



CR 2002/67 - Income tax: capital gains: scrip for scrip roll-over: exchange of units in Mirvac Commercial Trust for units in Mirvac Property Trust

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Class Ruling

Income tax: capital gains: scrip for scrip roll-over: exchange of units in Mirvac Commercial Trust for units in Mirvac Property Trust

Contents	Para
What this Class Ruling is about	1
Date of effect	8
Arrangement	9
Ruling	12
Explanations	13
Detailed contents list	31

Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a **Ruling** is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the tax law identified below applies to the defined class of persons who take part in the arrangement to which this Ruling relates.

Tax law

2. The tax law dealt with in this Ruling is Subdivision 124-M of the *Income Tax Assessment Act 1997* ('ITAA 1997').

Class of persons

3. The class of persons to which this Ruling applies is the unitholders in the Mirvac Commercial Trust, who:

- (a) are 'residents of Australia' as that term is defined in subsection 6(1) of the *Income Tax Assessment Act 1936* ('ITAA 1936'), or are 'non-residents' of Australia within the meaning of that expression in subsection 6(1) of ITAA 1936 but would be subject to capital gains tax because the units in the Mirvac Commercial Trust being disposed of have the necessary connection with Australia under any of the categories of CGT assets in section 136-25 of the ITAA 1997;

- (b) acquired their interest in the Mirvac Commercial Trust after 20 September 1985;
- (c) will dispose of their units in the Mirvac Commercial Trust to Mirvac Funds Limited as Trustee for Mirvac Property Trust, in exchange for units in the Mirvac Property Trust;
- (d) choose CGT scrip for scrip roll-over in accordance with paragraph 124-781(3)(c) of the ITAA 1997;
- (e) apart from the roll-over for which Subdivision 124-M of the ITAA 1997 provides, would make a capital gain from a CGT event happening in relation to their units in the Mirvac Commercial Trust;
- (f) might make a capital gain from a replacement unit in the Mirvac Property Trust which would not be disregarded (except because of a roll-over); and
- (g) are not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions as used 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 below at paragraphs 9 to 11 in this Ruling.
6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:
 - (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled, and
 - (b) this Ruling may be withdrawn or modified.
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Date of effect

8. This Class Ruling applies to the 2002-2003 income year.

Arrangement

9. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- (a) Class Ruling application dated 2 July 2001 from Greenwoods & Freehills requesting the Commissioner to make a Class Ruling in relation to the capital gains scrip for scrip roll-over provisions as they apply to the exchange of units in the Mirvac Commercial Trust for units in the Mirvac Property Trust on a one for one basis.
- (b) The restructure documentation accompanying the Class Ruling application from Greenwoods & Freehills dated 2 July 2001 as follows:
 - Current and Proposed Structure Diagram;
 - Letter dated 21 August 2000 from the Commissioner of Taxation setting out the Commissioner's view in relation to a proposed takeover of Advance Property Fund by Mirvac Property Trust;
 - Current draft of the proposed amended Mirvac Property Trust Constitution marked up with proposed changes from the current form of the Mirvac Property Trust Constitution;
 - Current draft of the proposed amended Mirvac Commercial Trust Constitution marked up with proposed changes from the current form of the Constitution; and

- Pro forma first draft of the Class Ruling.
- (c) Letter dated 13 July 2001 from Greenwoods & Freehills enclosing Draft Restructure Implementation Deed.
- (d) Draft Restructure Implementation Deed attached to Greenwoods & Freehills letter dated 13 July 2001.
- (e) Letter dated 14 December 2001 from Greenwoods & Freehills in response to a request from the Australian Taxation Office for further information dated 9 October 2001.
- (f) Documents and information attached to Greenwoods & Freehills letter dated 14 December 2001:
 - Response to Request for Further Information;
 - Mirvac Property Trust Share Price History and Unit Issue History;
 - Mirvac Commercial Trust Share Issue History and Unit Issue History;
 - Letter from the Commissioner of Taxation dated 1 April 1999 titled – ‘Request For Advance Opinion’;
 - Current Mirvac Property Trust Constitution;
 - Current Mirvac Commercial Trust Constitution;
 - Amended Mirvac Property Trust Constitution;
 - Amended Mirvac Commercial Trust Constitution;
 - Simplification Implementation Amending Deed dated 1 November 2001;
 - Distribution Reinvestment Plan;
 - Deed of Co-operation dated 15 June 1999;
 - Amended Distribution Reinvestment Plan;
 - Amended Deed of Co-operation dated 14 September 2001;
 - Australian Securities and Investment Commission Corporation Law – Paragraphs 601QA(1)(b) – Declaration dated 10 June 1999; and

- Australian Securities and Investment Commission Corporations Act – Paragraph 601QA(1)(a) and (b) – Exemptions and Declaration dated 17 September 2001.
- (g) Letter from Greenwoods & Freehills dated 24 April 2002 in reply to e-mail requests from the Australian Taxation Office dated 27 March 2002 and 4 April 2002.
- (h) Documentation and Information listed below enclosed with letter from Greenwoods & Freehills dated 24 April 2002 in response to the Australian Taxation Office requests of 27 March 2002 and 4 April 2002:
- Explanatory Memorandum dated 4 May 1999 issued to Mirvac Limited, Capital Property Trust, and Mirvac Property Trust investors, providing details of the proposed merger to form the Mirvac Group;
 - Letter from Greenwoods & Freehills dated 24 April 2002 comprising a further Request for Class Ruling, focusing on the Scrip for Scrip rollover provisions under subdivision 124-M of the ITAA 1997;
 - Constitution of Mirvac Limited and Certificate of Incorporation on Change of Name dated 21 August 1987;
 - Notice of Annual General Meeting and Explanatory Memorandum to Security holders of Mirvac Limited, Mirvac Property Trust, and Mirvac Commercial Trust dated 20 September 2001; and
 - Mirvac Group Annual General Meeting voting results dated 1 November 2001.
- (i) Facsimile transmission from Greenwoods & Freehills dated 3 May 2002 in reply to the Australian Taxation Office e-mail request dated 1 May 2002.
- (j) Facsimile transmission from Greenwoods & Freehills dated 3 July 2002 in reply to the Australian Taxation Office e-mail request dated 9 May 2002.
- (k) Documentation and Information listed below enclosed with letter from Greenwoods & Freehills dated 3 July 2002 in response to the Australian Taxation Office request of 9 May 2002:

- Appendix 9B Restrictions on securities;
 - Appendix 9A Restriction agreements; and
 - Details of Mirvac Group top twenty securityholders.
- (l) Letter from Greenwoods & Freehills dated 25 July 2002 in reply to the Australian Taxation Office e-mail request dated 16 July 2002.
- (m) Documentation enclosed with letter from Greenwoods & Freehills dated 25 July 2002 titled, 'Attachment: Answers to specific questions.'

10. Currently each Mirvac Group Stapled Security comprises one Mirvac Property Trust unit, one Mirvac Commercial Trust unit, and one Mirvac Limited share. The proposed restructure, of which the arrangement that is the subject of this Ruling forms part, will involve:

- the unstapling of the Current Mirvac Group Stapled Security;
- the existing Mirvac Commercial Trust unitholders transferring their Mirvac Commercial Trust units to Mirvac Funds Limited as trustee of the Mirvac Property Trust, in consideration for the issue to them of one Mirvac Property Trust unit for each Mirvac Commercial Trust unit transferred;
- every two Mirvac Property Trust units will be consolidated into one Mirvac Property Trust unit;
- The Mirvac Group Stapled Security will then consist of one Mirvac Property Trust Unit and one Mirvac Limited Share stapled.

11. Under the arrangement to which this Ruling applies:

- (a) Mirvac Property Trust is an Australian resident trust estate as defined in subsection 95(2) of the ITAA 1936 and a resident trust for CGT purposes as defined in section 995-1 of the ITAA 1997; and
- (b) Mirvac Funds Limited as trustee of the Mirvac Property Trust, is a resident of Australia as defined in subsection 6(1) of the ITAA 1936.

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

Ruling

12. Subject to the qualifications in paragraphs 4 to 6 of this Ruling, unitholders in the Mirvac Commercial Trust who are within the class of persons to whom this Ruling applies (as set out in paragraph 3 of this Ruling) will be eligible to choose scrip for scrip roll-over under paragraph 124-781(3)(c) of the ITAA 1997 for the disposal of their units in the Mirvac Commercial Trust under the arrangement.

Explanations

Availability of scrip for scrip roll-over

13. Subdivision 124-M of the ITAA 1997 contains a number of conditions for, and exceptions to the eligibility of, an entity to choose the roll-over. Some of these conditions and exceptions are not relevant to this arrangement. Below is an outline of the main conditions and exceptions that are relevant to the circumstances of the arrangement that is the subject of this Ruling.

14. Subparagraph 124-781(1)(a)(i) of the ITAA 1997 requires an entity to exchange a unit in a trust (the ‘original trust’) for a unit in another trust.

15. This requirement will be satisfied because the Mirvac Group Stapled Security will be unstapled and unitholders of the Mirvac Commercial Trust will exchange each of their units in the Mirvac Commercial Trust for a unit in the Mirvac Property Trust.

16. Paragraph 124-781(1)(b) of the ITAA 1997 requires that entities have fixed entitlements to all of the income and capital of the original entity (Mircvac Commercial Trust) and the acquiring entity (Mircvac Property Trust).

17. Having regard to:

- all of the documents and any other material referred to in paragraph 9 of this Ruling; and
- all the facts comprising the arrangement as described in paragraphs 10 to 11 of this Ruling;

it is considered, for the purposes of section 272-5, Schedule 2F of the ITAA 1936, that entities have fixed entitlements to all of the income and capital of both Mirvac Commercial Trust and Mirvac Property Trust immediately before, during and immediately after the proposed restructure referred to in paragraphs 10 to 11 of this Ruling occurs.

18. Paragraphs 124-781(1)(c) and 124-781(2)(a) of the ITAA 1997 require that the exchange of units is in consequence of an arrangement that results in the acquiring entity (Mirvac Property Trust) becoming the owner of 80% or more of the trust voting interests in the original entity (Mirvac Commercial Trust).

19. This requirement will be satisfied since Mirvac Property Trust will acquire 100% of the units in the Mirvac Commercial Trust, as a consequence of the arrangement that is the subject of this ruling,

20. Paragraphs 124-781(1)(c) and 124-781(2)(b) of the ITAA 1997 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 (Mirvac Commercial Trust) could participate.

21. This requirement will be satisfied because all of the existing unitholders as set out in the Register of Security Holders were entitled to vote on the restructure and will exchange all of their units in the Mirvac Commercial Trust for units in the Mirvac Property Trust.

22. Paragraphs 124-781(1)(c) and 124-781(2)(c) of the ITAA 1997 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.

23. The Mirvac Commercial Trust has only one class of units. This condition will be satisfied because all of the unitholders in Mirvac Commercial Trust will exchange their units on the same terms.

24. Paragraphs 124-781(3)(a) and 124-781(3)(b) of the ITAA 1997 require that the original interest holder acquired its interest after 20 September 1985 and apart from the roll-over, would make a capital gain from a CGT event happening in relation to its original interest.

25. The class of persons to whom this Ruling applies is limited to those unitholders who acquired their units on or after 20 September 1985 and who would otherwise make a capital gain.

26. Paragraph 124-781(3)(c) of the ITAA 1997 requires that the original interest holder choose to obtain roll-over.

27. This condition will be satisfied for those unitholders who choose roll-over.

28. Subsection 124-781(4) of the ITAA 1997 provides additional requirements to be satisfied if the original interest holder and the trustee of the acquiring entity did not deal with each other at arm's length, and neither the original entity nor the acquiring entity 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.**

29. Subsection 124-781(4) of the ITAA 1997 will not apply because the Mirvac Commercial Trust had more than 300 members just before the arrangement started. (Section 124-810 of the ITAA 1997 will not apply to the Mirvac Commercial Trust because its ownership is not concentrated in the manner contemplated by that section.)

Non-resident original interest holder

30. If a non-resident holder of a unit in the Mirvac Commercial Trust chooses scrip for scrip roll-over, Category number 9 in the table in section 136-25 of the ITAA 1997 modifies the usual requirement for a replacement unit to have the necessary connection with Australia. The effect of Category number 9, if it applies, is that it treats a non resident unitholder's replacement interest as having the necessary connection with Australia if their original interest had such a connection. So each unit in the Mirvac Property Trust which a non-resident holder of a unit in the Mirvac Commercial Trust receives in exchange for the non-resident holder's unit in the Mirvac Commercial Trust is treated as having the necessary connection with Australia.

Detailed contents list

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

	Paragraph
What this Class Ruling is about	1
Tax law	2
Class of persons	3
Qualifications	4
Date of effect	8
Arrangement	9
Ruling	12
Explanations	13

CR 2002/67

Availability of scrip for scrip roll-over	13
Non-resident original interest holder	30
Detailed contents list	31

Commissioner of Taxation4 September 2002

Previous draft:

Not previously released in draft form

- unit trust

Related Rulings/Determinations:

CR 2001/1; TR 92/1; TR97/16

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 95(2)
- ITAA 1936 272-5(2f)
- ITAA 1997 div124-M
- ITAA 1997 124-781(1)(a)(i)
- ITAA 1997 124-781(1)(b)
- ITAA 1997 124-781(1)(c)
- ITAA 1997 124-781(2)(a)
- ITAA 1997 124-781(2)(b)
- ITAA 1997 124-781(3)(a)
- ITAA 1997 124-781(3)(b)
- ITAA 1997 124-781(3)(c)
- ITAA 1997 124-781(4)
- ITAA 1997 124-810
- ITAA 1997 136-25
- ITAA 1997 995-1
- TAA 1953 Pt IVA
- Copyright Act 1968

Subject references:

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

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