CR 2008/78 - Income tax: Henderson Group plc reorganisation - scrip for scrip roll-over and Foreign Investment Fund (FIF) implications

Class Ruling

Income tax: Henderson Group plc reorganisation – scrip for scrip roll-over and Foreign Investment Fund (FIF) implications

Contents Para

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:

- Part XI of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-5 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- section 116-40 of the ITAA 1997; and

- Subdivision 124-M of the ITAA 1997.

All references to legislative provisions in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies are the entities who:

(a) are 'residents of Australia' within the meaning of that expression in subsection 6(1) of the ITAA 1936;

(b) owned ordinary shares or CHESS Depository Interests (CDIs) representing shares in Henderson Group plc (Old Henderson);

(c) owned their ordinary shares or CDIs on capital account at the time of the scheme; and

(d) participated in the scheme that is the subject of this Ruling.

4. In this Ruling, an entity belonging to this class of entities is referred to as a 'Henderson shareholder'.

Qualifications

5. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

6. 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 10 to 29 of this Ruling.

7. 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- this Ruling may be withdrawn or modified.

Date of effect

9. This Ruling applies from 1 July 2008 to 30 June 2009. The Ruling continues to apply after 30 June 2009 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 settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

10. The following description of the scheme is based on documents and information provided by the applicant. These documents include:

(a) Application for a Class Ruling from the applicant dated 4 July 2008;

(b) the Recommended Proposals to establish New Henderson as the holding company of Old Henderson dated 4 September 2008;

(c) a draft Income Assess Share (IAS) Trust Deed;

(d) a draft New Henderson Income Access Rules; and

(e) extracts from the Articles of Association of Old Henderson and New Henderson respectively.

Note: certain information from Henderson has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

Overview

11. The scheme that is the subject of this Ruling involves the change to the corporate structure and organisation of the Henderson group of companies.

Relevant entities

Henderson Group plc

12. Old Henderson is, prior to the scheme, a United Kingdom (UK) resident public company incorporated under the UK *Companies Act 2006* and dually listed on the London Stock Exchange (LSE) and the Australian Securities Exchange (ASX). The company listed following its demerger from AMP Limited on 23 December 2003.

13. Old Henderson was, prior to the implementation of the scheme, the holding company of Henderson Global Investors, an investment management group.

14. Old Henderson had, at the time of the scheme, approximately 725 million ordinary shares on issue. This included approximately 419 million shares held by CHESS Depositary Nominees on behalf of 117,006 CDI holders.

New Henderson

15. New Henderson is a company incorporated in Jersey which is a tax resident of the Republic of Ireland.

Old Henderson restructure

16. On 28 August 2008, Old Henderson announced its intention to undertake a restructure (Old Henderson restructure).

17. The steps in the Old Henderson restructure were:

- the interposition of a new holding company for the Old Henderson group of companies pursuant to a scheme of arrangement under the UK *Companies Act 2006* (Henderson Share Scheme of Arrangement); and
- the establishment of an Income Assess Share (IAS) Trust arrangement (the IAS arrangement) under which New Henderson shareholders, other than those who elect not to, will receive distributions under the IAS arrangement in substitution for dividend payments from New Henderson.

Interposition of new holding company

18. Immediately before the Henderson Scheme of Arrangement, Old Henderson issued one new share to New Henderson.

19. Under the Henderson Share Scheme of Arrangement:

- all shares in Old Henderson were cancelled, except for the one share acquired by New Henderson;
- the reserve arising from the cancellation of the shares in Old Henderson was used to immediately pay up new shares in Old Henderson to New Henderson; and
- former shareholders of the cancelled Old Henderson shares were allotted one share in New Henderson for every one Old Henderson share previously held.

20. The implementation date of the Henderson Share Scheme of Arrangement was 31 October 2008 (the Scheme Implementation Date).

IAS arrangement

21. On 27 August 2008, the Directors of New Henderson passed a resolution approving the IAS Trust Deed and the IAS Plan Rules. As a consequence of that resolution and the restructure, a subsidiary of Old Henderson, a resident for tax purposes in the UK (IAS Issuer), issued on 5 November 2008, an IAS to the trustee of the IAS Trust (IAS Trustee) for nominal consideration.

22. The IAS was issued on the following terms:

- it is a non-voting share;
- it is a redeemable share;
- it carries a right to dividends payable at the discretion of the directors of the IAS Issuer; and
- New Henderson shareholders have no right to receive distributions on the IAS.

23. In establishing the IAS arrangement, the IAS Trust Deed provided that:

- the IAS was issued directly to the IAS Trustee on terms that the right to dividends paid by the IAS Issuer on the IAS are to be held on trust for the New Henderson shareholders;
- all other rights, except for the right to dividends paid by the IAS Issuer, in respect of the IAS are held on trust for New Henderson; and
- the rights under the IAS Trust cannot be transferred or assigned.

24. Upon establishing the IAS arrangement, all New Henderson shareholders (and CDI holders registered on the CDI register) were deemed to have elected to participate in the IAS arrangement and be paid distributions under the IAS arrangement in lieu of dividends from New Henderson (that is they have made an IAS election) unless they lodged a withdrawal notice with New Henderson's share registry.

25. New Henderson shareholders who participated in the IAS arrangement will receive their dividends (or part of) under the IAS arrangement. The shareholders' entitlement to an amount of dividend declared by New Henderson is reduced by the amount paid to them on behalf of the IAS Trust. To the extent that a distribution is not fully extinguished by virtue of a payment under the IAS arrangement, New Henderson has the obligation to pay any outstanding part of their dividend entitlement.

26. New Henderson shareholders that withdraw from the IAS arrangement receive dividends declared on their New Henderson shares from New Henderson and do not receive distributions under the IAS arrangement. Further, when a withdrawal notice has been lodged, the New Henderson shareholder can subsequently lodge an election to again receive dividends via the IAS arrangement if they wish to do so.

27. The IAS Trustee is not an Australian resident entity and the IAS Trust is established and managed in Jersey.

Other matters

28. Under the scheme, no Henderson shareholder will be either a ‘significant stakeholder’ or ‘common stakeholder’ within the meaning of those terms in Subdivision 124-M.

29. As soon as practicable after the Scheme Implementation Date (31 October 2008), Old Henderson will apply for termination and removal of the official quotation and listing of Old Henderson shares on the LSE and ASX. New Henderson will be listed on the LSE and ASX on 3 November 2008 and 27 October 2008, respectively.

Ruling

CGT event C2 happens on the cancellation of Henderson shares

30. CGT event C2 happens to a Henderson shareholder upon the cancellation of their Old Henderson shares on the Scheme Implementation Date (subsection 104-25(1)).

Capital gain or capital loss

31. A Henderson shareholder will make a capital gain from CGT event C2 happening if the capital proceeds from the cancellation of a Old Henderson share exceeds its cost base. A Henderson shareholder will make a capital loss if the capital proceeds are less than the reduced cost base of the cancelled Old Henderson share (subsection 104-25(3)).

Capital proceeds

32. The capital proceeds for the cancellation of each Old Henderson share is the sum of:

(a) the market value of the New Henderson share received, and

(b) the market value of the interest in the IAS Trust received (ineligible proceeds)(subsections 116-20(1) and 116-40(1)) worked out as at the Scheme Implementation Date.

If a capital gain is made

Capital gain referable to New Henderson shares – partial scrip for scrip roll-over

33. A Henderson shareholder who makes a capital gain from the cancellation of their Old Henderson shares may choose partial scrip for scrip roll-over for the cancellation of their Old Henderson shares (section 124-790).

34. If partial scrip for scrip roll-over is chosen, that part of the capital gain that is referable to the receipt of New Henderson shares is disregarded (subsection 124-790(1)).

Capital gain referable to the IAS trust interests

35. The part of the capital gain that is referable to the receipt of the interests in the IAS Trust is not disregarded. This is because the interests are ineligible proceeds under subsection 124-790(1).

36. The part of the capital gain on the cancellation of an Old Henderson share that is referable to the receipt of an IAS Trust interest is the ineligible proceed less the part of the cost base of the Old Henderson share reasonably attributable to the receipt of the IAS Trust interest.

Discount capital gain

37. Henderson shareholders who make a capital gain that is not disregarded from the cancellation of their Old Henderson shares (that is capital gains relating to the receipt of the IAS Trust interest and capital gains where partial scrip for scrip roll-over is not chosen) are eligible to treat the capital gain as a ‘discount capital gain’ provided that they satisfy the requirements of Subdivision 115-A.

Cost base of New Henderson shares

Scrip for scrip roll-over is not chosen

38. Where scrip for scrip roll-over is not chosen, the first element of the Henderson shareholder’s cost base and reduced cost base of each New Henderson share is equal to the market value of the part of the Old Henderson share given in exchange for the New Henderson share (subsections 110-25(2) and 110-55(2)).

Scrip for scrip roll-over is chosen

39. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each New Henderson share is worked out by reasonably attributing to it part of the cost base of the Old Henderson share exchanged for the relevant New Henderson share. That is, the part of the cost base of the Old Henderson share that does not relate to the IAS Trust interest received (subsections 124-785(2) and 124-785(4)).

Acquisition date of New Henderson shares

40. Henderson shareholders acquired their New Henderson shares when they became the owner of New Henderson shares on the Scheme Implementation Date (subsection 109-5(1)).

41. However, for the purposes of determining if a capital gain on any later disposal of their New Henderson shares is a discount capital gain, Henderson shareholders who choose scrip for scrip roll-over are taken to have acquired their New Henderson shares when they acquired the corresponding Old Henderson shares (item 2 in the table in subsection 115-30(1)).

Application of the FIF rules

42. The Foreign Investment Fund (FIF) rules will apply in respect of the Australian Henderson shareholders' interest in the IAS Trust, with the amount of income attributable to the Australian Henderson shareholders based on the market value of the interest in the IAS Trust at the time of acquisition (Part XI of the ITAA 1936).

Commissioner of Taxation
19 November 2008

Appendix 1 – Explanation

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.

43. The tax consequences and relevant legislative provisions that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

44. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M. It enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

45. Subdivision 124-M contains a number of conditions that determine whether scrip for scrip roll-over is available under an arrangement. The main conditions and exceptions that are relevant to the circumstances of the corporate structure and organisation of the Henderson group of companies are:

- (a) shares are exchanged for shares in another company;
- (b) the exchange occurs as part of a single arrangement;
- (c) conditions for roll-over are satisfied;
- (d) further conditions are not applicable or are satisfied; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

46. Under the scheme the conditions for roll-over under Subdivision 124-M are satisfied. Further, the scheme raises no novel issues of tax law interpretation other than in one aspect of the conditions for roll-over. The relevant issue is the scope of the relevant 'arrangement' for the purposes of Subdivision 124-M.

47. It is considered that, in the circumstances of the scheme, the relevant 'arrangement' included both the interposition of New Henderson as the holding company for the Henderson group of companies and the establishment of the IAS arrangement.

48. One consequence of this is that the IAS arrangement falls to be considered under paragraph 124-780(2)(c). That provision requires that the relevant arrangement for Subdivision 124-M purposes must be 'one 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. As the interest in the IAS Trust was offered to all Henderson shareholders on a non-discriminatory basis, 'opt out' basis, this condition was satisfied.

Subdivision 124-G

49. Subsection 124-795(3) provides that scrip for scrip roll-over is not available if a roll-over can be chosen under Division 122 or Subdivision 124-G.

50. This exception does not apply as neither of the roll-overs in Division 122 or Subdivision 124-G are available to the Henderson shareholders in respect of the cancellation of their Old Henderson shares in exchange for New Henderson shares under the Scheme.

Application and Attribution of FIF income

51. Paragraph 481(1)(b) of the ITAA 1936 states that a 'foreign trust' is a FIF.

52. Paragraph 481(3)(a) of the ITAA 1936 provides that, subject to other requirements that are not relevant in this case, a 'foreign trust' is a foreign trust at a particular time if, at that time, the trust is not an Australian Trust.

53. Section 473 of the ITAA 1936 provides that a trust is an Australian trust if, at any time in the period of 12 months immediately preceding the test time, the trustee was a resident of Australia or the central management and control of the trust was in Australia.

54. The IAS Trust is established and managed in Jersey, in which case the central management and control of the IAS Trust will not be in Australia. Consequently, the IAS Trust is a foreign trust under subsection 481(3) of the ITAA 1936 and is a FIF under paragraph 481(1)(b) of the ITAA 1936.

55. Australian Henderson shareholders who are deemed to have made an election will have an interest in the income of the IAS Trust as they will have the right to receive dividends from the IAS Trust in accordance with the IAS Trust Deed.

56. As the IAS Trust is a FIF and Australian Henderson shareholders have an interest in the income of the IAS Trust, the Australian Henderson shareholders will have a interest in a FIF under paragraph 483(2)(a) of the ITAA 1936.

57. Subsection 534(2) of the ITAA 1936 sets out three alternative methods to determine accrual of FIF income: the market value method; the deemed rate of return method and the calculation method. The market value method is to be applied if it is practicable to do so (subsection 535(1) of the ITAA 1936). Where it is not practicable to apply the market value method, unless the taxpayer has elected to use the calculation method under subsection 535(3) of the ITAA 1936, the deemed rate of return method is to be applied (subsection 535(2) of the ITAA 1936).

58. Where it is not practicable to use the market value method and a taxpayer has elected to use the calculation method, Subdivision D of Division 18 in Part XI of the ITAA 1936 sets out the procedure for determining FIF income. The procedures involve determining whether there is any calculated profit or calculated loss in respect of the FIF (subsection 558(3) of the ITAA 1936). The calculated profit or calculated loss is set out in section 559 of the ITAA 1936. Generally, a calculated profit will arise when the notional income exceeds the notional deductions and a calculated loss will arise when the notional income is less than the notional deductions.

59. Where it is not practicable to use the market value method and a taxpayer has not elected to use the calculation method, Subdivision C of Division 18 in Part XI of the ITAA 1936 sets out the steps for determining whether any FIF income accrued to the taxpayer under the deemed rate of return method.

60. Step 1 is the procedure to determine the number of interests or groups of interests held in the FIF (section 544 of the ITAA 1936).

61. Step 2 is to determine the opening value of the FIF interests. In the initial year, as the FIF interests were acquired during the relevant period, the value is determined at the relevant day the interests were acquired (section 545 of the ITAA 1936) and the value is the consideration paid or given by the taxpayer in respect of the acquisition (section 554 of the ITAA 1936). Subsection 490(3) of the ITAA 1936 provides that where the acquisition is made without, or for excessive or inadequate consideration, the person is taken to have paid or given as consideration in respect of the acquisition an amount equal to the market value of the interest at the time of acquisition.

62. In the initial year, no consideration is paid by the Australian Henderson shareholders to acquire the interests in the IAS Trust, in which case the interests held by the Australian Henderson shareholders in the IAS Trust will have an opening value equal to the market value of their interest in the IAS Trust.

63. In respect of the opening value for subsequent years, section 551 of the ITAA 1936 sets out three steps to value the FIF interests where the deemed rate of return is applied in respect of the notional accounting period that immediately preceded the relevant period.

64. First, ascertain the value of the interests in the group at the beginning of the immediately preceding period or, if any of the interests were acquired after that time, at the date or dates of the acquisition (paragraph 551(a) of the ITAA 1936). As previously noted, the value of the interests in the preceding period in the IAS Trust will be the market value of the FIF interest at the time of acquisition. Second, add so much of the FIF income in respect of the immediately preceding period as was attributable to the interests in the group (paragraph 551(b) of the ITAA 1936).The income represented by the distribution amounts received by the IAS Trust will be FIF income that is added to the value of the FIF interests. Third, deduct the amount or value of so much of any distributions made by the FIF during the immediately preceding period as were attributable to the interests in the group (paragraph 551(c) of the ITAA 1936). Therefore, the amounts immediately distributed to the Australian Henderson shareholders will be deducted from the value of the FIF interests.

65. In summary, the opening value of the FIF interests for years subsequent to the year of acquisition will be the market value of the FIF interest acquired, plus the distributions received by the IAS Trust, less the amount distributed by the IAS Trust. As all the dividends distributed to the IAS Trust are immediately distributed out, the result is that the opening value will be the amounts reflected by the market value of the FIF interest at the time of acquisition.

66. Step 3 is to determine the FIF amount. This is based on the formula taking the opening value multiplied by the deemed rate of return for the number of days in the relevant period that the taxpayer had the interests (section 555 of the ITAA 1936).

67. Therefore, the amount of attributable income to the Australian Henderson shareholders from the FIF interest in the IAS Trust will be based on the market value of the interest in the IAS Trust at the time of acquisition.

FIF exemption

68. The operative provision of section 529 of the ITAA 1936 will not apply to include an amount of FIF income in the assessable income of a taxpayer where the sum of the values of all interests in FIFs and Foreign Life Assurance Policies held by the taxpayer and their associates is AUD$50,000 or less (see section 515 of the ITAA 1936.

69. Whether this FIF exemption applies will depend on the specific circumstances of each Australian Henderson shareholder.

Appendix 2 – Detailed contents list

70. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- arrangement
- CGT capital proceeds
- CGT cost base
- CGT event
- Foreign investment funds
- ordinary shares
- scrip for scrip roll-over
- takeovers & mergers

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 Pt XI
- ITAA 1936 473
- ITAA 1936 481(1)(b)
- ITAA 1936 481(3)
- ITAA 1936 481(3)(a)
- ITAA 1936 483(2)(a)
- ITAA 1936 490(3)
- ITAA 1936 515
- ITAA 1936 529
- ITAA 1936 534(2)
- ITAA 1936 535(1)
- ITAA 1936 535(2)
- ITAA 1936 535(3)
- ITAA 1936 Pt XI Div 18 Subdiv C
- ITAA 1936 544
- ITAA 1936 545
- ITAA 1936 551
- ITAA 1936 551(a)
- ITAA 1936 551(b)
- ITAA 1936 551(c)
- ITAA 1936 554
- ITAA 1936 Pt XI Div 18 Subdiv D
- ITAA 1936 555
- ITAA 1936 558(3)
- ITAA 1936 559
- ITAA 1997
- ITAA 1997 104-25
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(3)
- ITAA 1997 109-5
- ITAA 1997 109-5(1)
- ITAA 1997 110-25
- ITAA 1997 110-25(2)
- ITAA 1997 110-55
- ITAA 1997 110-55(2)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-30(1)
- ITAA 1997 116-20
- ITAA 1997 116-20(1)
- ITAA 1997 116-40
- ITAA 1997 116-40(1)
- ITAA 1997 Div 122
- ITAA 1997 Subdiv 124-G
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-780(2)(c)
- ITAA 1997 124-785(2)
- ITAA 1997 124-785(4)
- ITAA 1997 124-790
- ITAA 1997 124-790(1)
- ITAA 1997 124-795(3)
- TAA 1953
- Copyright Act 1968
- Companies Act 2006 UK

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