolidated, the options in that company (i.e. the DSUs and PSUs) must also be consolidated.

184. The consolidation of DSUs and PSUs (as with the consolidation of the MGL shares) does not involve the rescission and creation of new contractual rights. Accordingly, under section 112-25 the consolidation of MGL shares will not result in a CGT event happening for DSU and PSU Holders.

DSU Holder: Cash Equivalent Payment

185. Subsection 6-5(2) provides that the assessable income of a resident taxpayer includes ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

186. Salary and wages are ordinary income for the purposes of subsection 6-5(2).

187. Accordingly, the Cash Equivalent Payment received by DSU Holders will be included in their assessable income as salary and wages in the income year in which it is received: section 6-5.

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Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; CR 2010/73;
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Subject references:

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- Capital gains
- Distributions in specie
- Employee share scheme
- ESS deferred taxing point
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- Share capital
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- Franking credits
- Holding period rule
- Imputation system
- Imputation credits
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- Return of capital on shares

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ATO references 1-541SAZA

NO:	1-541SAZA
ISSN:	1445-2014
ATOlaw topic:	Income Tax ~~ Return of capital

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