



Class Ruling

Income tax: demerger of Treasury Wine Estates Limited by Foster's Group Limited

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❗ This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, 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 45B of the ITAA 1936;
- section 45BA of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;
- Division 110 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 is the shareholders of Foster's Group Limited (FGL) who:

- (a) participated in the scheme that is the subject of this Ruling;
- (b) were residents of Australia as defined in subsection 6(1) of the ITAA 1936 on the Implementation Date of the scheme;
- (c) owned ordinary shares in FGL (FGL shares) at the Record Date for the scheme and held those shares on capital account at the time of the scheme; and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their FGL shares.

(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 'FGL shareholder'.

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 31 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 from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on documents and information provided by FGL's advisors, Corrs Chambers Westgarth Lawyers (Corrs), the applicant for this ruling.

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

10. On 20 May 2011, FGL carried out a demerger of all the shares in its wholly owned subsidiary, Treasury Wine Estates Limited (Treasury Wine). The demerger, which was announced by the FGL Board on 26 May 2010, formed the central component of a restructuring of the FGL Group which sought to create structural separation and separate stock exchange listings for FGL's beer, cider and spirit business and its wine business.

Relevant Entities

FGL

11. FGL is an Australian resident public company listed on the Australian Securities Exchange (ASX) and the head company of an Australian consolidated tax group for the purposes of Part 3-90 of the ITAA 1997.

12. Prior to the demerger, FGL conducted a beer, cider, spirits, non-alcoholic beverages and wine business through five global regions (including Australia).

13. Immediately before the demerger, FGL had on issue:

- 1,940,894,542 fully paid (listed) ordinary shares (fully paid shares); and
- 786,510 unlisted partly paid ordinary shares (partly paid shares).

14. The partly paid shares were issued between 1983 and 1989 to executives of FGL under the 1983 Elders IXL Employee Share Plan and the 1987 Elders Employee Share Plan. The FGL Board determined that FGL's partly paid shareholders were entitled to participate in the demerger on the same basis as FGL's fully paid shareholders and will receive one Treasury Wine share for every three FGL partly paid shares held at 7pm on 16 May 2011 (the Record Date) (rounded up or down to the nearest whole Treasury Wine share).

15. There were no other ownership interests in FGL just before the demerger.

Treasury Wine

16. Treasury Wine was originally incorporated in 1957 and, together with its wholly owned subsidiaries, primarily operates an international wine business with a portfolio of luxury, premium and commercial wines.

17. Just before the demerger, Treasury Wine had on issue a total of 647,227,144 ordinary shares, all of which were owned by Foster's Australia Limited (FAL), an indirect wholly-owned subsidiary of FGL and a member of the FGL consolidated group.

18. There were no other ownership interests in Treasury Wine just before the demerger.

Pre-demerger transactions

19. Prior to the demerger, FGL undertook certain transactions to facilitate the demerger including:

- entering into a demerger implementation deed with Treasury Wine setting out the respective obligations of the two entities in relation to the demerger;
- entering into a Transfer Agreement with FAL setting out certain undertakings and obligations agreed between the two entities in respect of the demerger;
- changing Treasury Wine's name, as it was formerly known as Beringer Blass Wine Estates Pty Ltd;
- consolidating the number of shares held by FAL in Treasury Wine from 4,150,040,000 to 647,227,144;
- undertaking an internal restructure to ensure that, just after the demerger, Treasury Wine, either directly or indirectly, owned all the companies and assets relating to the wine business and FGL owned all the companies and assets relating to all other businesses of the group;
- rationalising and settling various intercompany loans, receivables and payables (other than ordinary trading receivables and payables); and
- establishing stand-alone funding arrangements for Treasury Wine.

The demerger of Treasury Wine

20. The demerger of Treasury Wine was carried out by a capital reduction and a court approved scheme of arrangement which were approved by the requisite majority of FGL shareholders on 29 April 2011.

21. The demerger was implemented according to its terms on 20 May 2011 (the Implementation Date). On that day:

- (a) FGL reduced its share capital in the amount of \$1,248,161,682 in aggregate which was applied equally against each ordinary share of the Company on issue as at the Record Date; and
- (b) FGL satisfied the capital reduction by agreeing to pay to its subsidiary, FAL (the current sole shareholder of Treasury Wine), an amount so as to procure the transfer by FAL of the Treasury Wine shares to FGL shareholders.

22. In accordance with the terms of the scheme of arrangement, FGL shareholders were entitled to one Treasury Wine share for every three shares they owned in FGL as at 7pm on the Record Date of 16 May 2011 (rounded to the nearest whole Treasury Wine share).

Sale Facility

23. For certain FGL shareholders a Sale Facility was made available to enable their demerged Treasury Wine shares to be sold on the ASX and the net proceeds remitted to them free of brokerage costs and stamp duty.

24. FGL shareholders whose shares were sold through the Sale Facility were:

- Ineligible Overseas Shareholders; and
- Eligible Shareholders who were Small Shareholders and who elected to participate in the Sale Facility.

25. Ineligible Overseas Shareholders were FGL's shareholders whose registered addresses were shown in FGL's share register on the Record Date as being in a jurisdiction outside Australia, Canada, the United Kingdom, the United States and certain other countries specified in the scheme documentation.

26. Small Shareholders were Eligible Shareholders (being FGL shareholders who were not Ineligible Overseas Shareholders as described in paragraph 25 of this Ruling) who held 1,000 FGL shares or less as at the Record Date.

Accounting for the distribution to effect the demerger

27. FGL accounted for the transfer of the Treasury Wine shares to FGL shareholders by:

- debiting its share capital account by \$1,248,161,682 in aggregate which was applied equally against each ordinary share of the company on issue; and
- debiting the balance of the demerger allocation (\$926,521,522) to a demerger reserve account.

The total demerger distribution amount of \$2,174,683,204 was ascertained by reference to the volume weighted average price of the Treasury Wine shares, \$3.36, as traded on the ASX on a deferred settlement basis over the first five trading days after the Effective Date, 9 May 2011.

Reasons for the demerger

28. FGL believed that a number of advantages accrued to its shareholders as a result of the demerger. The key advantages were said to include:

- increased transparency allowing investors to more appropriately value each business over time;
- greater investment choice for existing investors; and
- flexibility for separate boards and management of beer and wine to develop their own corporate strategies and implement capital structures and financial policies appropriate to their businesses.

Other matters

29. Treasury Wine listed on the ASX, first trading on 10 May 2011, on a deferred settlement basis.

30. FGL confirmed that its share capital account is not tainted as defined in Division 197 of the ITAA 1997.

31. Just after the demerger, at least 50% of the market value of capital gains tax (CGT) assets owned by Treasury Wine or its subsidiaries were used directly or indirectly in one or more businesses carried on by Treasury Wine or any of its subsidiaries.

Ruling**CGT consequences*****CGT event G1***

32. CGT event G1 happened in relation to each of the FGL shares owned by FGL shareholders at the time FGL made the payment of the capital reduction amount (section 104-135 of the ITAA 1997).

Capital Gain

33. FGL shareholders made a capital gain when CGT event G1 happened if the capital reduction amount exceeded the cost base of the FGL share (subsection 104-135(3) of the ITAA 1997). No capital loss can be made from CGT event G1.

34. A capital gain made when CGT event G1 happened is disregarded if the FGL shareholder acquired the FGL share before 20 September 1985 (pre-CGT FGL share) (subsection 104-135(5) of the ITAA 1997).

Demerger roll-over relief

35. A demerger, as described under section 125-70 of the ITAA 1997, happened under the scheme.

36. Therefore, FGL shareholders can choose demerger roll-over relief under subsection 125-55(1) of the ITAA 1997 for their pre-CGT and post-CGT FGL shares.

Choosing demerger roll-over relief for pre-CGT FGL shares

37. FGL shareholders who choose demerger roll-over relief for their pre-CGT FGL shares are taken to have acquired the corresponding Treasury Wine shares under the demerger before 20 September 1985 (subsections 125-55(1), 125-80(5) and 125-80(6) of the ITAA 1997).

Choosing demerger roll-over relief for post-CGT FGL shares

38. FGL shareholders who acquired their FGL shares after 19 September 1985 (post-CGT FGL shares) disregard any capital gain made when CGT event G1 happened if they choose demerger roll-over relief (subsections 125-55(1) and 125-80(1) of the ITAA 1997).

39. If a FGL shareholder chooses demerger roll-over relief for their post-CGT FGL shares, they must recalculate the cost base and reduced cost base of their FGL and Treasury Wine shares.

40. The first element of the cost base and reduced cost base of each post-CGT FGL share and corresponding Treasury Wine share received under the demerger is worked out as follows:

- take the sum of the cost bases of the post-CGT FGL shares (just before the demerger); and
- apportion that sum over the remaining post-CGT FGL shares and corresponding new Treasury Wine shares received under the demerger.

The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the FGL shares and Treasury Wine shares, or a reasonable approximation of those market values (subsections 125-80(2) and 125-80(3) of the ITAA 1997).

Demerger roll-over relief is not chosen for pre-CGT FGL shares

41. For FGL shareholders who own pre-CGT FGL shares and do not choose demerger roll-over relief:

- none of the corresponding Treasury Wine shares acquired under the demerger are taken to be pre-CGT shares;

- those Treasury Wine shares are acquired on the Implementation Date of the demerger (20 May 2011) (section 109-10 of the ITAA 1997); and
- the first element of the cost base and reduced cost base of those Treasury Wine shares is calculated in accordance with the rules in Division 110 of the ITAA 1997.

Demerger roll-over relief is not chosen for post-CGT FGL shares

42. For FGL shareholders who own post-CGT FGL shares and do not choose demerger roll-over relief:

- they are not entitled to disregard any capital gain made in respect of CGT event G1 that happened to their FGL shares under the demerger; and
- the first element of the cost base and reduced cost base of each post-CGT FGL share and the corresponding Treasury Wine share is calculated in the manner described in paragraph 40 of this Ruling (subsection 125-85(1) and 125-85(2) of the ITAA 1997).

Acquisition date of the Treasury Wine shares for the purposes of the CGT discount

43. For the purposes of determining eligibility for a discount capital gain, the Treasury Wine shares received by a FGL shareholder in relation to post-CGT FGL shares are taken to have been acquired on the same date as the corresponding FGL shares (item 2 in the table in subsection 115-30(1) of the ITAA 1997). This is the case irrespective of whether demerger roll-over relief is chosen or not.

44. For Treasury Wine shares acquired in relation to pre-CGT FGL shares under the demerger where demerger roll-over relief is not chosen, the acquisition date of these Treasury Wine shares is the Implementation Date of the demerger 20 May 2011 for the purposes of the CGT discount.

Demerger dividend

45. Any dividend arising under the demerger is a demerger dividend (subsection 6(1) of the ITAA 1936).

46. Any demerger dividend is neither assessable income nor exempt income of the participating FGL shareholders (subsections 44(3) and (4) of the ITAA 1936).

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47. As the share capital reduction amount was debited to FGL's share capital account it is not a dividend, as defined in subsection 6(1) of the ITAA 1936 (see the exclusion contained in paragraph (d) of the definition of a dividend contained in subsection 6(1) of the ITAA 1936).

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

48. 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 FGL shareholders under the demerger.

49. 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 FGL shareholders under the demerger.

Commissioner of Taxation

15 June 2011

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 G1

50. CGT event G1 happened in relation to the FGL shares owned by FGL shareholders at the time that FGL made the payment of the capital reduction amount. The payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997, nor an amount taken to be a dividend under section 47 of the ITAA 1936 (section 104-135 of the ITAA 1997).

51. A FGL shareholder made a capital gain if the capital reduction amount is more than the cost base of their FGL shares. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

52. A FGL shareholder cannot make a capital loss when CGT event G1 happens (note 1 of subsection 104-135(3) of the ITAA 1997).

53. If the FGL share to which the payment relates was acquired by a FGL shareholder at least 12 months before the payment of the capital reduction amount, a capital gain made from CGT event G1 may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied).

54. A FGL shareholder who acquired their FGL shares before 20 September 1985 disregards any capital gain made when CGT event G1 happened (subsection 104-135(5) of the ITAA 1997).

The demerger roll-over relief

55. Demerger roll-over enables a shareholder to choose to disregard a capital gain made as a result of CGT event G1 happening when a non-assessable payment is made in relation to a share under a demerger.

56. The demerger roll-over provisions in Division 125 of the ITAA 1997 contain a number of conditions for eligibility to choose demerger roll-over relief. The main conditions that are relevant to the Scheme are:

- (a) a shareholder owns a share in a company;
- (b) the company is the head entity of a demerger group;
- (c) a demerger happens to the demerger group; and
- (d) under the demerger, a CGT event happens to the original interest and a new or replacement interest is acquired in the demerged entity and nothing else.

57. Under the scheme to which this Ruling relates the conditions for demerger roll-over relief under Division 125 of the ITAA 1997 are satisfied. Further, the scheme to which this Ruling relates raises no novel issues of tax law interpretation and no further explanation of the application of those tax laws beyond that contained in the Ruling section of this document and the following paragraph is necessary.

58. For the purposes of the cost base and reduced cost base apportionment under subsections 125-80(2) and 125-80(3) of the ITAA 1997, the Commissioner accepts the volume weighted average price of the Treasury Wine shares, \$3.36, and the FGL fully paid ordinary shares, \$4.47, as traded on the ASX (whether on a deferred or normal settlement basis) over the first five trading days after the Effective Date, 9 May 2011, as a reasonable approximation of the relative market value of those shares.

Application of section 45B of the ITAA 1936

59. The purpose of section 45B is to ensure that relevant amounts distributed to shareholders of a company are treated as dividends for tax purposes if:

- (a) components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger; or
- (b) certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

60. Subsection 45B(2) of the ITAA 1936 provides (relevantly) 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;
- (b) under the scheme the taxpayer obtains a tax benefit as defined in subsection 45B(9) of the ITAA 1936; and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the scheme was entered into or carried out for a more than incidental purpose of enabling the taxpayer to obtain the tax benefit.

61. 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 FGL shareholders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) is not present.

62. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(a) or 45B(3)(b) of the ITAA 1936 that either section 45BA or 45C of the ITAA 1936 applies to the scheme to which this Ruling relates.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- capital benefit
- capital gains
- CGT events
- CGT events G1-G3 - shares
- CGT capital proceeds
- cost base adjustments
- demerger
- demerger allocation
- demerger benefit
- demerger dividend
- demerger group
- demerger subsidiary
- return of capital on shares

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 44
- ITAA 1936 44(3)
- ITAA 1936 44(4)
- ITAA 1936 45B
- ITAA 1936 45B(1)
- ITAA 1936 45B(2)
- ITAA 1936 45B(9)
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(3)(a)
- ITAA 1936 45B(3)(b)
- ITAA 1936 45BA
- ITAA 1936 45C
- ITAA 1997 104-135
- ITAA 1997 104-135(3)
- ITAA 1997 104-135(5)
- ITAA 1997 109-10
- ITAA 1997 Division 110
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25(1)
- ITAA 1997 115-30
- ITAA 1997 115-30(1)
- ITAA 1997 Div 125
- ITAA 1997 125-55(1)
- ITAA 1997 125-70
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- ITAA 1997 125-80(2)
- ITAA 1997 125-80(3)
- ITAA 1997 125-80(5)
- ITAA 1997 125-80(6)
- ITAA 1997 125-85(1)
- ITAA 1997 125-85(2)
- ITAA 1997 Div 197
- ITAA 1997 Div 230
- ITAA 1997 Pt 3-90
- ITAA 1997 975-300
- ITAA 1997 975-300(3)
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968

ATO references

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