

CR 2001/51 - Income tax: capital gains: scrip for scrip roll-over: acquisition of Howard Smith Limited by Wesfarmers Retail Pty Ltd, a 100% owned subsidiary of Wesfarmers Limited

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Class Ruling

Income tax: capital gains: scrip for scrip roll-over: acquisition of Howard Smith Limited by Wesfarmers Retail Pty Ltd, a 100% owned subsidiary of Wesfarmers Limited

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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* (‘ITAA 1997’):

- (a) subdivision 124-M;
- (b) section 116-20;
- (c) paragraph 104-10(3)(a).

Class of persons

3. The class of persons to whom this Ruling applies are the shareholders of Howard Smith Limited who:

- (a) were ‘residents of Australia’ within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (‘ITAA 1936’);

- (b) were not 'significant stakeholders' or 'common stakeholders' within the meaning of Subdivision 124-M;
- (c) accepted the takeover offer from Wesfarmers Retail Pty Ltd a wholly owned subsidiary of Wesfarmers Limited for certain consideration by choosing to accept the offer dated 28 June 2001 as amended on 12 July 2001 or as a result of a compulsory acquisition by virtue of Part 6A.1 (section 661) of the *Corporations Act 2001*.
- (d) apart from the roll-over which Subdivision 124-M provides, would make a capital gain from a CGT event happening in relation to the Howard Smith Limited shares; and
- (e) might make a capital gain from a replacement Wesfarmers Limited 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. Scrip for scrip roll-over is not available under section 124-780 for interests in a company that were acquired before 20 September 1985 (paragraph 124-780(3)(a)). This Ruling does not apply to shares in Howard Smith Limited that were acquired for capital gains tax purposes before that date.
- 6. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 10 to 14 is carried out in accordance with the details of the arrangement provided in this Ruling.
- 7. 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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The Manager
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Date of effect

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

Arrangement

10. 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 3 September 2001 from Wesfarmers Limited 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 acquisition of Howard Smith Limited by Wesfarmers Retail Pty Ltd, a 100% wholly owned subsidiary of Wesfarmers Limited.
- (b) Offer document dated 28 June 2001 extended to the shareholders of Howard Smith Limited offering two ordinary shares in Wesfarmers Limited and \$12 cash for every five Howard Smith Limited ordinary shares. The offer was open until 5:00pm (Perth time) 31 July 2001.
- (c) Supplementary Bidder's Statement dated 11 July 2001 increasing the cash component of the offer from \$12.00 to \$13.25. The revised offer also extended the offer period by seven days to 5:00pm (Perth time) on 7 August 2001. This revised offer was accepted by the board of directors of Howard Smith Limited.
- (d) Open letter to Howard Smith Limited shareholders dated 13 July 2001 extending the offer period from 7 August 2001 to the close of business on 22 August 2001.

- (e) Notice from Wesfarmers Retail Pty Ltd pursuant to section 650F of the Corporations Act 2001, dated 14 August 2001 declaring that the offer dated 28 June 2001 for all the shares in Howard Smith Limited is now free of all defeating conditions.
- (f) Notice from Wesfarmers Retail Pty Ltd pursuant to section 630(3) of the Corporations Act 2001, dated 14 August 2001 declaring that the offer dated 28 June 2001 for all the shares in Howard Smith Limited is now free of all defeating conditions.
- (g) Written statement from Wesfarmers Limited confirming that it had achieved the 80% threshold requirement of paragraph 124-780(2)(a) in relation to Howard Smith Limited.

11. Under a takeover proposal announced on 13 June 2001 by Wesfarmers Limited, to be carried out under the terms and conditions outlined in the offer document dated 28 June 2001, Wesfarmers Retail Pty Ltd invited the shareholders of Howard Smith Limited to dispose of their Howard Smith Limited shares in exchange for certain consideration.

12. The offer document gave the Howard Smith Limited shareholders the option to dispose of their Howard Smith Limited shares for a combination of shares in Wesfarmers Limited and cash.

13. The offer document stipulated that the offer was conditional on Wesfarmers Retail Pty Ltd or its associates having relevant interests in more than 90% of the Howard Smith Limited shares then on issue, before the end of the offer period (i.e., before 5:00pm Perth time 31 July 2001).

14. Under the arrangement to which this Ruling applies:

- (a) Howard Smith Limited is an Australian resident company;
- (b) All Howard Smith Limited shares on issue are ordinary shares (listed in the Australian Stock Exchange);
- (c) Wesfarmers Limited is an Australian resident company;
- (d) All Wesfarmers Limited shares on issue are ordinary shares (listed on the Australian Stock Exchange);
- (e) Wesfarmers Retail Pty Ltd is an Australian resident company; and
- (f) All Wesfarmers Limited shares to be issued as consideration under the offer will be ordinary shares.

Ruling

15. Subject to the qualifications in paragraphs 4 to 7 of this Ruling, shareholders of Howard Smith Limited who are within the class of persons to whom this Ruling applies and who accept the takeover offer made by Wesfarmers Retail Pty Ltd will be eligible to choose partial scrip for scrip roll-over under paragraph 124-780(3)(d) for the disposal of their Howard Smith Limited shares in exchange for Wesfarmers Limited shares. There is no roll over for Howard Smith Limited shareholders to the extent that they receive ineligible proceeds (that is, the cash): section 124-790.

16. The capital proceeds received in terms of subsection 116-20(1) that a Howard Smith Limited shareholder who is within the class of persons to whom this Ruling applies and who accepted the offer made by Wesfarmers Retail Pty Ltd for their Howard Smith Limited shares will be the cash (\$13.25) together with the market value of the Wesfarmers Limited shares at the time the shareholder disposed of the Howard Smith Limited shares. In terms of paragraph 104-10(3)(a) that is the date when the contract for the disposal was entered into. As per paragraph 46, this will be the date on which the Howard Smith Limited shareholder accepts the offer from Wesfarmers Retail Pty Ltd to purchase their Howard Smith shares.

Explanations

Availability of scrip for scrip roll-over

17. Subdivision 124-M contains a number of conditions for, and exceptions to, the eligibility of an entity to choose the roll-over. Some of these conditions and exceptions are not relevant to this arrangement. 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.

18. **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.**

19. This requirement will be satisfied by Howard Smith Limited shareholders to the extent they receive Wesfarmers Limited shares as consideration for the transfer of their Howard Smith Limited shares to Wesfarmers Retail Pty Ltd.

20. **Paragraphs 124-780(1)(b) and 124-780(2)(a) require that the exchange of shares is in consequence of a single arrangement that results in the acquiring entity (Wesfarmers Retail Pty Ltd)**

becoming the owner of 80% or more of the voting shares in the original entity (Howard Smith Limited).

21. In the context of the scrip for scrip roll-over provisions, the acquisition of shares resulting from the acceptance of the takeover offer and any later acquisition pursuant to the provisions of the *Corporations Act 2001* are considered to be in consequence of a 'single arrangement'.

22. This requirement will be satisfied as Wesfarmers Limited have confirmed that Wesfarmers Retail Pty Ltd have exceeded the 80% threshold requirement of paragraph 124-780-(2)(a).

23. **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 (Howard Smith Limited) could participate.**

24. This requirement will be met as Howard Smith Limited's issued shares consist wholly of ordinary shares and the takeover offer was made to all Howard Smith Limited shareholders.

25. **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 (Howard Smith Limited).**

26. This requirement will be satisfied as the takeover offer is made openly to each Howard Smith Limited shareholder.

27. Some of the choices that non-resident Howard Smith Limited shareholders may have in relation to the offer made 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.

28. 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.

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

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

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

32. Whether a Howard Smith Limited shareholder would make a capital gain, apart from the roll-over, in relation to the disposal of its Howard Smith Limited shares under the arrangement is dependent on the specific circumstances of each shareholder - in particular the shareholder's cost base of each Howard Smith Limited 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.

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

34. This requirement will be satisfied as the proposed takeover offer will be made by Wesfarmers Retail Pty Ltd and, to the extent that the offer consideration provides shares, the shares will be in Wesfarmers Limited (the ultimate holding company of the Wesfarmers Limited Group).

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

36. Additional rules associated with the cost base of interests apply for the purposes of scrip for scrip roll-over if a Howard Smith Limited shareholder, that 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 (Howard Smith Limited) and the replacement entity (Wesfarmers Limited); and
- (c) whether either or both the original entity (Howard Smith Limited) or the replacement entity (Wesfarmers Limited) 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.

37. 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).

38. **Subsection 124-780(4) provides for additional requirements if the original interest holder (a Howard Smith Limited shareholder) and an acquiring entity (Wesfarmers Retail Pty Ltd) did not deal with each other at arm’s length and:**

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

39. Additional rules about the value of an Howard Smith Limited shareholder’s proceeds for the exchange and about the kinds of rights and obligations attaching to their interests apply where the Howard Smith Limited shareholder is otherwise eligible for the roll-over but does not deal with Wesfarmers Retail Pty Ltd at arm’s length.

40. Under the arrangement, all the shareholders of Howard Smith Limited will be invited by Wesfarmers Retail Pty Ltd to dispose of their Howard Smith Limited shares only in the manner and under the terms proposed in the offer document. On this basis, the shareholders that accept the offer and receive their offer consideration will be regarded as having dealt with Wesfarmers Retail Pty Ltd at arm’s length and the additional rules will not be required to be met.

41. **Subsection 124-790(1) provides that the original interest holder (the Howard Smith Limited shareholder) will obtain only a partial roll-over if its capital proceeds (the offer consideration) includes something other than its replacement interest (the Wesfarmers Limited shares).**

42. Howard Smith Limited shareholders in accepting the offer from Wesfarmers Retail Pty Ltd and receiving a combination of cash and Wesfarmers Limited shares will not be eligible for roll-over in respect of that part of each Howard Smith Limited share for which they receive the cash component. The Ruling at paragraph 14 is qualified in this regard.

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

44. The Howard Smith Limited shareholder may work out what percentage of the total capital proceeds they receive for each Howard Smith Limited share (that is, the market value of the Wesfarmers Limited shares on the date of disposal of the Howard Smith Limited shares plus the \$13.25 cash consideration) was represented by cash. That percentage would be applied to the cost base of each Howard Smith Limited share to determine the part of that cost base which is reasonably attributable to the ineligible proceeds (the cash).

45. In determining the market value of a Wesfarmers Limited share the shareholder may use the closing value of the share on the stock exchange on the date of disposal of the Howard Smith Limited shares.

46. For Howard Smith Limited shareholders who accept the takeover offer the date of disposal will be the date that they accept the offer from Wesfarmers Retail Pty Ltd to purchase their Howard Smith Limited shares. The date is not the date on which the offer from Wesfarmers Retail Pty Ltd became unconditional. For Howard Smith Limited shareholders whose shares are compulsorily acquired under the *Corporations Act 2001* the date of disposal is determined under subsection 104-10(6) as the earliest of:

- (a) when the shareholder received compensation from Wesfarmers Retail Pty Ltd;
- (b) when Wesfarmers Retail Pty Ltd became the owner of the Howard Smith Limited shares;
- (c) when Wesfarmers Retail Pty Ltd took possession of the Howard Smith Limited shares under the power of compulsory acquisition conferred by the *Corporations Act 2001*.

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

48. This exception may apply if, for example, the Wesfarmers Limited 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.

49. Paragraph 124-795(2)(b) provides that the roll-over is not available if you (the Howard Smith Limited shareholder) and the acquiring entity (Wesfarmers Retail Pty Ltd) are members of the same wholly owned group just before you stop owning your original interest (the Howard Smith Limited shares).

50. This exception will not apply and this Ruling is made on the basis that neither Wesfarmers Retail Pty Ltd nor any Wesfarmers Limited group company held any shares in Howard Smith Limited before the arrangement.

Detailed contents list

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

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Commissioner of Taxation

17 October 2001

Previous draft:

Not previously issued in draft form

Legislative references:

- TAA 1953 Part IVAAA
- ITAA 1936 6(1)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)
- ITAA 1997 104-10(3)(a)
- ITAA 1997 124-M
- ITAA 1997 124-780
- ITAA 1997 124-780(1)(a)(i)
- ITAA 1997 124-780(1)(b)
- ITAA 1997 124-780(1)(c)

Related Rulings/Determinations:
CR 2001/1; TR 92/1; TR 97/16

Subject references:

- Approved early retirement scheme payments;
- eligible termination payments;
- eligible termination payment components

- ITAA 1997 124-780(2)(a)
- ITAA 1997 124-780(2)(b)
- ITAA 1997 124-780(3)(a)
- ITAA 1997 124-780(3)(b)
- ITAA 1997 124-780(3)(c)
- 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 6A.1(661)
- Corporations Act 2001 619(3)

ATO References

NO T2001/016939

ISSN: 1445 2014