CR 2005/63 - Income tax: scrip for scrip roll-over: merger of James Fielding Group and Mirvac Group

Class Ruling

Income tax: scrip for scrip roll-over: merger of James Fielding Group and Mirvac Group

Contents Para

Preamble

The number, subject heading, ***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 law(s)' 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 Ruling are the following provisions of the *Income Tax Assessment Act 1997* (ITAA 1997):

- section 104-10;
- section 109-10; and
- Subdivision 124-M.

Class of persons

3. The class of persons to which this Ruling applies is the holders of James Fielding Group (JFG) stapled securities (consisting of a share in James Fielding Holdings Limited (JFH) and a unit in the James Fielding Trust (JFT)) who:

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

(b) hold their shares in JFH on capital account;

(c) hold their units in the JFT on capital account;

(d) dispose of their shares in JFH to Mirvac Limited (ML) in exchange for shares in ML;

(e) dispose of their units in the JFT to the Mirvac Property Trust (MPT) in exchange for units in the MPT; and

(f) are not 'significant stakeholders' within the meaning of that expression in Subdivision 124-M of the ITAA 1997.

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 actually carried out is carried out in accordance with the arrangement described in paragraphs 9 to 19.

6. 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.

Date of effect

8. This Class Ruling applies to the year of income ended 30 June 2005.

Arrangement

9. The arrangement that is the subject of this Ruling is described below. The description is based on, and includes reference to, the following documents:

(a) Class Ruling application from PricewaterhouseCoopers dated 30 November 2004;

(b) copy of the Explanatory Memorandum in relation to a recommended acquisition of the JFG by the Mirvac Group (MG), dated 12 November 2004;

(c) copy of the JFT constitution dated 19 April 1979 and supplement deed polls 17 to 26 inclusive;

(d) copy of the MPT constitution dated 7 November 2002;

(e) copies of previous submissions and documents relating to Class Ruling CR 2002/67; and

(f) correspondence from PricewaterhouseCoopers dated:

   (i) 30 November 2004;

   (ii) 20 December 2004;

   (iii) 15 March 2005; and

   (iv) 24 March 2005.

10. The arrangement that is the subject of this Ruling involves the merger of the JFG and the MG. The merger was effected by:

(a) each shareholder in JFH disposing of their shares to ML pursuant to a Scheme of Arrangement; and

(b) each unit holder in the JFT disposing of their units to the MPT pursuant to amendments to the JFT trust deed passed at a meeting of JFT unit holders.

11. Each JFH shareholder received 0.73 ML shares for each JFH share they held. Each JFT unit holder received 0.73 MPT units for each JFT unit they held.

12. Prior to the merger, a share in JFH was stapled to a unit in the JFT. However, under Clause 3.2(a) of the Scheme of Arrangement, on the implementation date JFH shares were de-stapled from the JFT units, then JFH shares were transferred to ML and JFT units were transferred to the MPT.

13. Each replacement ML share was stapled to a replacement MPT unit – called MG securities.

14. JFG security holders could elect to participate in a cash out facility or a security sale facility in relation to some or all of their replacement MG securities. Under both facilities, the MG securities which would otherwise be issued to the JFG security holder were instead issued to a nominee for sale.

15. A JFG security holder who participated in the cash out facility was entitled to receive a cash payment equal to $4.5616 for each new MG security which the JFG security holder was entitled to be issued. A scale back applied if the number of securities elected into the cash out facility exceeded a specified limit.

16. A JFG security holder who participated in the security sale facility was entitled to receive a cash payment determined by reference to the total sale proceeds received by the nominee from the sale of all MG securities under both the cash out facility and the security sale facility.

17. The entitlement that excluded foreign security holders would otherwise have to be issued replacement MG securities was satisfied by the MG issuing the replacement MG securities for sale under the cash out facility or the security sale facility or a combination of the facilities. Generally an excluded foreign security holder was a JFG security holder who was not a resident of either Australia or New Zealand.

18. JFH and ML both had at least 300 members just before the commencement of the arrangement and both the JFT and the MPT had at least 300 beneficiaries at that time.

19. Both JFH and ML were Australian residents at the time of the arrangement and both the JFT and the MPT were resident trusts for CGT purposes at that time.

Ruling

Time of CGT event

20. CGT event A1 in section 104-10 of the ITAA 1997 happened as a result of a JFH shareholder or a JFT unit holder disposing of a JFH share or a JFT unit.

21. The event happened on the merger implementation date when the change in ownership of the JFH share or the JFT unit occurred: paragraph 104-10(3)(b) of the ITAA 1997.

22. A JFH shareholder or a JFT unit holder will make a capital gain from CGT event A1 happening if the capital proceeds for a JFH share or a JFT unit exceed its cost base. A JFH shareholder or a JFT unit holder will make a capital loss if the capital proceeds for a JFH share or a JFT unit are less than its reduced cost base: subsection 104-10(4) of the ITAA 1997.

Time of acquisition of replacement interest

23. A replacement ML share will be acquired by the JFH shareholders on the merger implementation date when the shares were issued or allotted: item 2 in the table in section 109-10 of the ITAA 1997.

24. A replacement MPT unit will also be acquired by the JFT unit holders on the merger implementation date when the units were issued: item 3 in the table in section 109-10 of the ITAA 1997.

Availability of scrip for scrip roll-over

25. A JFH shareholder who made a capital gain from CGT event A1 happening in relation to their JFH share, and a JFT unit holder who made a capital gain from CGT event A1 happening in relation to their JFT unit, can choose roll-over relief under Subdivision 124-M of the ITAA 1997 provided:

(a) they acquired their share or unit on or after 20 September 1985; and

(b) any capital gain that could be made upon a future CGT event happening in relation to a replacement share in ML or a replacement unit in the MPT would not be disregarded (except because of a roll-over).

26. Where a JFH shareholder or a JFT unit holder chooses roll-over, the capital gain arising from the disposal of the JFH share or the JFT unit is disregarded.

27. This Ruling does not address the capital gains tax consequences arising in relation to any capital gain or capital loss that is made from a sale of a replacement MG security under either the cash out facility or the security sale facility.

Explanation

CGT event A1

28. CGT event A1 in section 104-10 of the ITAA 1997 happens if there is a change in the ownership of an asset from one entity to another. The event happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs.

29. The time when CGT event A1 happens determines the income year in which any capital gain or loss is made and eligibility for the CGT discount.

30. The Addendum to Taxation Determination TD 2002/4 indicates that a takeover or merger effected by a court ordered scheme of arrangement does not involve a disposal of shares under a contract.

31. CGT event A1 therefore happened to all JFH shareholders on the merger implementation date when the shares were transferred to ML.

32. Similarly, the transfer of the JFT units was not pursuant to a contract. Accordingly, CGT event A1 happened to all the JFT unit holders on the merger implementation date as the terms of the Scheme of Arrangement required the JFT units to be transferred at the same time as the JFH shares.

Time of acquisition of replacement interests

33. As ML shares were not acquired under a contract, they are taken, by item 2 in the table in subsection 109-10 of the ITAA 1997, to have been acquired when they were issued or allotted. Similarly, under item 3 in the table in subsection 109-10, the time of acquisition of the MPT units is the time they were issued.

34. ML shares and the MPT units may, for some purposes, be taken to have been acquired at an earlier time if scrip for scrip roll-over is chosen in respect of a JFH share or a JFT unit. For example, for CGT discount purposes a ML share or a MPT unit will be taken to have been acquired at the time the JFH share or the JFT unit for which it was exchanged was acquired: item 2 in the table in subsection 115-30(1) of the ITAA 1997.

Availability of scrip for scrip roll-over

35. Scrip for scrip roll-over enables a shareholder or unit holder to disregard a capital gain they make from a share or unit that is disposed of as part of a takeover or merger if the shareholder or unit holder receives in exchange a replacement share or unit.

36. The capital gain is disregarded completely if the only capital proceeds the shareholder or unit holder receives is a replacement share or unit. The roll-over also provides that the cost base and reduced cost base of the replacement share or unit is based on the cost base and reduced cost base of the original share or unit at the time of the roll-over.

37. Subdivision 124-M of the ITAA 1997 contains a number of conditions for, and exceptions to, the eligibility of a shareholder or unit holder to choose scrip for scrip roll-over. Below is an outline of the main conditions and exceptions which are relevant to the circumstances of the arrangement that is the subject of this Ruling.

Share for share exchange

Subparagraph 124-780(1)(a)(i) of the ITAA 1997 requires an entity (a JFH shareholder) to exchange a share in a company for a share in another company (ML)

38. This requirement was satisfied by a JFH shareholder as under the Scheme of Arrangement, JFH shares were exchanged for ML shares.

39. JFH shareholders who elected that their replacement ML shares be issued to a nominee for sale under either the cash out facility or the security sale facility are considered to satisfy this requirement as those shareholders were entitled to receive replacement shares under the terms of both the Scheme of Arrangement and the Deed Poll executed by ML and Mirvac Funds Limited as responsible entity for the MPT.

Paragraphs 124-780(1)(b) and 124-780(2)(a) of the ITAA 1997 require that shares in an original entity (JFH) be exchanged in consequence of a single arrangement that results in the acquiring entity (ML) becoming the owner of 80% or more of the voting shares in the original entity

40. In the context of the scrip for scrip provisions the merger of JFH and ML under the Scheme of Arrangement is considered to be a single arrangement.

41. The only JFH shares which satisfy the definition of voting shares in subsection 995-1(1) of the ITAA 1997 are the shares that were the subject of the arrangement.

42. Accordingly, upon implementation of the Scheme of Arrangement this requirement was satisfied as ML became the owner of all of the JFH shares.

Paragraphs 124-780(1)(b) and 124-780(2)(b) of the ITAA 1997 require that the exchange of shares be in consequence of a single arrangement in which at least all owners of voting shares in the original entity (JFH) could participate

43. This requirement was satisfied as all the shareholders in JFH were able to participate in the Scheme of Arrangement.

Paragraphs 124-780(1)(b) and 124-780(2)(c) of the ITAA 1997 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 (JFH)

44. This requirement is satisfied as participation in the Scheme of Arrangement was on the same terms for all JFH shareholders.

45. JFH shareholders, including some excluded foreign JFH shareholders, having their replacement ML shares issued to a nominee for sale under either the cash out facility or the security sale facility does not prevent the arrangement being on substantially the same terms for all owners of shares in JFH as those shareholders were entitled to receive replacement shares under the terms of both the Scheme of Arrangement and the Deed Poll executed by ML and Mirvac Funds Limited as responsible entity for the MPT.

Paragraphs 124-780(1)(c) and 124-780(3)(a) of the ITAA 1997 require the original interest holder (a JFH shareholder) to have acquired its original interest (a JFH share) on or after 20 September 1985

46. This requirement was satisfied as all of the shares in JFH were issued on or after 20 September 1985.

Paragraphs 124-780(1)(c) and 124-780(3)(b) of the ITAA 1997 require that, apart from the roll-over, the original interest holder (a JFH shareholder) would make a capital gain from a CGT event happening in relation to the original interest (a JFH share)

47. Whether a JFH shareholder would, apart from the roll-over, have made a capital gain from the disposal of any of its shares to ML is a question of fact that is dependent on the specific circumstances of each shareholder – in particular on the cost base of each JFH share and the value of the capital proceeds received. Paragraph 25 limits this Ruling in this regard.

Paragraphs 124-780(1)(c) and 124-780(3)(c) of the ITAA 1997 require that the replacement interest is in the acquiring entity (ML) or the ultimate holding company of the wholly-owned group of which it is a member

48. This requirement is satisfied as the replacement interest received by JFH shareholders will be in ML which is the ultimate holding company of a wholly-owned group.

Paragraphs 124-780(1)(c) and 124-780(3)(d) of the ITAA 1997 require that the original interest holder (a JFH shareholder) choose to obtain the roll-over

49. Whether a JFH shareholder chooses roll-over is a question of fact.

Subsection 124-780(4) of the ITAA 1997 provides that the additional requirements in subsection 124-780(5) of the ITAA 1997 must be satisfied if the original interest holder (a JFH shareholder) and the acquiring entity (ML) did not deal with each other at arm's length and:

> ***(a) neither the original entity (JFH) nor the replacement entity (ML) had at least 300 members just before the arrangement started: paragraph 124-780(4)(a) of the ITAA 1997; or***
>
> ***(b) the original interest holder (a JFH shareholder), the original entity (JFH) and the acquiring entity (ML) were all members of the same linked group just before the arrangement started: paragraph 124-780(4)(b) of the ITAA 1997***

50. Paragraph 124-780(4)(a) of the ITAA 1997 will not apply because both JFH and ML had at least 300 members just before the arrangement started. Section 124-810 of the ITAA 1997 will not apply to either JFH or ML as their ownership was not concentrated in the manner contemplated by that section.

51. Paragraph 124-780(4)(b) of the ITAA 1997 will not apply because JFH and ML were not members of the same linked group (within the meaning of section 170-260 of the ITAA 1997) just before the arrangement started.

Unit for unit exchange

Subparagraph 124-781(1)(a)(i) requires an entity (a JFT unit holder) to exchange a unit in a trust (the JFT) for a unit in another trust (the MPT)

52. This requirement was satisfied by a JFT unit holder as JFT units were exchanged for MPT units pursuant to the amendments to the JFT trust deed.

53. JFT unit holders who elected that their replacement MPT units be issued to a nominee for sale under either the cash out facility or the security sale facility are considered to satisfy this requirement as those unit holders were entitled to receive replacement units under the terms of both the amendments to the JFT trust deed and the Deed Poll executed by ML and Mirvac Funds Limited as responsible entity for the MPT.

Paragraph 124-781(1)(b) requires that entities have fixed entitlements to all of the income and capital of the original entity (the JFT) and the acquiring entity (the MPT)

54. Having regard to:

(a) all of the documents and any other material referred to in paragraph 9 of this Ruling; and

(b) all the facts comprising the arrangement as described in paragraphs 10 to 19 of this Ruling,

it is considered that for the purposes of paragraph 124-781(1)(b) there are fixed entitlements to all of the income and capital of the JFT and the MPT immediately before, during and immediately after the arrangement that is the subject of this Ruling.

Paragraphs 124-781(1)(c) and 124-781(2)(a) require that the exchange of units is in consequence of an arrangement that results in the acquiring entity (the MPT) becoming the owner of 80% or more of the trust voting interests in the original entity (the JFT)

55. A ‘trust voting interest’ is defined in subsection 124-781(6) as an interest that confers rights of the same or a similar kind as the rights conferred by a voting share in a company. ‘Voting shares’ are defined in subsection 995-1(1) of the ITAA 1997 by reference to the definition in section 9 of the *Corporations Act 2001.*

56. All of the JFT units are trust voting interests. Accordingly, upon implementation of the merger, this requirement was satisfied as the MPT became the owner of all of the JFT units.

Paragraphs 124-781(1)(c) and 124-781(2)(b) require that the exchange of units is in consequence of an arrangement in which at least all owners of trust voting interests in the original entity (the JFT) could participate

57. This requirement was satisfied because under the amendments to the JFT trust deed all the unit holders in the JFT participated in the arrangement.

Paragraphs 124-781(1)(c) and 124-781(2)(c) require that the exchange of units is in consequence of an arrangement in which participation was available on substantially the same terms for all of the owners of units of a particular type

58. This requirement was satisfied as the amendments to the JFT trust deed applied to all the JFT unit holders.

59. JFT unit holders, including some excluded foreign JFT unit holders, having their replacement MPT units issued to a nominee for sale under either the cash out facility or the security sale facility does not prevent the arrangement being on substantially the same terms for all owners of units in the JFT as those unit holders were entitled to receive replacement units under the terms of both the amendments to the JFT trust deed and Deed Poll executed by ML and Mirvac Funds Limited as responsible entity for the MPT.

Paragraphs 124-781(1)(d) and 124-781(3)(a) of the ITAA 1997 require the original interest holder (a JFT unit holder) to have acquired its original interest (a JFT unit) on or after 20 September 1985

60. Roll-over will only be available for those JFT units that were acquired on or after 20 September 1985. Paragraph 25(a) limits this Ruling in this regard.

Paragraphs 124-781(1)(d) and 124-781(3)(b) require that, apart from the roll-over, the original interest holder (a JFT unit holder) would make a capital gain from a CGT event happening in relation to the original interest (a JFT unit)

61. Whether a JFT unit holder would, apart from the roll-over, have made a capital gain from the disposal of any of its units to the MPT is a question of fact that is dependent on the specific circumstances of each unit holder – in particular on the cost base of each JFT unit and the value of the consideration received. Paragraph 25 limits this Ruling in this regard.

Paragraphs 124-781(1)(d) and 124-781(3)(c) require that the original interest holder (a JFT unit holder) choose to obtain the roll-over

62. Whether a JFT unit holder chooses roll-over is a question of fact.

Subsection 124-781(4) of the ITAA 1997 provides that additional requirements must be satisfied if the original interest holder (a JFT unit holder) and the trustee of the acquiring entity (the MPT) did not deal with each other at arm's length, and neither the original entity (the JFT), nor the acquiring entity (the MPT), had at least 300 beneficiaries just before the arrangement started. The additional requirements are:

> ***(a)*** ***the market value of the original interest holder's capital proceeds for the exchange must be at least substantially the same as the market value of its original interest; and***
>
> ***(b)*** ***the replacement interest must carry the same kind of rights and obligations as those attached to the original interest***

63. Subsection 124-781(4) will not apply because the JFT and the MPT each had more than 300 beneficiaries just before the arrangement started.

Exceptions to obtaining scrip for scrip roll-over

Paragraph 124-795(2)(a) of the ITAA 1997 provides that the roll-over is not available if any capital gain the original interest holder (a JFH shareholder or JFT unit holder) might make from their replacement interest (a ML share or a MPT unit) would be disregarded (except because of a roll-over)

64. This exception may apply if, for example, the ML shares or the MPT units are held as trading stock. Paragraph 25(b) limits this Ruling in this regard.

Paragraph 124-795(2)(b) of the ITAA 1997 provides that the roll-over is not available if the original interest holder (a JFH shareholder) and the acquiring entity (ML) are members of the same wholly-owned group just before the original interest holder stops owning their original interest (a JFH share), and the acquiring entity is a foreign resident

65. This exception does not apply as ML was not a foreign resident.

Detailed contents list

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

Commissioner of Taxation
29 June 2005

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR 97/16; TD 2002/4

Subject references:

- acquiring entity
- arrangement
- capital
- capital gain
- class of persons
- exchange
- fixed entitlement
- income
- original entity
- original interest
- replacement interest
- roll-over
- share
- shareholder
- scrip
- scrip for scrip roll-over unit
- unitholder
- unit trust

Legislative references:

- TAA 1953 Pt IVAAA
- ITAA 1936 6(1)
- ITAA 1997 104-10
- ITAA 1997 104-10(3)(b)
- ITAA 1997 104-10(4)
- ITAA 1997 109-10
- ITAA 1997 115-30(1)
- ITAA 1997 Subdiv 124-M
- 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)
- 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(4)(a)
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- ITAA 1997 124-780(5)
- ITAA 1997 124-781(1)(a)(i)
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- ITAA 1997 124-781(3)(b)
- ITAA 1997 124-781(3)(c)
- ITAA 1997 124-781(4)
- ITAA 1997 124-781(6)
- ITAA 1997 124-795(2)(a)
- ITAA 1997 124-795(2)(b)
- ITAA 1997 124-810
- ITAA 1997 170-260
- ITAA 1997 995-1(1)
- Copyright Act 1968
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