


CR 2001/39 - Income tax: capital gains: scrip for scrip roll-over: proposed takeover of F H Faulding & Co Limited by the Mayne Nickless Limited Group

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Class Ruling

Income tax: capital gains: scrip for scrip roll-over: proposed takeover of F H Faulding & Co Limited by the Mayne Nickless Limited Group

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the tax laws identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates.

Tax laws

2. The tax laws dealt with in this Ruling are the following provisions of the *Income Tax Assessment Act 1997*:

- section 110-25;
- section 116-20; and
- Subdivision 124-M.

Class of persons

3. The class of persons to whom this Ruling applies is the shareholders of FH Faulding & Co Limited (‘FHF’) who:

- (a) are ‘residents of Australia’ within the meaning of that expression in subsection 6(1) of the *Income Tax Assessment Act 1936*;

- (b) are not ‘significant stakeholders’ or ‘common stakeholders’ within the meaning of those expressions as used in Subdivision 124-M;
- (c) accept the takeover offer from Mayne Health Logistics Pty Ltd (‘MHL’), a wholly-owned subsidiary of Mayne Nickless Limited (‘Mayne’) to exchange their shares in FHF wholly or partly for shares in Mayne by choosing Offer Consideration (i) [‘the Share Alternative’], Offer Consideration (ii) [‘the Part Cash Alternative’] or Offer Consideration (iii) [‘the Maximum Cash Alternative’] of the Offer Agreement of 20 July 2001 entered into between MHL and FHF;
- (d) apart from the roll-over for which Subdivision 124-M provides, would make a capital gain from a CGT event happening in relation to the FHF shares; and
- (e) might make a capital gain from a replacement Mayne share which would not be disregarded (except because of a roll-over).

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.
5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 9 to 13 is carried out in accordance with the details of the arrangement provided in this Ruling.
6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:
 - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - (b) this Ruling may be withdrawn or modified.
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Date of effect

8. This Class Ruling applies to the year ended 30 June 2002 and later income years.

Arrangement

9. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. 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 arrangement are:

- (a) Class Ruling Application dated 27 July 2001 from KPMG requesting the ATO to make a Class Ruling in relation to the capital gains scrip for scrip roll-over provisions as they apply to the proposed takeover of FHF by MHL;
- (b) 'Pre-Bid Announcement' of 31 May 2001 issued by Mayne in respect of an off market takeover bid for FHF;
- (c) 'Revised-Bid Announcement' of 12 July 2001 issued by MHL in respect of an off market takeover bid for FHF. This offer was recommended by FHF's Board of Directors;
- (d) 'Offer Agreement' of 20 July 2001 between MHL and FHF which describes among other things the structure and manner in which MHL proposes to make its formal takeover offer to FHF shareholders.

10. Under a takeover proposal announced on 12 July 2001 by MHL, to be carried out under the terms and conditions set out in the Offer Agreement, MHL will invite all FHF shareholders to dispose of their FHF shares in exchange for certain consideration.

11. The takeover proposal gives the FHF shareholders the choice of disposing of their FHF shares to MHL in exchange for one of the following Offer Consideration options:

- (i) a certain number of shares in Mayne [the Share Alternative]; or

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- (ii) a certain combination of cash and shares in Mayne [the Part Cash Alternative]; or
- (iii) a certain combination of cash and an unsecured note [the Maximum Cash Alternative].

12. Under the arrangement to which this Ruling applies the Mayne Nickless Limited Group (of which MHL is a wholly owned member) must become owner of 80% or more of the voting shares in FHF as a result of the arrangement.

13. Under the arrangement to which this Ruling applies:

- FHF is an Australian resident company;
- all FHF shares on issue are ordinary shares (listed on the Australian Stock Exchange);
- MHL is an Australian resident company;
- Mayne is an Australian resident company;
- all Mayne shares to be issued as consideration under the proposal will be ordinary shares.

Ruling

14. Subject to the qualifications in paragraphs 4 to 6 of this Ruling,

- (a) shareholders of FHF who are within the class of persons to whom this Ruling applies and who accept the takeover offer and select the Share Alternative will be eligible to choose full scrip for scrip roll-over under paragraph 124-780(3)(d) for the disposal of their FHF shares acquired on or after 20 September 1985 in exchange wholly for Mayne shares; and
- (b) shareholders of FHF who are within the class of persons to whom this Ruling applies and who accept the takeover offer and select the Part Cash Alternative will be eligible to choose a scrip for scrip roll-over under paragraph 124-780(3)(d) for the disposal of their FHF shares acquired on or after 20 September 1985 in exchange for Mayne shares. There is no roll-over for these FHF shareholders to the extent that they receive ineligible proceeds (that is, the cash): section 124-790.
- (c) shareholders of FHF who are within the class of persons to whom this Ruling applies and who accept the takeover offer and select the Maximum Cash Alternative will not be eligible to choose scrip for scrip

- roll-over under paragraph 124-780(3)(d) for the disposal of their FHF shares in exchange for cash and an unsecured note.
- (d) the capital proceeds in terms of subsection 116-20(1) that a FHF shareholder who is within the class of persons to whom this Ruling applies and who selects the Maximum Cash Alternative will receive for their FHF shares will be the cash (\$6.50) together with the market value of the unsecured note at the time of the contract for the disposal of the FHF shares. The Commissioner is not able to rule as to the market value of the unsecured note.
 - (e) the cost base in terms of paragraph 110-25(2)(b) of any Mayne share later received on redemption of the unsecured note under the Maximum Cash Alternative will be calculated having regard to the percentage of the market value of the unsecured note at the time the Mayne share is acquired that the market value of the Mayne share bears to the total value of the capital proceeds received on redemption of the unsecured note.

Explanations

Availability of scrip for scrip roll-over

15. Subdivision 124-M contains a number of conditions for, and exceptions to, the eligibility of an entity to choose the roll-over. Below is an outline of the main conditions and exceptions that are relevant to the circumstances of the arrangement that is the subject of this Ruling.

16. *Subparagraph 124-780(1)(a)(i) requires an entity to exchange a share in a company (the 'original entity') for a share in another company.*

17. This requirement will be satisfied by FHF shareholders to the extent they receive Mayne shares as consideration for the transfer of their FHF shares to MHL by selecting the Share Alternative or the Part Cash Alternative. These options provide consideration that consist wholly or partly of Mayne shares.

18. FHF shareholders who select the Maximum Cash Alternative under the proposed arrangement will not qualify for scrip for scrip roll-over as the consideration under this alternative is not a share in a company. This is the case even if the FHF shareholder receives a Mayne share on redemption of the unsecured note issued under this alternative.

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19. Under the Maximum Cash Alternative an unsecured note is redeemable for additional cash of up to \$7.84 per FHF share to the extent that cash is available. To the extent that cash is not available a FHF shareholder will receive 0.158 Mayne shares for each \$1 that would otherwise be payable for cash (pro rata for amounts less than \$1).

20. In accordance with subsection 116-20(1), the capital proceeds these FHF shareholders receive from the disposal of their FHF shares will be the cash they receive together with the market value (at the time those shares are disposed of) of the unsecured note they receive in respect of the disposal.

21. In accordance with paragraph 110-25(2)(b), the cost base of any Mayne share received under this alternative will be calculated having regard to the market value of the unsecured note at the time the Mayne shares are acquired. That value would be pro-rated having regard to the extent that cash is received for the unsecured note.

22. *Paragraph 124-780(1)(b) and subparagraph 124-780(2)(a)(ii) require that the exchange of shares is in consequence of a single arrangement that results in the acquiring entity (MHL) increasing the percentage of voting shares that it owns in the original entity (FHF) and the acquiring entity (MHL) or members of the wholly-owned group of which it is a member becoming the owner of 80% or more of those voting shares).*

23. The takeover proposal in the Offer Agreement is considered to be a 'single arrangement' as that expression is used in its context in the scrip for scrip roll-over provisions.

24. Whether or not the arrangement results in the Mayne Nickless Limited group (the MN group) becoming the owner of 80% or more of the voting shares in FHF is a question of fact that can only be satisfied if the MN group becomes the owner of 80% or more of the voting shares in FHF as a result of the proposed arrangement. The description of the arrangement to which this Ruling applies at paragraph 12 is qualified in this regard. This requirement will be satisfied if the offer results in MHL increasing the percentage of voting shares that it owns in FHF and the offer results in the MN group owning 80% or more of the shares in FHF regardless of the fact that MHL did not own any shares in FHF before the arrangement: Taxation Determination TD 2000/51.

25. *Paragraphs 124-780(1)(b) and 124-780(2)(b) require that the exchange of shares is in consequence of a single arrangement in which at least all owners of voting shares in the original entity (FHF) could participate.*

26. This requirement will be met as FHF's issued shares consist wholly of ordinary shares and the proposed takeover offer will be offered to all FHF shareholders.

27. *Paragraphs 124-780(1)(b) and 124-780(2)(c) require that the exchange of shares is in consequence of a single arrangement in which participation was available on substantially the same terms for all of the owners of interests of a particular type in the original entity (FHF).*

28. This requirement will be satisfied as the takeover proposal will give each FHF shareholder a choice as to the manner in which to dispose of their FHF shares and as to the consideration receivable in exchange for the disposal.

29. Some of the choices that non-resident FHF shareholders may have in relation to the options available under the arrangement will be restricted, for example, any non cash consideration provided to non-resident shareholders will be paid to a nominee for sale.

30. Paragraph 124-780(2)(c) will be met to the extent that the parties rely on subsection 619(3) of the *Corporations Act 2001* in relation to foreign shareholders.

31. *Paragraphs 124-780(1)(c) and 124-780(3)(a) require the original interest holder (FHF shareholder) to have acquired its original interest (its FHF shares) on or after 20 September 1985.*

32. For FHF shareholders who hold FHF shares which were acquired before 20 September 1985, the disposal of those FHF shares will not be eligible for any roll-over. The cost base of any Mayne share received in exchange for a pre-CGT share will be its market value just after acquisition: subsection 124-800(1).

33. *Paragraphs 124-780(1)(c) and 124-780(3)(b) require that, apart from the roll-over, the original interest holder (FHF) would make a capital gain from a CGT event happening in relation to its original interest (its FHF shares).*

34. Whether a FHF shareholder would make a capital gain, apart from the roll-over, in relation to the disposal of their FHF shares under the arrangement is dependent on the specific circumstances of each shareholder - in particular the shareholder's cost base of each FHF share and the value of the consideration received. The description of the class of persons to whom this Ruling applies at paragraph 3(d) is qualified in this regard.

35. *Paragraphs 124-780(1)(c) and 124-780(3)(c) require that the replacement interest is in the ultimate holding company (Mayne) of the wholly owned group which includes the acquiring entity (MHL).*

36. This requirement will be satisfied as the proposed takeover offer will be made by MHL and, to the extent that the Offer

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Consideration provides shares, the shares will be in Mayne (the ultimate holding company of the MN group).

37. *Paragraphs 124-780(1)(c) and 124-780(3)(d) provide that roll-over is available for an original interest holder (a FHF shareholder) who is a significant stakeholder or a common stakeholder only if the replacement entity (Mayne) jointly elects the roll-over.*

38. Additional rules associated with the cost base of interests apply for the purposes of scrip for scrip roll-over if a FHF shareholder, who is otherwise eligible for the roll-over, is a significant stakeholder or a common stakeholder for the arrangement. There are a number of matters to consider in determining whether a shareholder is a significant stakeholder or a common stakeholder in an entity, including:

- (a) the association (if any) between different shareholders in an entity;
- (b) the extent of the interests held by a shareholder (on an associate inclusive basis) in both the original entity (FHF) and the replacement entity (Mayne); and
- (c) whether either or both the original entity (FHF) or the replacement entity (Mayne) has a 'concentrated ownership' on the basis that twenty or fewer individuals between them own directly or indirectly and for their own benefit 75% or more of the relevant interests in the entity.

39. It is beyond the scope of this Ruling to determine with certainty whether there is any 'significant stakeholder' or 'common stakeholder'. Accordingly, the class of persons to whom this Ruling applies has been qualified at paragraph 3(b).

40. *Subsection 124-780(4) provides for additional requirements if the original interest holder (a FHF shareholder) and an acquiring entity (Mayne) did not deal with each other at arm's length and:*

- (a) *neither the original entity (FHF) nor the replacement entity (Mayne) had at least 300 members just before the arrangement started; or*
- (b) *the original interest holder (a FHF shareholder), the original entity (FHF) and an acquiring entity (Mayne) were all members of the same linked group just before the arrangement started.*

41. Additional rules about the value of a FHF shareholder's proceeds for the exchange and about the kinds of rights and obligations attaching to their interests apply if the FHF shareholder is

otherwise eligible for the roll-over but does not deal with Mayne at arm's length.

42. Under the arrangement, all of the FHF shareholders will be invited by MHL to dispose of their FHF shares only in the manner and under the terms proposed in the Offer Agreement. On this basis, the shareholders who accept the offer and receive their Offer Consideration will be regarded as having dealt with Mayne at arm's length and the additional rules will not be required to be met.

43. *Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain you (the FHF shareholder) might make from your replacement interest (the Mayne shares) would be disregarded.*

44. This exception may apply if, for example, the Mayne shares are trading stock. The description of the class of persons to whom this Ruling applies at paragraph 3(e) is qualified in this regard.

45. *Paragraph 124-795(2)(b) provides that the roll-over is not available if the FHF shareholder and the acquiring entity (Mayne) are members of the same wholly owned group just before the FHF shareholders stop owning their original interest (the FHF shares).*

46. This exception will not apply and this Ruling is made on the basis that neither MHL nor any MN group company held any shares in FHF before the arrangement.

47. *Subsection 124-790(1) provides that the original interest holder (the FHF shareholder) will obtain only a partial roll-over if its capital proceeds (the Offer Consideration) includes something other than its replacement interest (the Mayne shares).*

48. A FHF shareholder who chooses the Part Cash Alternative and receives a combination of cash and Mayne shares will not be eligible for roll-over in respect of that part of each FHF share for which it receives the cash component: subsection 124-790(1).

49. A reasonable portion of the cost base of the FHF share will be taken into account in working out the capital gain in respect of the cash (ineligible proceeds). The following method of attributing the cost base of each FHF share between the cash and scrip consideration received will be considered reasonable in accordance with subsection 124-790(2).

50. The FHF shareholder may work out what percentage of the total capital proceeds they receive for each FHF share (that is, the value of the Mayne share on the date it was acquired plus the \$6.50 cash consideration) was represented by cash. That percentage would be applied to the cost base of each FHF share to determine the part of that cost base which is reasonably attributable to the ineligible proceeds (the cash).

51. It is not considered reasonable to attribute the cost base of each FHF share by having regard to the proportion (52.86%) that, at the time of the offer, the Mayne shares receivable under the Part Cash Alternative (1.239) bears to the shares receivable under the Share Alternative (2.344).

Detailed contents list

52. Below is a detailed contents list for this Class Ruling:

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Commissioner of Taxation

29 August 2001

Previous draft:

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Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 97/16;
TD 2000/51

Subject references:

- arrangement
- capital proceeds
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- cost base
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- resident
- roll-over
- roll-over relief
- scrip
- scrip for scrip
- significant stake
- significant stakeholder
- share
- shareholder
- takeover

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 104-10(3)
- ITAA 1997 110-25

- ITAA 1997 110-25(2)(b)
 - ITAA 1997 116-20
 - ITAA 1997 116-20(1)
 - ITAA 1997 124-780(1)(a)(i)
 - ITAA 1997 124-780(1)(b)
 - ITAA 1997 124-780(1)(c)
 - ITAA 1997 124-780(2)(a)(ii)
 - ITAA 1997 124-780(2)(b)
 - ITAA 1997 124-780(2)(c)
 - ITAA 1997 124-780(3)(a)
 - ITAA 1997 124-780(3)(b)
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 - ITAA 1997 124-780(3)(d)
 - ITAA 1997 124-780(4)
 - ITAA 1997 124-790
 - ITAA 1997 124-790(1)
 - ITAA 1997 124-790(2)
 - ITAA 1997 124-795(2)(a)
 - ITAA 1997 124-795(2)(b)
 - ITAA 1997 124-800(1)
 - Corporations Act 2001 619(3)
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ATO References:

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