

CR 2005/37 - Income tax: trust restructure and transfer of assets - Estate of the Late George Adams/Tattersall's Limited

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Class Ruling

Income tax: trust restructure and transfer of assets – Estate of the Late George Adams/Tattersall’s Limited

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Preamble

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **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 law(s)

2. The tax laws dealt with in this Class Ruling are:
- section 97 of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 98A of the ITAA 1936;
 - Part IIIA of the ITAA 1936;
 - Division 40 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 40-30 of the ITAA 1997;
 - section 40-285 of the ITAA 1997;
 - section 104-70 (CGT event E4) of the ITAA 1997;
 - section 104-75 (CGT event E5) of the ITAA 1997;
 - section 104-80 (CGT event E6) of the ITAA 1997;
 - section 104-85 (CGT event E7) of the ITAA 1997;
 - section 104-195 (CGT event J4) of the ITAA 1997;
 - section 106-50 of the ITAA 1997;

- Subdivision 124-N of the ITAA 1997;
- section 124-855 of the ITAA 1997;
- section 124-860 of the ITAA 1997;
- section 124-870 of the ITAA 1997;
- section 124-875 of the ITAA 1997; and
- Division 128 of the ITAA 1997.

Class of persons

3. The class of persons are the successors and assigns of the beneficiaries named (Named Beneficiaries) in Clauses T and Y of the Will of the Late George Adams to which the arrangement described in paragraphs 9 to 22 apply.

Qualifications

4. Those persons may rely on this Ruling provided the arrangement actually carried out is the arrangement described in paragraphs 9 to 22.

5. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- 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
- this Ruling may be withdrawn or modified.

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Date of effect

7. This Ruling applies from 1 July 2004. However the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 21 and 22 of Taxation Ruling TR92/20).

Withdrawal

8. This Ruling is withdrawn from 30 June 2006.

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:

- Class Ruling request from Moore Stephens HF Services Pty Ltd dated 16 March 2005;
- Will of the Late George Adams dated 16 March 1901;
- Codicil to the Will of the Late George Adams dated 31 May 1902;
- 1905 Agreement between the then Beneficiaries of the Estate of the Late George Adams (Estate) and the then Trustees;
- Schedule of Trademarks;
- Settlement Deed dated November 2004 between the Trustees of the Estate (Trustees), the representative of the Named Beneficiaries, the representative of the Employee Beneficiaries and the representative for future Employee Beneficiaries, as approved by the Supreme Court of Victoria;
- Tattersall's Clause Y Employee Trust Deed;
- Decision of the appellate court of the Supreme Court of Victoria handed down on 7 April 2005 as to how the entitlements of the Named Beneficiaries are to be determined (*Playoust v. Hornsby* [2005] VSCA 73);
- Draft Restructure Implementation Agreement (Implementation Agreement) dated 5 April 2005;
- Opinion from Queen's Counsel dated 11 February 2005;
- Draft Tattersall's Non-Responding Beneficiaries' Trust Deed;
- Explanatory Memorandum for the Beneficiaries of the Estate in connection with a decision regarding the restructure of the Estate (Restructure) dated 1 September 2004; and

- Independent Valuation dated February 2005.

Note: Certain information received from the applicants and Moore Stephens HF Services Pty Ltd may have been provided on a commercial in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

10. This Ruling is based on:

- any entitlement of the Trustees to corpus commission because of the winding up of the Estate not being an interest in the Estate; and
- the Estate not being a trust to which Division 128 of the ITAA 1997 applies.

Background

11. The Estate was established by the Will of the Late George Adams dated 16 March 1901 (together with a Codicil dated 31 May 1902) (Will).

12. Mr Adams died on 23 September 1904.

13. Since Mr Adams' death, his executors and now the Trustees have continuously conducted the Business, which has expanded to include sweeps, lotteries (including Tattslotto), Club Keno and electronic gaming machines. The assets of the Estate (Estate Assets) include the Tattersall's Brand (defined as the generic Man with the Hat logo registered as Trademark number 345258 and, for the purposes of this Ruling, the term 'Tattersall's Brand' does not include any copyright attached to the Trademark).

14. In 1998, the Trustees, in accordance with powers granted by the Will, 'corporatised' the Business. The Australian businesses of the Estate are now carried on by three Australian companies, Tattersall's Gaming Pty Ltd, Tattersall's Sweeps Pty Ltd and Tattersall's Club Keno Pty Ltd, all of which are wholly-owned by Tattersall's Holdings Pty Ltd (Tattersall's Holdings).

15. All of the issued shares in Tattersall's Holdings are held by the Estate. A new company, Tattersall's Limited, will acquire all the Estate Assets, including all of the shares in Tattersall's Holdings.

16. Clause Y of the Will sets out the interests of the Named Beneficiaries.

17. Over the course of the last century, the interests of the Named Beneficiaries have become further divided, in most instances, through devolution on death and assignment of fractional interests.

18. The number of Named Beneficiaries, and the difference in the extent of their interests in the Estate, is now such that it has become convenient for the Trustees to manage the relative rights of the beneficiaries in the Estate by ascribing to each a number of 'notional units', in proportion to their respective interests.

19. The Will specified that 90% of the net profits of the Estate were to be distributed to the Named Beneficiaries in fixed proportions while 10% of the net profits were to be distributed 'between and amongst such of the Employees for the time being engaged in the [Business] and in such proportions in all respects as [the] Trustees shall in their absolute discretion think fit' (Clause Y of the Will). The entitlement of the Employees to 10% of the net profits of the Estate is referred to in this Ruling as 'the Employee Share'.

20. The effect of the Settlement Deed, for the purposes of the Restructure outlined below is to reduce the Employee Share to 5% and to increase the share attributable to the Named Beneficiaries to 95%.

Restructure of Estate

21. The intention of the Trustees is that the Estate Assets be transferred to Tattersall's Limited and the Estate wound up facilitating the eventual listing of Tattersall's Limited on the Australian Stock Exchange (ASX). Tattersall's Limited will then directly and indirectly own the Business and related assets, which are currently the property of the Estate.

22. The arrangement as it relates to the Named Beneficiaries is set out in detail in the Implementation Agreement. The essential elements of the Restructure are summarised as follows:

- The Trustees will assign or otherwise transfer all of the assets of the Estate to Tattersall's Limited.
- These assets currently include the shares in Tattersall's Holdings, freehold land, plant and equipment and intangible assets including the Tattersall's Brand.
- Certain assets are to be retained by the Estate to discharge any existing liabilities.
- In consideration for the transfer of the Estate Assets, Tattersall's Limited will issue to the Trustees 599,999,999 fully paid ordinary shares and will assume certain liabilities and obligations of the Trustees.
- The shares issued to the Trustees will be transferred in specie by the Trustees as follows:
 - (i) as to 5% to the Employee Trust, as per the Supreme Court of Victoria approved Settlement Deed; and
 - (ii) as to 95% amongst the Named Beneficiaries.

- In accordance with the decision of the Victorian Court of Appeal in *Playoust v. Hornsby* [2005] VSCA 73 and the subsequent decision of Mandie J in the subsequent Supreme Court hearing on 28 April 2005 to give the Trustees power to effect the Restructure, such shares will be immediately transferred to the Named Beneficiaries in proportion to their respective interests as determined by the terms of Clauses T and Y of the Will. Hence, the shares will be transferred in proportion to the Named Beneficiaries' entitlements to net profits of the Estate.
- Once the Estate has discharged any remaining debts with the assets retained, it will be terminated.
- Tattersall's Limited will then be listed on the ASX.

Ruling

23. The Named Beneficiaries who are not disqualified by virtue of subsection 124-870(3) of the ITAA 1997 will be entitled to choose rollover relief under section 124-870 in Subdivision 124-N of the ITAA 1997 for the exchange of their interests in the Estate for shares in Tattersall's Limited.

24. Any capital gain or capital loss made from the disposal of CGT assets of the Estate to Tattersall's Limited will be disregarded under section 124-875 of the ITAA 1997. Therefore, no amount arising from these disposals will be included in the assessable income of the Named Beneficiaries under either section 97 or section 98A of the ITAA 1936.

25. The Tattersall's Brand is not a 'depreciating asset' within the meaning of section 40-30 of the ITAA 1997.

26. No capital gain will be made under subsection 104-75(3) (CGT event E5) of the ITAA 1997, subsection 104-80(3) (CGT event E6) of the ITAA 1997 or subsection 104-85(3) (CGT event E7) of the ITAA 1997 as a result of the issue of shares in Tattersall's Limited to the Trustees under the Restructure, to be immediately followed by the transfer of those shares to the Named Beneficiaries.

27. CGT event J4 (section 104-195 of the ITAA 1997) will not happen to the Named Beneficiaries who received their shares in Tattersall's Limited under the Restructure as the conditions in subsection 104-195(2) will not be satisfied.

Explanation

Rollover relief: Subdivision 124-N

28. Entities may choose to obtain a rollover under Subdivision 124-N of the ITAA 1997 if a trust disposes of all of its assets to a company and units and interests in the trust are replaced by shares in the company.

29. The requirements for a CGT rollover under Subdivision 124-N of the ITAA 1997 are set out in section 124-855 of the ITAA 1997. Subsection 124-855(1) of the ITAA 1997 provides that rollover relief may be available if:

- a trust disposes of all of its CGT assets to a company limited by shares;
- CGT event E4 in section 104-70 of the ITAA 1997 is capable of applying to all of the units and interests in the trust; and
- the requirements in section 124-860 of the ITAA 1997 are met.

30. Based on the arrangement that is the subject of this Ruling, the conditions for rollover in subsection 124-850(1) of the ITAA 1997 will be met. The Named Beneficiaries, who are not disqualified by virtue of subsection 124-870(3) of the ITAA 1997, will be entitled to choose rollover relief under section 124-870 of the ITAA 1997.

Tattersall's Brand

31. As provided for in section 40-285 of the ITAA 1997: 'a balancing adjustment event occurs for a depreciating asset...'. Consequently, for a balancing adjustment to arise for the Tattersall's Brand, the Tattersall's Brand must fall within the definition of a 'depreciating asset'.

Depreciating asset

32. A depreciating asset is defined in subsection 40-30(1) of the ITAA 1997 to be an asset that has a limited effective life and can reasonably be expected to decline in value over the time that it is used. The definition excludes land, trading stock and intangible assets, except for those intangible assets listed in subsection 40-30(2) of the ITAA 1997.

33. The Tattersall's Brand, a logo registered as a trademark, is an intangible asset. Therefore, to be a depreciating asset in Division 40 of the ITAA 1997, it needs to be an intangible asset of a kind listed in subsection 40-30(2) of the ITAA 1997.

34. However, a logo registered as a trademark does not fit within paragraphs (a) to (g) of the items listed in subsection 40-30(2) of the ITAA 1997. Subsection 40-30(2) of the ITAA 1997 includes paragraph 40-30(2)(c) of the ITAA 1997 which provides that items of intellectual property are depreciating assets, if they are not trading stock.

35. This definition of intellectual property does not include trade marks. For the purpose of applying the meaning of intellectual property in the ITAA 1997, a trade mark is not an item of intellectual property.

36. As the Tattersall's Brand is not an asset of a kind listed in subsection 40-30(2) of the ITAA 1997, but is an intangible asset, it is excluded from being a depreciating asset, by paragraph 40-30(1)(c) of the ITAA 1997.

CGT asset

37. Subdivision 124-N of the ITAA 1997 applies to disregard a capital gain or capital loss of the transferor that results from the disposal of a 'CGT asset'.

38. A CGT asset is defined in subsection 108-5(1) of the ITAA 1997 as any kind of property or a legal or equitable right that is not property.

39. Note 2 attaching to section 108-5 of the ITAA 1997 highlights that certain assets are excluded from being classed as a CGT asset if the asset:

- was last acquired before 26 June 1992; and
- was not an 'asset' for the purposes of Part IIIA of the ITAA 1936.

40. As the Tattersall's Brand is a separately identifiable, intangible asset, capable of assignment, it falls under the definition of a CGT asset in subsection 108-5(1) of the ITAA 1997.

41. Despite the Tattersall's Brand being acquired prior to 26 June 1992, the Tattersall's Brand is an 'asset' under Part IIIA of the ITAA 1936. As such, the Tattersall's Brand is a CGT asset.

42. Under the arrangement, the Estate intends to transfer the Tattersall's Brand to Tattersall's Limited.

43. As the Tattersall's Brand is a CGT asset, its disposal to Tattersall's Limited under the Restructure will qualify for rollover relief under Subdivision 124-N of the ITAA 1997 as discussed at paragraphs 28 to 30.

Transfer of shares in Tattersall's Limited to Named Beneficiaries

44. If the Named Beneficiaries are absolutely entitled to the shares in Tattersall's Limited as against the Trustees of the Estate, under section 106-50 of the ITAA 1997, the CGT provisions of the ITAA 1997 will not recognise the transfer of the shares by the Trustees to the Named Beneficiaries under the Restructure.

Absolute entitlement

45. Absolute entitlement, applied in the context of the CGT provisions, refers to a beneficiary with a vested and indefeasible interest in the Estate, having the ability to request the assets to be transferred directly to them or at their direction (*Saunders v. Vautier* [1841] 41 ER 282).

46. In accordance with the Implementation Agreement:

- the Trustees will hold the shares for the Named Beneficiaries in the agreed proportions;
- the Named Beneficiaries do not have a proportionate interest in all of the shares but a total interest in a specified number of shares and each is the sole beneficiary in respect of those shares;
- the interest that each of the Named Beneficiaries has in the shares is vested and indefeasible; and
- each Named Beneficiary will be able to immediately call for the shares held specifically for them to be transferred to them. However, they will not need to do this because the shares will immediately be transferred to them once the Trustees have legal title to them.

47. Therefore, the Named Beneficiaries will be absolutely entitled to the shares in Tattersall's Limited as against the Trustees.

48. As such, no CGT event will happen when those shares are transferred by the Trustees to the Named Beneficiaries.

CGT event J4

49. CGT event J4 in subsection 104-195(2) of the ITAA 1997 happens when:

- there is a rollover under Subdivision 124-N of the ITAA 1997 for an entity receiving a share in a company in exchange for a unit or interest in a trust under a trust restructure;
- the trust fails to cease to exist:
 - i) within six months after the start of the trust restructuring period; or

- ii) if that is not possible because of circumstances outside the control of the trustee – as soon as practicable after the end of that period; and
- the shareholder owns the share when the failure happens.

50. CGT event J4 of the ITAA 1997 will not happen if the Estate ceases to exist within six months after the start of the trust restructuring period, that is when the first asset of the Estate is disposed of to Tattersall's Limited.

51. CGT event J4 of the ITAA 1997 will also not happen if, because of circumstances outside of the control of the Trustees, the Estate does not cease to exist within six months after the start of the trust restructuring period. In this situation the Estate must cease to exist as soon as practicable after the end of the trust restructuring period.

52. The Implementation Agreement cites two matters relating to the Restructure that are currently before the courts. It is accepted that the resolution of these matters are circumstances outside the control of the Trustees. CGT event J4 of the ITAA 1997 will not happen provided that the Estate ceases to exist as soon as practicable after these matters have been finalised.

Detailed contents list

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

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Commissioner of Taxation

18 May 2005

<i>Previous draft:</i>	- ITAA 1997 104-70
Not previously issued as a draft	- ITAA 1997 104-75
	- ITAA 1997 104-75(3)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 104-80
CR 2001/1; TR 92/1; TR92/20;	- ITAA 1997 104-80(3)
TR 97/16;	- ITAA 1997 104-85
	- ITAA 1997 104-85(3)
	- ITAA 1997 104-195
<i>Subject references:</i>	- ITAA 1997 104-195(2)
- absolute entitlement	- ITAA 1997 106-50
- balancing adjustment	- ITAA 1997 108-5
- CGT event	- ITAA 1997 108-5(1)
- capital gains tax	- ITAA 1997 Subdiv 124-N
- capital proceeds	- ITAA 1997 124-850(1)
- cost base	- ITAA 1997 124-855
- depreciating asset	- ITAA 1997 124-855(1)
- estate	- ITAA 1997 124-860
- rollover relief	- ITAA 1997 124-870
- shares	- ITAA 1997 124-870(3)
- trust	- ITAA 1997 124-875
- uniform capital allowances	- ITAA 1997 Div 128
	- TAA 1953 Pt IVAAA
	- Copyright Act 1968
<i>Legislative references:</i>	
- ITAA 1936 Pt IIIA	
- ITAA 1936 97	
- ITAA 1936 98A	
- ITAA 1997 Div 40	
- ITAA 1997 40-30	
- ITAA 1997 40-30(1)	
- ITAA 1997 40-30(1)(c)	
- ITAA 1997 40-30(2)	
- ITAA 1997 40-30(2)(c)	
- ITAA 1997 40-285	
	<i>Case references:</i>
	- Hornsby v. Playoust [2004] VSC 472
	- Playoust v. Hornsby [2005] VSCA 73
	- Saunders v. Vautier [1841] 41 ER 282

ATO references

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