


# ***CR 2014/78 - Income tax: Westfield Group - Restructure and Merger with the Westfield Retail Trust***

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## Class Ruling

### Income tax: Westfield Group - Restructure and Merger with the Westfield Retail Trust

| Contents                            | Para       |
|-------------------------------------|------------|
| <b>LEGALLY BINDING SECTION:</b>     |            |
| <b>What this Ruling is about</b>    | <b>1</b>   |
| <b>Date of effect</b>               | <b>7</b>   |
| <b>Scheme</b>                       | <b>8</b>   |
| <b>Ruling</b>                       | <b>34</b>  |
| <b>NOT LEGALLY BINDING SECTION:</b> |            |
| <b>Appendix 1:</b>                  |            |
| <b>Explanation</b>                  | <b>72</b>  |
| <b>Appendix 2:</b>                  |            |
| <b>Detailed contents list</b>       | <b>130</b> |

#### **① This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## 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:

- section 44 of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 45 of the ITAA 1936
- section 45A of the ITAA 1936
- section 45B of the ITAA 1936
- section 45BA of the ITAA 1936
- section 45C of the ITAA 1936
- section 99B of the ITAA 1936
- subsection 128B(3D) of the ITAA 1936
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)

- Division 104 of the ITAA 1997
- subsection 109-5(1) of the ITAA 1997
- section 109-10 of the ITAA 1997
- Division 110 of the ITAA 1997
- section 112-25 of the ITAA 1997
- subsection 115-30(1) of the ITAA 1997
- Division 125 of the ITAA 1997
- section 126-245 of the ITAA 1997
- section 126-250 of the ITAA 1997
- Division 725 of the ITAA 1997, and
- section 855-10 of the ITAA 1997.

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

## **Class of entities**

3. The class of entities to which this Ruling applies is owners of Westfield Group stapled securities (WDC Securities) who:

- were registered on the unit registers of Westfield Trust (WT) and Westfield America Trust (WAT) at 7.00pm AEST on 27 June 2014 (Record Date)
- were registered on the Westfield Holdings Limited (WHL) share register as a holder of ordinary shares in WHL (WHL shares) on the Record Date
- held their WDC Securities on capital account for income tax purposes
- were not 'Ineligible Foreign Securityholders' as defined in the Westfield Group Securityholder Booklet dated 14 April 2014 (Westfield Group Securityholder Booklet), and
- were not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their WDC Securities.

(Note: Division 230 will generally not apply to individuals unless they made an election for it to apply to them.)

In this Ruling, a person belonging to this class of entities is referred to as a WDC Group Securityholder.

### Qualifications

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

5. 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 8 to 33 of this Ruling.

6. 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

7. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 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 a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

### Scheme

8. The following description of the scheme is based on information provided by the Applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling application dated 4 April 2014
- Westfield Group Securityholder Booklet and Supplementary Securityholder Booklet dated 9 May 2014, and
- Correspondence from the Applicant dated up to and including 22 September 2014.

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

## Background

9. The Westfield Group was formed in July 2004 by the stapling of the Australian Securities Exchange (ASX) listed securities of WHL (now Scentre Group Limited, a public company), to WT (now Scentre Group Trust 1) and WAT, both public unit trusts, and collectively WHL, WT and WAT are referred to as the WDC Group. The stapled securities were quoted and traded together on the ASX under the code 'WDC' and are referred to as WDC Securities. The WDC Securities could not be traded separately.

10. The Westfield Retail Trust (WRT) was established in December 2010. WRT was an ASX listed stapled property trust. WRT comprised two public unit trusts, Westfield Retail Trust 1 (WRT1) (now Scentre Group Trust 2) and Westfield Retail Trust 2 (WRT2) (now Scentre Group Trust 3). The securities of WRT1 and WRT2 were quoted and traded together on the ASX under the code 'WRT' (WRT Securities). The WRT Securities could not be traded separately. The holders of WRT Securities are referred to in this Ruling as WRT Securityholders.

## Proposal

11. On 4 December 2013, WDC Group and WRT jointly announced a proposal to restructure the WDC Group and merge the group's Australian and New Zealand assets with WRT to create two separate ASX listed stapled groups:

- Westfield Corporation (WC), which will own and operate shopping centres in the US, UK and Europe, and
- Scentre Group (SG), which will own and operate shopping centres in Australia and New Zealand.

This restructure is hereinafter referred to as the Proposal.

12. Just after implementation of the Proposal on 30 June 2014 (Implementation Date):

- (a) WDC Group Securityholders owned 1 stapled security in WC and 1.246 stapled securities in SG for every 1 WDC stapled security they owned just before the Implementation Date, and
- (b) WRT Securityholders owned 0.918 stapled securities in SG for every 1 WRT stapled security they owned just before the Implementation Date.

13. The Proposal was approved by WDC Group Securityholders on 29 May 2014 and by WRT Securityholders on 20 June 2014, and involved three main steps:

- Step 1 Restructure
- Step 2 De-stapling, and
- Step 3 Merger.

**Step 1 Restructure**

14. Prior to the Implementation Date:
  - (a) WHL transferred certain assets to a new company, Westfield Corporation Limited (WCL); and
  - (b) A new unit trust called WFD Trust (WFDT) was established by WT.
15. On the Implementation Date, the following occurred:
  - (a) WHL made an in-specie distribution of one WCL ordinary share (WCL share) to WHL shareholders for each WHL share they held on the Record Date. WCL was then stapled to the WDC Group.
  - (b) WT made an in-specie distribution, as a return of capital, of WFDT units to WT unitholders (equating to \$0.00000004 per WT unit) on the Record Date (WT Capital Distribution). WFDT was then stapled to the WDC Group.
  - (c) After the in-specie distribution of WFDT units, WT transferred certain assets (Relevant Shopping Centre Interests) to WFDT.
16. The transactions outlined at subparagraph 14(b) and subparagraphs 15(b) and (c) are, in this Ruling, collectively referred to as the WFDT Arrangement.

**Step 2 De-stapling**

17. After Step 1, WHL and WT were each de-stapled from the WDC Group and from each other.

**Step 3 Merger**

18. Step 3 of the Proposal involved the following elements that all occurred on the Implementation Date:

*WRT capital return*

- WRT1 made a capital distribution of \$0.2853 per unit in cash (total distribution \$850 million) to unitholders who were registered on the unit register of WRT1 on the Record Date. WRT1 reduced its Contributed Capital Account by \$850 million.

*Stapling Arrangement*

- Each WHL share and each WT unit was respectively converted to 1.246 WHL shares and 1.246 WT units.
- Each WRT1 unit and each WRT2 unit was respectively converted to 0.918 WRT1 units and 0.918 WRT2 units.

- WT paid a capital distribution of \$0.0011 per converted unit (total distribution \$2.8 million) to WT unitholders who were registered on the unit register of WT on the Record Date (WT Stapling Distribution). WT reduced its Contributed Capital Account by \$2.8 million.
- The WT Stapling Distribution was applied on behalf of WT unitholders to apply for one unit in WRT1 (\$0.001) and one unit in WRT2 (\$0.0001) for each converted WT unit held.
- WRT1 paid a capital distribution of \$0.0011 per converted unit (total distribution \$3 million) to WRT1 unitholders on the Record Date (WRT Stapling Distribution). WRT1 reduced its Contributed Capital Account by \$3 million.
- The WRT Stapling Distribution was applied on behalf of holders of WRT1 units to apply for one share in WHL (\$0.0001) and one unit in WT (\$0.001) for each converted WRT1 unit held.
- The shares in WHL and the units in WT were then stapled to units in WRT1 and WRT2 to form SG stapled securities.
- Collectively the WT Stapling Distribution, the WRT Stapling Distribution and the stapling of shares in WHL and units in WT, WRT1 and WRT2 are, in this Ruling, referred to as the Stapling Arrangement.

## Other

19. On the Implementation Date WHL reduced its share capital by \$1,037,077,642 (the Capital Reduction Amount), which was satisfied by the in specie distribution of WCL shares to WHL shareholders.

20. As a result, WHL shareholders received a return of capital of approximately \$0.50 per WHL share (WHL Distribution).

21. On the Implementation Date, WHL had only one class of shares on issue being ordinary shares.

22. WHL is the head entity of a demerger group (the WHL Demerger Group) as no other member of the group holds ownership interests in WHL.

23. WHL and its subsidiaries are not demerger subsidiaries of another demerger group as no company or trust owns, or has the right to acquire, more than the requisite 20% of WHL's shares.

24. WHL held 100% of the issued shares in WCL before the demerger of WCL and WHL will hold no shares in WCL after the demerger of WCL.

25. WHL shareholders received ordinary shares in WCL as part of the demerger.

26. Just after the demerger, at least 50% of the market value of CGT assets owned by WCL and its demerger subsidiaries will be used in businesses carried on by WCL and any of its subsidiaries.

27. WHL's share capital account is not 'tainted' for the purposes of Division 197 of the ITAA 1997.

28. WHL has not made an election in writing under subsection 44(2) for subsections 44(3) and 44(4) not to apply to WHL shareholders.

29. The Trustees of WT and WFDT have made a valid choice under section 126-225 to obtain a roll-over in respect of the transfer of Relevant Shopping Centre Interests from WT to WFDT.

30. WT is not a corporate unit trust under Division 6B of Part III of the ITAA 1936 or a public trading trust under Division 6C of Part III of the ITAA 1936.

31. For the purposes of item 2 of the table in section 855-15, the units in WT and shares in WHL held by WDC Group Securityholders that are foreign residents will not pass the non-portfolio interest test (section 960-195) as at 30 June 2014 or throughout a 12 month period that began no earlier than 30 June 2012 and ended no later than 30 June 2014 (paragraph 855-25(1)(a)). In addition, the units in WT and shares in WHL are not taxable Australian real property interests within item 1 of the table in section 855-15.

32. No entity, either alone or together with its associates, would be regarded as controlling WHL, WT, WAT, WRT1, and WRT2 for value shifting purposes under the tests in sections 727-355 and 727-360 during the period starting when the scheme is entered into and ending when it has been carried out.

33. Some WDC Securityholders acquired their WHL shares and their units in WT before 20 September 1985 for the purposes of section 109-5.

## **Ruling**

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### **Demerger**

#### ***CGT event G1***

34. CGT event G1 happened in relation to each of the WHL shares owned by a WDC Group Securityholder at the time WHL made the WHL Distribution.

35. A WDC Group Securityholder made a capital gain when CGT event G1 happened if the WHL Distribution exceeded the cost base of the WHL share (subsection 104-135(3)). No capital loss can be made from CGT event G1.



36. A capital gain made when CGT event G1 happened is disregarded if the WDC Group Securityholder acquired their WHL share before 20 September 1985 (pre-CGT WHL share) (subsection 104-135(5)).

37. Any capital gain made by a WDC Group Securityholder that is a foreign resident, or the trustee of a foreign trust for CGT purposes, as a result of CGT event G1 happening is disregarded if their WHL share is not taxable Australian property (section 855-10).

### ***Division 125 demerger roll-over relief***

38. A resident WDC Group Securityholder can choose demerger roll-over under subsection 125-55(1) for their pre-CGT and post-CGT WHL shares.

39. A WDC Group Securityholder who is a foreign resident cannot choose demerger roll-over under subsection 125-55(1) for their WHL shares if the WCL shares they acquired under the demerger are not taxable Australian property just after they acquired them (subsection 125-55(2)).

### ***Cost base and reduced cost base of WHL and WCL shares***

40. A WDC Group Securityholder who chose demerger roll-over for their post-CGT WHL shares must recalculate the cost base and reduced cost base of their WHL and WCL shares in accordance with subsections 125-80(2) and 125-80(3).

41. The Commissioner accepts that a reasonable apportionment of the cost bases and reduced cost bases of the WHL shares (just before the Implementation Date) is to attribute:

- 26.3% of the cost bases to the pre-converted WHL shares, and
- 73.7% of the cost bases to the WCL shares.

(Note, the cost base and reduced cost base of the WHL share is further adjusted by the conversion of the WHL shares as outlined in paragraphs 64 to 66 of this Ruling.)

### ***Demerger roll-over for pre-CGT WHL shares***

42. A WDC Group Securityholder who chose demerger roll-over for their pre-CGT WHL shares is taken to have acquired the corresponding WCL shares under the demerger before 20 September 1985 (subsections 125-55(1), 125-80(5) and 125-80(6)).

***Demerger roll-over for post-CGT WHL shares***

43. A WDC Group Securityholder who acquired their WHL shares on or after 20 September 1985 (post-CGT WHL shares) disregards any capital gain made when CGT event G1 happened if they chose demerger roll-over (subsections 125-55(1) and 125-80(1)).

***Demerger roll-over is not chosen for pre-CGT WHL shares***

44. A WDC Group Securityholder who owns a pre-CGT WHL share and chose not to obtain demerger roll-over:

- have none of the corresponding WCL shares they acquired under the demerger taken to be pre-CGT shares
- those WCL shares are acquired on the Implementation Date (section 109-10), and
- the first element of the cost base and reduced cost base of those WCL shares is calculated in accordance with the rules in Division 110.

***Demerger roll-over is not chosen for post-CGT WHL shares***

45. A WDC Group Securityholder who owns a post-CGT WHL share and chose not to obtain demerger roll-over:

- is not entitled to disregard any capital gain made in respect of CGT event G1 that happened to their WHL shares under the demerger, and
- the first element of the cost base and reduced cost base of each post-CGT WHL share and the corresponding WCL share is calculated in the manner described in paragraphs 41 and 85 of this Ruling (subsection 125-85(1) and 125-85(2)).

***Acquisition date of WCL shares for CGT discount purposes***

46. WCL shares received by a WDC Group Securityholder in relation to a post-CGT WHL share, are taken to have been acquired for CGT discount purposes on the same date as the corresponding WHL shares, regardless of whether a WDC Group Securityholder chose to obtain demerger roll-over (item 2 of the table in subsection 115-30(1)).

47. WCL shares received by a WDC Group Securityholder who holds pre-CGT WHL shares and who chose not to obtain demerger roll-over are taken to have been acquired for CGT discount purposes on the Implementation Date.

## **WHL Distribution and Demerger Dividend**

### ***Demerger Dividend***

48. To the extent there is a demerger dividend arising under the demerger, the demerger dividend will be non-assessable non-exempt income by virtue of subsection 44(3) and subsection 44(4) of the ITAA 1936.

49. The demerger dividend will not be subject to dividend withholding tax (subsection 128B(3D) of the ITAA 1936).

### ***Application of section 45 and section 45A of the ITAA 1936***

50. Section 45 and section 45A of the ITAA 1936 will not apply to the whole, or any part, of the WHL Distribution provided to WDC Group Securityholders under the Demerger.

### ***Application of section 45B of the ITAA 1936***

51. The Commissioner will not make a determination under paragraphs 45B(3)(a) or 45B(3)(b) of the ITAA 1936 that sections 45BA or 45C of the ITAA 1936 applies to the whole, or any part, of the WHL Distribution received by WDC Group Securityholders under the Demerger.

## **WFDT Arrangement and Stapling Arrangement**

### ***WT Capital Distribution and WT Stapling Distribution***

52. The WT Capital Distribution to WDC Group Securityholders of WFDT units will not be included in the assessable income of WDC Group Securityholders under section 6-5 or section 99B of the ITAA 1936.

53. The WT Stapling Distribution will not be included in the assessable income of a WDC Group Securityholder under section 6-5 or section 99B of the ITAA 1936.

### ***CGT Event E4***

54. CGT event E4 (section 104-70) happened to each WT unit upon the receipt of the WT Capital Distribution and the WT Stapling Distribution by WDC Group Securityholders.

55. A WDC Group Securityholder made a capital gain when CGT event E4 happened if the WT Capital Distribution and the WT Stapling Distribution exceeded the cost base of the WT unit (subsection 104-70(4)). A resident WDC Securityholder who made a capital gain when CGT event E4 happened may be eligible to treat the gain as a 'discount capital gain' provided they satisfy the requirements in Subdivision 115-A.

56. Any capital gain made as a result of CGT event E4 happening to a WT unit the WDC Group Securityholder acquired prior to 20 September 1985 (pre-CGT asset) is disregarded (subsection 104-70(7)).

57. Any capital gain made by a WDC Group Securityholder that is a foreign resident, or the trustee of a foreign trust for CGT purposes, as a result of CGT event E4 happening is disregarded under section 855-10 if their WT unit is not taxable Australian property.

58. No capital loss can be made from CGT event E4.

***Cost base and reduced cost base of WT units and WFDT units just after the transfer of the assets***

59. As the trustees of WT and WFDT have elected Subdivision 126-G roll-over with respect to the transfer of Relevant Shopping Centre Interests by WT to WFDT, a WDC Group Securityholder's cost base of each WT unit and WFDT unit will be calculated in accordance with section 126-245 unless the WDC Group Securityholder has chosen the adjustment under section 126-250.

60. The Commissioner accepts that a reasonable apportionment of the cost bases and reduced cost bases of the WT units (just before the Implementation Date) is that:

- the first element of the cost base and reduced cost base of each WT unit, just after the Implementation Date (for the purposes of Subdivision 126-G roll-over) is 46.7% of the cost base of each WT unit just before the Implementation Date (subsections 126-245(2) and 126-245(4)), and
- the first element of the cost base and reduced cost base of each WFDT unit, just after the Implementation Date, is the sum of:
  - 53.3% of the cost base of each WT unit just before the Implementation Date, and
  - the cost base of each WFDT unit just before the Implementation Date (subsections 126-245(3) and 126-245(4)).

(Note, the cost base and reduced cost base of the WT units is further adjusted by the conversion of the WT units as outlined in paragraphs 64 to 66 of this Ruling.)

***Acquisition date of WFDT units***

61. WFDT units will be taken to be acquired by a WDC Group Securityholder on the Implementation Date (subsection 126-245(5)).

62. Where a WDC Group Securityholder's WT units are pre-CGT assets just before the 'transfer time', each corresponding WFDT unit will also be taken to have been acquired by that WDC Group Securityholder before 20 September 1985 (subsection 126-245(6)).

### ***Acquisition date of WFDT units for CGT discount purposes***

63. For the purposes of the CGT discount rules, a WDC Group Securityholder's WFDT units will be taken to have been acquired on the date that the WDC Group Securityholder acquired their corresponding WT units (item 9 of the table in subsection 115-30(1)).

### ***Conversion of WHL shares and WT units***

64. The conversion of shares in WHL and units in WT will not result in a CGT event happening.

65. Each WDC Group Securityholder will be taken to have a cost base and reduced cost base for their converted shares and units equal to the sum of the corresponding cost base and reduced cost base of the original shares and units and which reflects the ratio of the conversion of the shares and units (subsections 112-25(2) to (4)).

66. Each WDC Group Securityholder will be taken to have acquired their converted shares in WHL and units in WT at the time they acquired their original WHL share or WT unit (subsection 109-5(1)).

### ***Cost base and reduced cost base of WRT1 units and WRT2 units***

67. Subsection 110-25(2) and subsection 110-55(2) provides that the first element of a WDC Group Securityholder's cost base and reduced cost base for each:

- WRT1 unit acquired under the Stapling Arrangement is \$0.001 per unit, and
- WRT 2 unit acquired under the Stapling Arrangement is \$0.0001 per unit.

### ***Acquisition date of WRT1 units and WRT2 units***

68. A WDC Group Securityholder's acquisition date for the WRT1 units and WRT2 units will be the Implementation Date (item 3 of the table in section 109-10).

***CGT event H2***

69. There are no CGT consequences arising for a WDC Group Securityholder under CGT event H2 with respect to the WFDT Arrangement or the Stapling Arrangement.

***Stapling transactions***

70. No CGT event in Division 104 will happen as a result of:

- the stapling of WCL shares, WFDT units, WAT units, WT units and WHL shares
- the de-stapling of WT units and WHL shares from the WAT units, WFDT units and WCL shares, and
- the stapling of WT units, WHL shares, WRT1 units and WRT2 units.

***Application of Division 725***

71. Division 725 will not apply to the Proposal.

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**Commissioner of Taxation**

1 October 2014

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## Appendix 1 – Explanation

**①** *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.*

72. CGT consequences not otherwise addressed in the Ruling part of this document are addressed in the Explanation part of this document.

### Demerger

#### **CGT event G1**

73. Under section 104-135, CGT event G1 will happen when a company makes a payment to a shareholder in respect of their share in the company and some or all of the payment is not a dividend (or an amount taken to be a dividend) and the payment is not included in the shareholder's assessable income.

74. Subsection 44(1) of the ITAA 1936 operates to include in a shareholder's assessable income any dividends, within the meaning of that term in subsection 6(1) of the ITAA 1936, paid to a shareholder out of company profits.

75. Paragraph (d) of the definition of dividend in subsection 6(1) of the ITAA 1936 provides that a dividend excludes amounts debited against an amount standing to the credit of the share capital account of the company.

76. The term 'share capital account' has the meaning given in section 975-300 as an account that the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

77. However, subsection 975-300(3) provides that an account is not a 'share capital account' if it is tainted. A share capital account is tainted if an amount to which Division 197 applies is transferred to the share capital account where the account is not already tainted.

78. In the circumstances of the demerger, WHL will debit its 'share capital account' by the entire Capital Reduction Amount. The Applicant has advised that WHL's 'share capital account' is not tainted for the purposes of Division 197. This amount will therefore not be a dividend for the purposes of subsection 6(1) of the ITAA 1936 and will not be assessable as a dividend under subsection 44(1) of the ITAA 1936.

79. The capital component of the WHL Distribution is also not assessable as ordinary income under section 6-5.

80. A WDC Group Securityholder who is not eligible to choose Division 125 demerger relief made a capital gain when CGT event G1 happened if the WHL Distribution exceeded the cost base of the WHL share (subsection 104-135(3)). No capital loss can be made from CGT event G1.

81. A capital gain made when CGT event G1 (subsection 104-135(5)) happened is disregarded if the WDC Group Securityholder acquired their WHL share before 20 September 1985.

82. A resident WDC Group Securityholder who made a capital gain when CGT event G1 happened is eligible to treat the gain as a discount capital gain provided they satisfy the requirements in Subdivision 115-A.

83. Under subsection 855-10(1), an entity disregards a capital gain or capital loss made from a CGT event if they are a foreign resident, or the trustee of a foreign trust for CGT purposes, just before the CGT event happens in relation to a CGT asset that is not taxable Australian property.

84. The shares in WHL are not taxable Australian property within item 1 of the table in section 855-15. In addition, as none of the shares in WHL pass the non-portfolio interest test, they are not an 'indirect Australian real property interest' (section 855-25) at the time that CGT event G1 happened, for the purposes of item 2 of the table in section 855-15. If items 3, 4 and 5 of the table in section 855-15 do not apply to the shares held in WHL, a WDC Group Securityholder who is a foreign resident, or the trustee of a foreign trust for CGT purposes, will disregard any capital gain from CGT event G1 happening (section 855-10).

### **Division 125 Demerger relief**

#### ***Cost base and reduced cost base of WHL and WCL shares***

85. The first element of the cost base and reduced cost base of each post-CGT WHL share and corresponding WCL share received under the demerger is a proportion of the sum of the cost bases of the post-CGT WHL shares worked out on a reasonable basis having regard to the market values (just after the demerger) of the WHL shares and WCL shares, or a reasonable approximation of those market values (subsections 125-80(2) and 125-80(3)).

### **WHL Distribution and Demerger Dividend**

#### ***Demerger Dividend***

86. As discussed in paragraphs 73 to 78 of this Ruling, the capital component of the WHL Distribution is not a dividend for the purposes of subsection 6(1) of the ITAA 1936 and will not be assessable as a dividend under subsection 44(1) of the ITAA 1936.



87. However, WDC Group Securityholders received a dividend to the extent that the market value of the WCL shares distributed under the demerger exceeded the amount debited against the share capital account (see Taxation Ruling TR 2003/8).

88. This dividend is neither assessable income nor exempt income (subsections 44(3) and 44(4) of the ITAA 1936) if:

- the dividend is a demerger dividend (as defined in subsection 6(1) of the ITAA 1936)
- the head entity does not elect that subsections 44(3) and 44(4) of the ITAA 1936 do not apply to the demerger dividend (subsection 44(2) of the ITAA 1936), and
- subsection 44(5) of the ITAA 1936 is satisfied.

89. As each of the conditions outlined in paragraph 88 of this Ruling are satisfied, the demerger dividend of approximately \$0.40 per WHL share received by WDC Group Securityholders under the demerger will be neither assessable income nor exempt income as per the operation of subsections 44(3) and 44(4) of the ITAA 1936.

90. The demerger dividend will not be subject to dividend withholding tax as section 45B of the ITAA 1936 does not apply (subsection 128B(3D) of the ITAA 1936).

### ***Application of section 45 and section 45A of the ITAA 1936***

91. Section 45 of the ITAA 1936 applies in respect of a company that, whether in the same year of income or in different years of income, streams the provision of shares (other than shares to which subsection 6BA(5) of the ITAA 1936 applies) and the payment of minimally franked dividends to its shareholders in such a way that:

- (a) the shares are received by some shareholders but not all shareholders; and
- (b) some or all of the shareholders who do not receive the shares receive or will receive minimally franked dividends.

92. A minimally franked dividend is defined in subsection 45(3) of the ITAA 1936 as one that is not franked or franked to less than 10%, in accordance with section 202-5 or section 208-60.

93. The demerger of WCL was implemented by means of a capital reduction by WHL and satisfied by the distribution by WHL of shares in WCL to WDC Group Securityholders. As a result, WDC Group Securityholders received a proportionate interest in WCL under the demerger in proportion to their ownership of WHL shares.

94. As the conditions in section 45 of the ITAA 1936 are not satisfied, section 45 of the ITAA 1936 does not apply.

95. Section 45A of the ITAA 1936 applies in respect of a company that, whether in the same year of income or in different years of income, directs the payment of capital benefits and the payment of dividends to its shareholders in such a way that:

- (a) capital benefits are, or apart from the operation of the provision, would be received by certain shareholders (the advantaged shareholders) who would in the year of income in which the capital benefits are provided, derive a greater benefit from the capital benefits than other shareholders; and
- (b) it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

96. For the purposes of section 45A, subsection 45A(3) of the ITAA 1936 defines a capital benefit to include:

- the provision to the shareholder of shares in the company
- the distribution to the shareholder of share capital or share premium, or
- something that is done in relation to the share that has the effect of increasing the value of a share (which may or may not be the same share) held by the shareholder.

97. Under the demerger, WHL will demerge WCL, a wholly owned subsidiary of WHL. The proportionate distribution of shares in WCL represents a distribution of capital to all WDC Group Securityholders in their capacity as WHL shareholders. The shares in WCL will not be streamed to some WDC Group Securityholders and not others.

98. Therefore, the Commissioner will not make a determination under section 45A of the ITAA 1936 in respect of the demerger as it cannot be concluded that capital benefits will be provided to certain advantaged shareholders while other disadvantaged shareholders are provided with dividends.

### ***Application of section 45B of the ITAA 1936***

99. The purpose of section 45B of the ITAA 1936 is to ensure that relevant amounts distributed to shareholders of a company are treated as dividends for tax purposes if:

- (a) components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger; or
- (b) certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

100. Subsection 45B(2) of the ITAA 1936 relevantly provides that the section applies if:

- (a) there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company;
- (b) under the scheme the taxpayer obtains a tax benefit as defined in subsection 45B(9) of the ITAA 1936; and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the scheme was entered into or carried out for more than an incidental purpose of enabling the taxpayer to obtain the tax benefit.

101. In this case, while the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 are met, the requisite purpose of enabling WDC Group Securityholders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) is not present.

102. The Commissioner will not make a determination under paragraphs 45B(3)(a) or 45B(3)(b) of the ITAA 1936 that sections 45BA or 45C of the ITAA 1936 applies to the whole, or any part, of the WHL Distribution received by WDC Group Securityholders under the demerger.

## **WFDT Arrangement and Stapling Arrangement**

### ***WT Capital Distribution and WT Stapling Distribution***

#### *Non-assessable payments*

103. Subsection 99B(1) of the ITAA 1936 provides that an amount, being property of a trust estate, paid to, or applied for the benefit of, a beneficiary of the trust estate who was a resident at any time during the year of income, is the assessable income of the beneficiary, subject to the exceptions in subsection 99B(2) of the ITAA 1936.

104. The exception in paragraph 99B(2)(a) of the ITAA 1936 reduces the amount that would otherwise be included in assessable income by the amount that represents corpus of the trust estate and is not attributable to amounts derived by the trust estate that, if they had been derived directly by a taxpayer being a resident, would have been included in the assessable income of that taxpayer.

105. Section 6-5 provides that a taxpayer's assessable income includes income according to ordinary concepts (ordinary income).

106. The WT Capital Distribution and the WT Stapling Distribution paid to WDC Group Securityholders has been debited to the contributed equity capital of WT. The contributed equity capital clearly has the quality of capital in the hands of the trustee and that characterisation does not change if the relevant amounts were derived by a resident taxpayer.

107. Accordingly, the WT Capital Distribution and the WT Stapling Distribution are not included in the assessable income of WDC Group Securityholders under subsection 99B(1) of the ITAA 1936 as they represent corpus of WT that is attributable to amounts derived by the trust.

108. The capital distribution (being a payment of corpus) does not have the quality of income in the hands of WDC Group Securityholders and is not ordinary income under section 6-5.

#### ***CGT event E4***

109. Under section 104-70, CGT event E4 will happen as a result of the trustee of a trust making a payment to a unitholder in respect of their unit in the trust, and some or all of the payment is not included in the unitholder's assessable income (the non-assessable part). Subsection 104-70(3) provides that the time of CGT event E4 is:

- just before the end of the income year in which the trustee makes the payment, or
- if another CGT event (except CGT event E4) happens in relation to the unit after the trustee makes the payment but before the end of the income year – just before the time of that other CGT event.

110. If CGT event E4 happens during an income year, a unitholder will make a capital gain if the total of the amounts of the non-assessable parts of the payments made by the trustee during the income year in respect of the unit exceeds the cost base of the unit (subsection 104-70(4)).

111. However, if the total of the amounts of the non-assessable parts of the payments made by the trustee during the income year is not more than the cost base of the unit, the cost base and reduced cost base of the unit are reduced by that total amount (subsection 104-70(6)).

112. WDC Group Securityholders received under the scheme the sum of the WT Capital Distribution and WT Stapling Distribution. No part of this amount will be included in the assessable income of WDC Group Securityholders. Therefore, CGT event E4 will happen to each WT unit as a result of the capital distributions to WDC Group Securityholders.

113. A resident WDC Group Securityholder who made a capital gain when CGT event E4 happened is eligible to treat the gain as a discount capital gain provided they satisfy the requirements in Subdivision 115-A.

114. The units in WT are not taxable Australian property within item 1 of the table in section 855-15. In addition, for non-resident WDC Securityholders whose income year ended on 30 June 2014, as none of their units in WT pass the non-portfolio interest test, their units are not an 'indirect Australian real property interest' (section 855-25) at the time that CGT event E4 happened, for the purposes of item 2 of the table in section 855-15. If items 3, 4 and 5 of the table in section 855-15 do not apply to the units held in WT, a WDC Group Securityholder who is a foreign resident, or the trustee of a foreign trust for CGT purposes, will disregard any capital gain from CGT event E4 happening (section 855-10). Non-resident WDC Securityholders whose income year does not end on 30 June 2014 (as a result of having a substituted accounting period) will need to assess at the time CGT event E4 happens whether their units in WT pass the non-portfolio interest test such that their units are taxable Australian property and any capital gain from CGT event E4 is not disregarded.

***Cost base and reduced cost base of WT units and WFDT units just after the transfer of the assets***

115. As the trustees of WT and WFDT will each elect Subdivision 126-G roll-over with respect to the transfer of assets by WT to WFDT, a WDC Group Securityholder's cost base in each WT unit and WFDT unit will be calculated in accordance with section 126-245 unless the WDC Group Securityholder has chosen the adjustment under section 126-250.

***WT units***

116. Subsection 126-245(1) requires unitholders to apportion the cost base of each WT unit that they own between that unit and their corresponding new unit in WFDT. The apportionment must be reasonable, having regard to the relative market values of the units in WT and WFDT (or a reasonable approximation of those market values) just before and just after the transfer time.

***WFDT units***

117. The first element of the cost base and reduced cost base of each WFDT unit, just after the transfer time, is an amount such that the total cost base of each WFDT unit and the cost base of the corresponding WT unit reasonably approximates the total cost base of units in WFDT and WT just before the transfer time (subsections 126-245(3) and (4)).

***Cost base and reduced cost base of WRT1 units and WRT2 units***

118. Pursuant to subsections 110-25(2) and 110-55(2), the first element of the cost base and reduced cost base of a CGT asset is the money a taxpayer paid, or is required to pay, in respect of acquiring it.

119. Under the Stapling Arrangement, Westfield Management Limited, the trustee of WT (on behalf of each WDC Group Securityholder) applied the WT Stapling Distribution to acquire a unit in WRT1 and a unit in WRT2. Relevantly, \$0.001 was applied for the subscription of each unit in WRT1 and \$0.0001 was applied for the subscription of each unit in WRT2.

120. Accordingly, the first element of the cost base and reduced cost base for a WDC Group Securityholder in each:

- WRT1 unit acquired under the Stapling Arrangement is \$0.001 per unit, and
- WRT2 unit acquired under the Stapling Arrangement is \$0.0001 per unit.

***Acquisition date of WRT1 units and WRT 2 units***

121. Pursuant to item 3 of the table in section 109-10, where a trustee of a unit trust issues units in circumstances where no contract is entered into in respect of the acquisition, the units will be deemed to have been acquired at the time of issue.

122. Accordingly, each WDC Group Securityholder will be taken to have acquired the WRT1 units and WRT2 units on the Implementation Date, being the time they were issued under the Stapling Arrangement.

***CGT event H2***

123. CGT event H2 in section 104-155 happens if:

- an act, transaction or event occurs in relation to a CGT asset owned by a taxpayer, and
- the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base.

124. There are no CGT consequences arising for a WDC Group Securityholder under CGT event H2 with respect to the WFDT Arrangement or the Stapling Arrangement.

## **Application of Division 725**

125. Division 725 may apply where there is a direct value shift under a scheme involving equity interests in an entity. For Division 725 to have consequences, paragraph 725-50(b) requires, amongst other things, that the 'controlling entity test' be satisfied.

126. The 'controlling entity test' is satisfied for value shifting purposes, if, an entity (the controller) controls the target entity at some time during the period starting when the scheme is entered into and ending when the scheme has been carried out.

127. Subdivision 727-E sets out the circumstances in which an entity will be regarded as controlling another entity for value shifting purposes.

128. On the basis of the information provided by the Applicant no entity, either alone or together with its associates, would be regarded as controlling WAT, WHL, WT, WRT1 and WRT2 for value shifting purposes under the tests in sections 727-355 and 727-360 during the period starting when the scheme is entered into and ending when it has been carried out. Although WFDT and WCL are wholly owned and controlled respectively by WT and WHL at some point during the scheme their ownership was merely to facilitate the Proposal rather than for the purpose of controlling the entities.

129. Therefore, as the threshold requirement in paragraph 725-50(b) is not satisfied, Division 725 can have no consequences for the WDC Group Securityholders in respect of the scheme.

## Appendix 2 – Detailed contents list

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

|                                                                                                         | <b>Paragraph</b> |
|---------------------------------------------------------------------------------------------------------|------------------|
| <b>What this Ruling is about</b>                                                                        | <b>1</b>         |
| Relevant provision(s)                                                                                   | 2                |
| Class of entities                                                                                       | 3                |
| Qualifications                                                                                          | 4                |
| <b>Date of effect</b>                                                                                   | <b>7</b>         |
| <b>Scheme</b>                                                                                           | <b>8</b>         |
| Background                                                                                              | 9                |
| Proposal                                                                                                | 11               |
| Step 1 Restructure                                                                                      | 14               |
| Step 2 De-stapling                                                                                      | 17               |
| Step 3 Merger                                                                                           | 18               |
| Other                                                                                                   | 19               |
| <b>Ruling</b>                                                                                           | <b>34</b>        |
| Demerger                                                                                                | 34               |
| <i>CGT event G1</i>                                                                                     | 34               |
| <i>Division 125 demerger roll-over relief</i>                                                           | 38               |
| <i>Cost base and reduced cost base of WHL and WCL shares</i>                                            | 40               |
| <i>Demerger roll-over for pre-CGT WHL shares</i>                                                        | 42               |
| <i>Demerger roll-over for post-CGT WHL shares</i>                                                       | 43               |
| <i>Demerger roll-over is not chosen for pre-CGT WHL shares</i>                                          | 44               |
| <i>Demerger roll-over is not chosen for post-CGT WHL shares</i>                                         | 45               |
| <i>Acquisition date of WCL shares for CGT discount purposes</i>                                         | 46               |
| WHL Distribution and Demerger Dividend                                                                  | 48               |
| <i>Demerger Dividend</i>                                                                                | 48               |
| <i>Application of section 45 and section 45A of the ITAA 1936</i>                                       | 50               |
| <i>Application of section 45B of the ITAA 1936</i>                                                      | 51               |
| WFDT Arrangement and Stapling Arrangement                                                               | 52               |
| <i>WT Capital Distribution and WT Stapling Distribution</i>                                             | 52               |
| <i>CGT Event E4</i>                                                                                     | 54               |
| <i>Cost base and reduced cost base of WT units and WFDT units just after the transfer of the assets</i> | 59               |
| <i>Acquisition date of WFDT units</i>                                                                   | 61               |



|                                                                                                         |            |
|---------------------------------------------------------------------------------------------------------|------------|
| <i>Acquisition date of WFDT units for CGT discount purposes</i>                                         | 63         |
| <i>Conversion of WHL shares and WT units</i>                                                            | 64         |
| <i>Cost base and reduced cost base of WRT1 units and WRT2 units</i>                                     | 67         |
| <i>Acquisition date of WRT1 units and WRT2 units</i>                                                    | 68         |
| <i>CGT event H2</i>                                                                                     | 69         |
| <i>Stapling transactions</i>                                                                            | 70         |
| <i>Application of Division 725</i>                                                                      | 71         |
| <b>Appendix 1 – Explanation</b>                                                                         | <b>72</b>  |
| <i>Demerger</i>                                                                                         | 73         |
| <i>CGT event G1</i>                                                                                     | 73         |
| <i>Division 125 Demerger relief</i>                                                                     | 85         |
| <i>Cost base and reduced cost base of WHL and WCL shares</i>                                            | 85         |
| <i>WHL Distribution and Demerger Dividend</i>                                                           | 86         |
| <i>Demerger Dividend</i>                                                                                | 86         |
| <i>Application of section 45 and section 45A of the ITAA 1936</i>                                       | 91         |
| <i>Application of section 45B of the ITAA 1936</i>                                                      | 99         |
| <i>WFDT Arrangement and Stapling Arrangement</i>                                                        | 103        |
| <i>WT Capital Distribution and WT Stapling Distribution</i>                                             | 103        |
| <i>Non-assessable payments</i>                                                                          | 103        |
| <i>CGT event E4</i>                                                                                     | 109        |
| <i>Cost base and reduced cost base of WT units and WFDT units just after the transfer of the assets</i> | 115        |
| <i>WT units</i>                                                                                         | 116        |
| <i>WFDT units</i>                                                                                       | 117        |
| <i>Cost base and reduced cost base of WRT1 units and WRT2 units</i>                                     | 118        |
| <i>Acquisition date of WRT1 units and WRT 2 units</i>                                                   | 121        |
| <i>CGT event H2</i>                                                                                     | 123        |
| <i>Application of Division 725</i>                                                                      | 125        |
| <b>Appendix 2 – Detailed contents list</b>                                                              | <b>130</b> |

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Not previously issued as a draft

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TR 2003/8; TR 2006/10

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- capital gains
- CGT capital proceeds
- CGT discount
- CGT events
- CGT events E1-E9 – trusts
- CGT events G1-G3 – shares
- CGT events H1-H2 - special capital receipts
- cost base adjustments
- demerger
- demerger allocation
- demerger benefit
- demerger dividend
- demerger group
- Demerger roll-over
- demerger subsidiary
- return of capital on shares
- Value shifting arrangements

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NO: 1-5DXA8U0

ISSN: 1445-2014

ATOlaw topic: Income tax ~~ Capital gains tax ~~ Restructures /  
mergers and acquisitions / demergers

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