



CR 2007/114 - Income tax: scrip for scrip: acquisition of Coles Group Limited by Wesfarmers Limited

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Class Ruling

Income tax: scrip for scrip: acquisition of Coles Group Limited by Wesfarmers Limited

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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.

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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:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 44 of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 128B of the ITAA 1936;
- Division 1A of the former Part IIIA of the ITAA 1936;

- section 177EA of ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 67 of the ITAA 1997;
- section 104-10 of the ITAA 1997;
- section 109-10 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 124-780 of the ITAA 1997;
- section 124-785 of the ITAA 1997;
- section 124-790 of the ITAA 1997;
- section 124-795 of the ITAA 1997;
- section 124-800 of the ITAA 1997;
- section 130-20 of the ITAA 1997;
- section 202-5 of the ITAA 1997;
- section 202-40 of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 855-15 of the ITAA 1997; and
- Division 974 of the ITAA 1997.

All subsequent 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 are the shareholders of Coles Group Limited (Coles) who:

- (a) were ordinary shareholders (other than Excluded Shareholders as described in the Scheme Booklet) of Coles on the record date (16 November 2007);
- (b) participated in the scheme of arrangement under which Wesfarmers Limited (Wesfarmers), through its wholly owned subsidiary, Wesfarmers Retail Holdings Pty Ltd, acquired all of the Coles shares;
- (c) held their Coles shares on capital account; and

- (d) were not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions in Subdivision 124-M.

The class of entities does not include Wesfarmers or any of its associated entities.

Qualifications

4. 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 12 to 26 of this Ruling.

5. 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.

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Date of effect

7. This Ruling will apply from 7 November 2007 to 30 June 2008. This Ruling continues to apply after 30 June 2008 to all entities within the specified class who entered into the specified scheme during the term of the Ruling, subject to there being no change in the scheme or in the entities involved in the scheme.

8. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

12. The following description of the scheme is based on a number of documents provided to the Commissioner. These documents or relevant parts of them as the case may be, form part of and are to be read with this description. The documents include:

- a revised Scheme Implementation Agreement (SIA) dated 5 September 2007;
- Class Ruling application dated 13 September 2007;
- Financial Services Guide and Independent Expert's Report in relation to the Proposal by Wesfarmers Limited dated 13 September 2007;
- Scheme Booklet dated 27 September 2007; and
- correspondence dated 3 October 2007.

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

13. Coles and Wesfarmers are public companies listed on the Australian Securities Exchange (ASX). Both companies are residents of Australia as defined in subsection 6(1) of the ITAA 1936.

14. On 2 July 2007, Coles and Wesfarmers announced a proposal for the acquisition of Coles by Wesfarmers by way of a scheme of arrangement. A revised scheme of arrangement was executed on 5 September 2007. Under the scheme, Wesfarmers Retail Holdings Pty Ltd acquired all of the ordinary shares of Coles from Coles shareholders on the Implementation Date (23 November 2007). After the Implementation Date, Coles will apply to be de-listed from the ASX.

15. The standard consideration paid to Coles shareholders under the scheme was:

- (a) \$4.00 cash (cash consideration);
- (b) 0.14215 of a Wesfarmers ordinary share (Wesfarmers share); and
- (c) 0.14215 of a Wesfarmers Partially Protected Share (WPP share)

for each Coles share owned on the record date.

16. However, Coles shareholders were entitled to elect to receive:

- (a) an increased cash consideration component under the scheme (maximum cash alternative); or
- (b) an increased Wesfarmers share consideration component under the scheme (maximum scrip alternative).

17. The consideration paid to Coles shareholders who elected for the maximum scrip alternative was:

- (a) \$2.9583 cash consideration;
- (b) 0.16854 of a Wesfarmers share; and
- (c) 0.14215 of a WPP share

for each Coles share owned on the record date.

18. The consideration paid to Coles shareholders who elected for the maximum cash alternative was:

- (a) \$9.6118 cash consideration; and
- (b) 0.14215 of a WPP share

for each Coles share owned on the record date.

19. WPP shares (as detailed in the Scheme Booklet):

- (a) listed on the ASX and commenced trading on a deferred settlement basis on 12 November 2007;
- (b) have the same rights as the Wesfarmers shares, including voting rights, dividends, participation in surplus asset and profits on winding up, returns of capital and to receive accounts, reports and notice of meetings of the company and to attend any general meetings of Wesfarmers;
- (c) rank equally with each other WPP share and each Wesfarmers share;
- (d) provide WPP shareholders with additional Wesfarmers shares in the event the Wesfarmers share price is less than \$45 at the reclassification date (4 years from the time of issue, and subject to extension by Wesfarmers) for the WPP share;

- (e) will be capable of being reclassified into Wesfarmers shares at any time before that reclassification date by the WPP shareholder;
- (f) will be capable of being reclassified into Wesfarmers shares by Wesfarmers if at any time before that reclassification date, the 20 day volume weighted average price per ordinary share (VWAP) exceeds \$45 (if the 20 day VWAP is less than \$45, the WPP shareholders will receive additional Wesfarmers shares of up to 0.25 of a Wesfarmers share per WPP share).

20. Wesfarmers shares that would otherwise have issued to some non-resident shareholders (ineligible foreign shareholders) were issued to a nominee. The nominee will sell the shares on behalf of those ineligible shareholders and will remit the net proceeds to those shareholders.

21. Small shareholders (Coles shareholders who hold 100 or fewer Coles shares at the record date) may elect to sell all their Wesfarmers shares and WPP shares on the ASX through a sale agent.

22. Coles paid its final dividend for the year ended 29 July 2007 of \$0.25 cash per share on the Implementation Date. The dividend was paid to entities who were Coles shareholders on the relevant record date (16 November 2007). The dividend was to be paid regardless of whether or not the scheme of arrangement proceeded.

Other matters

23. Wesfarmers and Coles each had more than 300 members at the time of the commencement of the scheme.

24. Wesfarmers Retail Holdings Pty Ltd is a wholly owned subsidiary of Wesfarmers Limited and a subsidiary member of the Wesfarmers tax consolidated group.

25. Coles' balance sheet as at 30 July 2006 shows that the total value of its Australian real property comprised less than 50% of the value of Coles' total assets.

26. On the Implementation Date (23 November 2007), no Coles shareholder was either a 'significant stakeholder' or 'common stakeholder' within the meaning of those terms in Subdivision 124-M.

Ruling

Disposal of Coles shares

27. CGT event A1 happened when a Coles shareholder disposed of their Coles share to Wesfarmers on the Implementation Date (subsections 104-10(1) and 104-10(2) and paragraph 104-10(3)(b)).

28. A Coles shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of their Coles share exceeds its cost base. A Coles shareholder will make a capital loss if those capital proceeds are less than the Coles share's reduced cost base (subsection 104-10(4)).

29. The capital proceeds for the disposal of each Coles share is any cash consideration plus the market value of the Wesfarmers share and WPP share worked out on the Implementation Date. The capital proceeds will not include the final Coles dividend paid on the Implementation Date (subsection 116-20(1)).

30. A Coles shareholder who makes a capital gain will be eligible to treat the gain as a discount capital gain providing they acquired the Coles share at least 12 months before the disposal and the other requirements of Subdivision 115-A are satisfied (section 115-25).

Acquisition of Wesfarmers and WPP shares

31. The acquisition date of Wesfarmers shares and WPP shares received in exchange for Coles shares is the date that the shares are issued to Coles shareholders (the Implementation Date) (section 109-10).

32. The first element of the cost base (and reduced cost base) of the Wesfarmers shares and the WPP shares will be a reasonable portion of the market value of the Coles shares exchanged under the scheme (subsection 110-25(2) and subsection 110-55(2)), determined at the time of acquisition (the Implementation Date). However, the market value of the Coles shares must first be reduced by that part of the market value that is reasonably attributable to any cash consideration (paragraph 110-25(2)(b)).

Availability of scrip for scrip roll-over

33. A Coles shareholder will be eligible to choose scrip for scrip roll-over under section 124-780 if:

- they acquired their Coles shares on or after 20 September 1985 (paragraph 124-780(3)(a));
- apart from the roll-over under Subdivision 124-M, they would make a capital gain when CGT event A1 happens to their Coles shares (paragraph 124-780(3)(b));
- they cannot disregard (except because of a roll-over) any capital gain they might make from a replacement Wesfarmers or WPP share (paragraph 124-795(2)(a)); and
- all other relevant requirements are satisfied. The requirements for the roll-over are explained in paragraphs 69 to 101 of this Ruling.

Consequences of scrip for scrip roll-over

34. If a Coles shareholder chooses scrip for scrip roll-over, a capital gain from the disposal of their Coles share is disregarded to the extent that the shareholder receives Wesfarmers shares and WPP shares (subsection 124-785(1)). The capital gain is not disregarded to the extent that the capital proceeds include ineligible proceeds (cash consideration) (section 124-790).

35. If a Coles shareholder chooses scrip for scrip roll-over, the first element of the cost base of a replacement Wesfarmers share and WPP share will be a reasonable portion of the cost base of the Coles share exchanged for those shares under the scheme (subsection 124-785(2)). However, the cost base of the Coles shares must first be reduced by that part of the cost base that is reasonably attributable to any cash consideration (subsections 124-785(2) and (3)).

Pre-CGT Coles shares

36. Any capital gain or loss on the disposal of Coles shares acquired before 20 September 1985 (pre-CGT Coles shares) will be disregarded (paragraph 104-10(5)(a)).

37. There is no roll-over for Coles shares that were acquired before 20 September 1985 (paragraph 124-780(3)(a)).

38. The first element of the cost base (and reduced cost base) for Wesfarmers shares and WPP shares acquired in exchange for pre-CGT Coles shares will be the respective market values of the replacement Wesfarmers shares and WPP shares just after they were acquired (subsection 124-800(1)).

Foreign resident Coles shareholders

39. A foreign resident Coles shareholder will only have CGT consequences for the disposal of their Coles shares if they used their shares in connection with the carrying on of a business through a permanent establishment in Australia (item 3 in the table in section 855-15).

Reclassification of WPP shares

Section 6-5

40. The value of any additional shares issued on reclassification of the WPP shares will not be assessable as ordinary income under subsection 6-5(1).

Subsection 6(1)

41. The value of any additional shares issued on reclassification of the WPP shares will not be a dividend as defined in subsection 6(1) of the ITAA 1936, and will not be included in an eligible shareholder's (being the class of entities as referred to in paragraph 3 of this Ruling) assessable income under subsection 44(1) of the ITAA 1936.

Section 45B

42. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the provision of any additional shares on reclassification of the WPP shares, and no part of the capital benefit provided will be taken to be a dividend for income tax purposes.

Capital gains tax

43. No CGT event will happen to WPP shareholders as a result of their WPP shares being reclassified into Wesfarmers shares.

44. No CGT event will happen to WPP shareholders as a result of the allotment of additional Wesfarmers shares to WPP shareholders on their reclassification.

45. Any additional Wesfarmers shares issued to WPP shareholders will be taken to have been acquired when the WPP shares were acquired (the Implementation Date). The cost base (and reduced cost base) of the WPP shares is to be apportioned in a reasonable way over the reclassified WPP shares and any additional Wesfarmers shares (item 1 in the table in subsection 130-20(3)).

WPP share dividends

46. The WPP shares will be equity interests for the purposes of Division 974. Any distribution paid in respect of the WPP shares will be a dividend within the meaning of subsection 6(1) of the ITAA 1936. The distribution will be a frankable distribution pursuant to section 202-40, to the extent the dividends are sourced from current and retained earnings. The WPP share dividends will be capable of being franked in accordance with section 202-5.

Final dividend

47. The final dividend paid by Coles to an eligible shareholder is a distribution paid by the company. The distribution is a dividend as it was not debited to Coles' share capital account (paragraphs (a) and (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936).

48. The final dividend is a frankable distribution pursuant to section 202-40, and is capable of being franked under section 202-5.

Assessability of the final dividend and tax offset

49. The final dividend will be included in the assessable income of resident individual, superannuation fund and company shareholders under subsection 44(1) of the ITAA 1936. Subject to being a 'qualified person', (see paragraphs 51 and 52 of this Ruling), an amount equal to the franking credit on the final dividend (gross-up) will be included in the assessable income under subsection 207-20(1). These shareholders will be entitled to a tax offset under subsection 207-20(2) equal to the amount of the franking credit on the final dividend included in their assessable income.

Refundable tax offset

50. The tax offset is subject to the refundable tax offset provisions in Division 67. Certain trustees and corporate tax entities are not entitled to the refundable tax offset because of subsections 67-25(1A) to (1D).

Qualified person

51. The payment of the final dividend did not constitute a related payment for the purposes of former section 160APHN of the ITAA 1936.

52. For the purposes of Division 1A of former Part IIIAA of the ITAA 1936, eligible shareholders will be considered to satisfy the holding period rule under section 160APHO of the ITAA 1936 and therefore be qualified persons in relation to the final dividend received if:

- (a) the Coles shares were acquired on or before 1 October 2007; and
- (b) during the period when the shares or interest in the shares were held the shareholders did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) for a continuous period of at least 45 days.

Non-resident shareholders

53. As the final dividend was fully franked, non-resident shareholders will not be liable for Australian withholding tax under paragraph 128B(3)(ga) of the ITAA 1936.

The anti-avoidance provisions

54. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the final dividend received by Coles shareholders.

55. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits received in relation to the final dividend received by Coles shareholders.

Commissioner of Taxation5 December 2007

Appendix 1 – Explanation

❶ *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.*

CGT event A1 happens

56. CGT event A1 happens if there is a change in the ownership of a CGT asset from one entity to another. On the disposal of the Coles shares to Wesfarmers, a change of ownership of Coles shares occurred and therefore CGT event A1 happened (section 104-10).

57. A Coles shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of their Coles share exceeds its cost base (subsection 104-10(4)). A Coles shareholder will make a capital loss if those capital proceeds are less than the Coles share's reduced cost base (subsection 104-10(4)).

58. The time when CGT event A1 happens determines the income year in which any capital gain or capital loss is made and whether the CGT discount applies to any capital gain. Under subsection 104-10(3), CGT event A1 happens when a contract to dispose of the asset is entered into or, if there is no contract, when the change of ownership occurs.

59. A takeover or merger effected by a court approved scheme of arrangement does not involve a disposal of shares under a contract (see paragraph 9 of consolidated Taxation Determination TD 2002/4). Therefore, when a Coles shareholder disposed of a Coles share to Wesfarmers under the scheme, CGT event A1 happened on the Implementation Date, which is the date when the change of ownership occurred (subsection 104-10(3)).

Capital proceeds

60. Subsection 116-20(1) provides that the capital proceeds from a CGT event includes the money and the market value of any property you receive or are entitled to receive (worked out at the time of the event happening).

61. The capital proceeds Coles shareholders received for the disposal of their Coles shares to Wesfarmers is the market value of the Wesfarmers shares and WPP shares worked out at the Implementation Date plus any cash consideration. The final dividend, the declaration and payment of which was not a term of the offer, and was not contingent upon the SIA going ahead, will not form part of the capital proceeds for the disposal of the Coles shares.

62. The Commissioner will accept the volume weighted average price (VWAP) of Wesfarmers shares and WPP shares traded on the ASX on a deferred settlement basis on the Implementation Date as indicative of the market value of Wesfarmers shares and WPP shares respectively as at the Implementation Date.

Discount capital gain

63. A Coles shareholder who makes a capital gain from the disposal of the Coles shares may be entitled to treat the gain as a discount capital gain in respect of those Coles shares that were acquired at least 12 months before the Implementation Date, provided the other requirements of Subdivision 115-A are satisfied (section 115-25).

Acquisition date of Wesfarmers and WPP shares

64. The acquisition date for Coles shareholders of Wesfarmers shares and WPP shares acquired in exchange for their Coles shares is the date that the shares are issued to the Coles shareholder (the Implementation Date) (section 109-10).

Cost base of Wesfarmers and WPP shares

65. If a Coles shareholder does not choose scrip for scrip roll-over, the first element of the cost base (and reduced cost base) of each of their Wesfarmers and WPP shares will be a reasonable portion of the market value of the Coles share exchanged for those shares under the scheme, determined at the Implementation Date. However, the market value of the Coles share must first be reduced by that part of the market value that is reasonably attributable to any cash consideration (subsection 110-25(2) and subsection 110-55(2)).

66. The Commissioner will accept the VWAP of the replacement Wesfarmers shares and WPP shares on the ASX on the Implementation Date, together with any cash consideration, as indicative of the market value of the Coles share on that day.

Availability of scrip for scrip roll-over – Subdivision 124-M

67. Scrip for scrip roll-over enables a shareholder to disregard a capital gain they make from a share that is disposed of as part of a corporate restructure if the shareholder receives a replacement share in exchange.

68. The capital gain is disregarded completely if the only capital proceeds the shareholder receives are replacement shares. A capital gain will be only partially disregarded if, in addition to shares, the capital proceeds include something other than shares, for example, cash consideration is received as part of the capital proceeds.

Requirements for scrip for scrip roll-over

69. Subdivision 124-M contains a number of conditions for, and exceptions to, the eligibility of a shareholder to choose scrip for scrip roll-over. The main conditions and exceptions that are relevant to the scheme that is the subject of this Ruling 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; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

Shares are exchanged for shares in another company

70. Paragraph 124-780(1)(a) requires an entity (the original interest holder) to exchange a share in a company for a share in another company.

71. This requirement is satisfied as a Coles shareholder received Wesfarmers shares and WPP shares as part of the capital proceeds for the disposal of their Coles shares under the scheme.

The exchange occurs as part of a single arrangement

72. Paragraph 124-780(1)(b) requires that shares in an entity be exchanged in consequence of a single arrangement.

73. In the context of the scrip for scrip roll-over, the acquisition of the Coles shares by Wesfarmers under the scheme is considered to be a single arrangement. The single arrangement must also satisfy the conditions as outlined in paragraphs 74 to 81 of this Ruling.

80% ownership

74. Paragraph 124-780(2)(a) requires that shares in an entity be exchanged in a single arrangement that results in another entity becoming the owner of 80% or more of the voting shares in the original entity.

75. This requirement is satisfied as Wesfarmers (the acquiring entity) became the owner of all the ordinary shares in Coles (the original entity) as a result of the scheme. These Coles ordinary shares satisfy the definition of a 'voting share' in subsection 995-1(1).

All voting share owners participate

76. Paragraph 124-780(2)(b) requires that the exchange of shares is in consequence of a single arrangement in which at least all owners of voting shares in the original entity (apart from the acquiring entity or members of the acquiring entity's wholly-owned group) could participate.

77. This requirement is satisfied because all Coles shareholders (other than Wesfarmers) participated in the scheme.

Participation is on substantially the same terms

78. Paragraph 124-780(2)(c) requires that the exchange is in consequence of a single arrangement in which participation was available on substantially the same terms for all of the owners of interests of a particular type in the original entity.

79. Under the offer, the Wesfarmers shares and WPP shares to which ineligible foreign Coles shareholders would otherwise be entitled will be issued to a nominee for sale in accordance with subsection 619(3) of the *Corporations Act 2001* and the proceeds will be distributed to those ineligible foreign Coles shareholders.

80. This does not prevent the arrangement from being on substantially the same terms for all owners of Coles shares (Note 2 to subsection 124-780(2) states that participation will be on substantially the same terms if, for example, matters such as those referred to in subsections 619(2) and (3) of the *Corporations Act 2001* affect the capital proceeds that each participant can receive).

81. Similarly, the availability of alternative forms of consideration (for example, the maximum scrip or the maximum cash) does not prevent the arrangement from being on substantially the same terms for all owners of Coles shares (Note 2 to paragraph 124-780(2)(c)).

Conditions for roll-over are satisfied

82. Paragraph 124-780(1)(c) requires that the conditions for roll-over outlined in subsection 124-780(3) are met. These conditions, (as outlined in paragraphs 83 to 88 of this Ruling) must be met in relation to each Coles share for which scrip for scrip roll-over will be chosen.

The Coles shares are post-CGT shares

83. Paragraph 124-780(3)(a) requires that the original interest holder acquired their original interests on or after 20 September 1985.

84. Therefore, roll-over will only be available for those Coles shares that were acquired on or after 20 September 1985.

A Coles shareholder would otherwise make a capital gain

85. Paragraph 124-780(3)(b) requires that, apart from the roll-over, the original interest holder would make a capital gain from a CGT event happening in relation to its original interest.

86. A capital gain will be made from the disposal of a Coles share if the capital proceeds for the share are more than its cost base. Whether this condition is met will depend on the individual circumstances of each Coles shareholder.

Coles shareholders receive replacement interests in the acquiring entity or the ultimate holding company

87. Paragraph 124-780(3)(c) requires that the replacement interest is in the acquiring entity or the ultimate holding company of the wholly owned group which includes the acquiring entity.

88. This requirement is satisfied as the Coles shareholders received shares in Wesfarmers, the ultimate holding company of the acquiring entity, Wesfarmers Retail Holdings Pty Ltd.

A Coles shareholder must choose to obtain scrip for scrip roll-over

89. Paragraph 124-780(3)(d) requires that the original interest holder chooses the roll-over, or, if section 124-782 applies, the original interest holder and the replacement entity jointly choose to obtain the roll-over.

90. Section 124-782 does not apply to the scheme as there are no significant stakeholders or common stakeholders under the scheme.

91. Subject to their eligibility, whether a Coles shareholder chooses to obtain roll-over in relation to the disposal of a Coles share is a matter to be decided by each individual shareholder.

Further conditions are not applicable

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

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

93. Paragraph 124-780(4)(a) will not apply because both Coles and Wesfarmers had at least 300 members just before the arrangement commenced. Paragraph 124-780(4)(b) will not apply as Coles shareholders, Coles and Wesfarmers were not members of the same linked group just before the arrangement commenced.

Exceptions to obtaining scrip for scrip roll-over are not applicable

94. Section 124-795 contains a number of exceptions where scrip for scrip roll-over cannot be chosen. The exceptions in section 124-795 are outlined in paragraphs 95 to 101 of this Ruling.

Foreign resident Coles shareholders

95. Subsection 124-795(1) provides that roll-over is not available if, just before the disposal, the original interest holder is a foreign resident unless, just after the acquisition of the replacement interest, the replacement interest is taxable Australian property.

A capital gain cannot (apart from the roll-over) be otherwise disregarded

96. Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain the original interest holder might make from their replacement interest would be disregarded (except because of a roll-over), for example, if the shares are trading stock.

97. Whether a capital gain a Coles shareholder might make from their replacement Wesfarmers share or WPP share will be disregarded is a question of fact for each Coles shareholder.

Acquiring entity is not a foreign resident

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

99. This exception does not apply as Wesfarmers is not a foreign resident.

No roll-over is available under Division 122 or Subdivision 124-G

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

101. This exception will not apply as the circumstances of the scheme are such that a roll-over under Division 122 or Subdivision 124-G is not available.

Consequences of roll-over

102. Scrip for scrip roll-over enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger to the extent that the shareholder receives a replacement share in exchange.

103. The capital proceeds a Coles shareholder received was replacement Wesfarmers shares, WPP shares, and cash consideration (under the maximum scrip alternative or where no election was made), or WPP shares and cash consideration (under the maximum cash alternative). Accordingly, a Coles shareholder eligible for and choosing the roll-over will not in any circumstances, be able to completely disregard the capital gain.

Acquisition date for CGT discount

104. For Coles shareholders who choose scrip for scrip roll-over, the acquisition date of their Wesfarmers and WPP shares for CGT discount purposes is the date they acquired the Coles shares that were disposed of for the replacement Wesfarmers and WPP shares. (item 2 of the table in subsection 115-30(1)).

Partial roll-over

105. Since the capital proceeds paid to Coles shareholders in respect of their Coles shares includes cash consideration as well as Wesfarmers and WPP shares, a shareholder will be able to choose only partial roll-over. The capital gain that relates to the cash consideration is not disregarded (subsection 124-790(1)).

106. In determining the first element of the cost base (and reduced cost base) of each Wesfarmers share and WPP share, the cost base of the Coles shares will be reduced by that part of the cost base which is reasonably attributable to the cash consideration (ineligible proceeds) (subsections 124-785(2), 124-785(3) and subsection 124-790(2)).

107. In working out the proportion of the cost base of the Coles share that is reasonably attributable to the cash consideration, the Commissioner accepts the following method:

$$\text{Cost Base of Coles shares} \times \text{cash consideration} / (\text{Value of share consideration} \textit{ plus cash consideration})$$

where:

- (1) if the Coles shareholder received the consideration as described in paragraph 15 of this Ruling, the share consideration means 0.14215 Wesfarmers shares plus 0.14215 WPP shares for each Coles share disposed of (subparagraphs 15(b) and 15(c) of this Ruling). Alternatively, where the Coles shareholder received alternative consideration as described in paragraphs 17 or 18 of this Ruling, the share consideration means the Wesfarmers shares component plus 0.14215 WPP shares received for each Coles share held;

- (2) the value of the share consideration is the market value of the share consideration worked out as at the Implementation Date; and
- (3) the Commissioner will accept that the market value of a Wesfarmers share and WPP share may be determined by reference to the VWAP on the ASX of these shares on the Implementation Date.

108. When that proportion is determined, the remaining amount is used to determine the first element of the cost base (and reduced cost base) for replacement Wesfarmers and WPP shares issued as consideration to a Coles shareholder (subsections 124-785(2), 124-785(3) and 124-785(4)).

Pre-CGT Coles shares

109. Any capital gain or loss on the disposal of pre-CGT Coles shares is disregarded (paragraph 104-10(5)(a)).

110. Paragraph 124-780(3)(a) requires, as a condition for roll-over, that the original interest holder (a Coles shareholder) acquired their original interest (a Coles share) on or after 20 September 1985. Accordingly, roll-over is not available for pre-CGT Coles shares (paragraph 124-780(3)(a)).

111. The first element of the cost base (and reduced cost base) of Wesfarmers shares and WPP shares acquired in exchange for pre-CGT Coles shares will be the respective market values of the Wesfarmers shares and WPP shares just after they were acquired (subsection 124-800(1)).

112. The Commissioner will accept the VWAP of a Wesfarmers share and a WPP share on the Implementation Date as indicative of the market value of the Wesfarmers shares and WPP shares just after they were acquired.

Foreign resident Coles shareholders

113. A foreign resident can disregard any capital gain or loss made from a CGT event unless that CGT event happens in relation to a CGT asset that is taxable Australian property (subsection 855-10(1)).

114. Foreign resident Coles shareholders can disregard any capital gains they make when they dispose of their Coles shares to Wesfarmers if the Coles shares are not taxable Australian property.

115. The Coles shares disposed of by a foreign resident are taxable Australian property if they:

- are an indirect Australian real property interest (item 2 in the table in section 855-15); or

- were used at any time by the foreign resident in carrying on a business through a permanent establishment in Australia (item 3 in the table in section 855-15).

116. Under subsection 855-25(1), a foreign resident Coles shareholder will have an indirect real property interest if:

- the foreign resident has an interest of 10% or more in Coles (the 'non-portfolio interest test' in section 960-195); and
- the total market value of Coles' Australian real property is more than 50% of the total market value of Coles' assets (the 'principal asset test' in section 855-30).

117. Coles' corporate records, in particular its share register, do not disclose any foreign resident Coles shareholders with non-portfolio interests in Coles. Also, a share in Coles does not pass the principal asset test because the market value of Coles' Australian real property is not more than 50% of the total market value of Coles' assets.

118. Therefore, a Coles share will only be 'taxable Australian property' if the foreign resident Coles shareholder has used their Coles share in connection with the carrying on of a business through a permanent establishment in Australia (Subdivision 855-A).

Reclassification of WPP shares

Section 6-5

119. An issue of additional shares on reclassification of the WPP shares would be a bonus issue within the meaning of paragraph 254A(1)(a) of the *Corporations Act 2001*, that is, an issue of shares for which consideration is not payable. The issue of additional shares would result in a re-expression of an eligible shareholder's interest in the share capital of Wesfarmers. Accordingly, the value of any additional shares issued on the reclassification of the WPP shares would not be assessable as ordinary income under subsection 6-5(1) (*Commissioner of Taxation v. McNeil* 2007 ATC 4223).

Subsection 6(1)

120. Subsection 6(1) of the ITAA 1936 defines a dividend to include any distribution made by a company to any of its shareholders, whether in money or other property, and any amount credited by a company to any of its shareholders as shareholders.

121. Although any additional shares issued will constitute 'property' in the hands of the eligible shareholder, the issue will not be a disposition of property in the ordinary meaning of that expression (*Ord Forrest Pty Ltd v. Commissioner of Taxation* (1974) 130 CLR 124). As there is no disposition, there cannot be a distribution of property by Wesfarmers.

122. Further, an issue of additional shares will not involve an amount being credited to an eligible shareholder, or an amount being paid out of profits.

123. Accordingly, the issue of additional shares will not constitute a dividend within the meaning of subsection 6(1) of the ITAA 1936, and the value of any additional shares will not be included in an eligible shareholder's assessable income under subsection 44(1) of the ITAA 1936.

Section 45B

124. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends.

125. The issue of additional shares to eligible shareholders is a provision of capital benefits pursuant to paragraph 45B(5)(a) of the ITAA 1936.

126. For the provision to apply, among other things, paragraph 45B(2)(c) of the ITAA 1936 requires that, having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, entered into the scheme or carried out the scheme or any part of the scheme for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit. A non-exhaustive list of relevant circumstances of the scheme is provided in subsection 45B(8) of the ITAA 1936.

127. The issue of additional shares would result in a re-expression of an eligible shareholder's interest in the share capital of Wesfarmers, and is not attributable to the profits of the company. Having regard to the relevant circumstances surrounding the issue of the additional shares, it cannot be concluded that Coles, Wesfarmers, the eligible shareholders or any other person who entered into or carried out the scheme for the issue of the additional shares did so for the purpose of enabling the eligible shareholders to obtain a tax benefit.

128. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the provision of the additional shares on reclassification of the WPP shares.

Capital gains tax

129. WPP shares are a class of ordinary shares in the share capital of Wesfarmers. The reclassification of a WPP share into a Wesfarmers share involves a variation of the rights that make up a WPP share. The WPP shares are not cancelled or redeemed on reclassification.

130. The reclassification does not involve the ownership of the WPP shares ending for the purposes of section 104-25 nor is it a disposal of the WPP shares for the purposes of section 104-10. Taxation Ruling TR 94/30, at paragraphs 8 and 9, provides that a variation of rights attaching to shares does not result in a full or part disposal of the share.

131. Accordingly, the reclassification of WPP shares into Wesfarmers shares will not give rise to a CGT event for the WPP shareholder.

132. No CGT event will happen to the WPP shareholder if additional Wesfarmers shares are issued as a result of the reclassification of the WPP shares.

133. Subdivision 130-A applies where a company issues other shares (bonus shares) in relation to existing shares in the company. Subdivision 130-A provides special rules about the time of acquisition and the cost base of bonus shares for capital gains tax purposes.

134. Subdivision 130-A will apply to the issue of any additional Wesfarmers shares to WPP shareholders on reclassification.

135. As the additional Wesfarmers shares are not a dividend nor taken to be a dividend, the first element of the cost base (and reduced cost base) of the WPP shares is to be reasonably apportioned over the Wesfarmers shares and any additional Wesfarmers shares (item 1 in the table in subsection 130-20(3)).

136. Any additional Wesfarmers shares issued to WPP shareholders on reclassification of the WPP shares will be taken to have been acquired when the WPP shares were acquired (on the Implementation Date) (item 1 in the table in subsection 130-20(3)).

WPP share dividends

137. The ability to frank a distribution made on the WPP shares depends on whether they are classified as equity interests under Division 974. The distribution will not be frankable if the WPP shares are debt interests.

138. The WPP shares will satisfy the equity test given that the WPP shares will be interests in Wesfarmers as members or stockholders of Wesfarmers (item 1 of subsection 974-75(1)). However, if the WPP shares also satisfy the debt test they will be debt interests, rather than equity interests, as a result of the tie-breaker rule in subsection 974-5(4).

139. The debt test is contained in subsection 974-20(1). The WPP shares will satisfy the debt test if they constitute a 'scheme' which is a financing arrangement for Wesfarmers under which:

- Wesfarmers receives a financial benefit;

- Wesfarmers has an 'effectively non-contingent obligation' to provide a financial benefit to the WPP shareholders; and
- it is substantially more likely than not that the value of the benefit that Wesfarmers provides to the WPP shareholders will at least equal the value of the benefit that Wesfarmers receives from the WPP shareholders (where neither of these values is nil).

140. The arrangement between Wesfarmers and the WPP shareholders in relation to the WPP shares falls within the ambit of a 'scheme', which is broadly defined in subsection 995-1(1) to include 'any arrangement'. Wesfarmers will receive a financial benefit under the arrangement in the form of Coles shares.

141. The payment of dividends on the WPP shares is contingent on the existence of funds legally available for payment of the dividends. Therefore, Wesfarmers will not have an effectively non-contingent obligation to pay dividends.

142. Furthermore, the reclassification of WPP shares as ordinary shares after 4 years (maximum of 8 years if the Lapse Date is extended) will not be a financial benefit because paragraph 974-30(1)(a) provides that the issue of an equity interest in the entity does not constitute the provision of a financial benefit by the entity.

143. The WPP shares will therefore fail the debt test because the only financial benefit that Division 974 will recognise in this arrangement will be the dividend, the payment of which will be contingent on profits. Therefore, the WPP shares will be equity interests for the purposes of Division 974.

144. The WPP share dividends will constitute dividends for the purposes of subsection 6(1) of the ITAA 1936 and frankable distributions for the purposes of section 202-40 to the extent the dividends are sourced from current and retained earnings. The WPP share dividends will be capable of being franked in accordance with section 202-5.

Final dividend

145. The definition of 'dividend' in subsection 6(1) of the ITAA 1936 has the effect that any distribution made by the company to any of its shareholders, whether in money or property, is a dividend except where the distribution is debited against an amount standing to the credit of the share capital account of the company (paragraphs (a) and (d) of the definition). The final dividend was wholly debited to retained earnings, and accordingly shareholders received a dividend of \$0.25 cents per share.

Assessability of the final dividend and tax offset

146. In the case of Australian resident eligible shareholders who directly received the final dividend:

- the final dividend is included in the assessable income of each shareholder under subsection 44(1) of the ITAA 1936; and
- subject to the 'qualified person' rule (see paragraphs 149 to 155 of this Ruling), an amount equal to the amount of the franking credit on the final dividend is included in the assessable income of each shareholder under subsection 207-20(1) (gross-up).

147. Subject to the 'qualified person' rule, these shareholders are entitled to a tax offset under subsection 207-20(2) equal to the amount of the franking credit on the final dividend.

Refundable tax offset

148. The franking credit on the final dividend will be subject to the refundable tax offset rules in Division 67, provided the eligible shareholders are not excluded by subsections 67-25(1A) to (1D).

Qualified person

149. Paragraph 207-145(1)(a) provides that in relation to a franked distribution, an entity that is not a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 is denied a gross-up and a tax offset. Broadly speaking, to be a 'qualified person' in relation to the dividend paid, the shareholder must satisfy the holding period rule having regard to the related payment rule.

150. Broadly, a shareholder will be considered to be under an obligation to make a related payment if the shareholder, or an associate of the shareholder, is under an obligation to make, or makes a payment in respect of the dividend which effectively passes the benefit of the dividend to another person.

151. In the case of the Coles final dividend there is no related payment in respect of a dividend as it cannot be said that a shareholder, or an associate of a shareholder, does anything that has the effect of passing the benefit of the dividend to another person. The dividend was to be paid regardless of whether or not the scheme was implemented, and therefore it had no effect on the total consideration paid by Wesfarmers under the scheme of arrangement to acquire the shares. As the eligible shareholders are not taken, for the purposes of Division 1A of the former Part IIIAA of the ITAA 1936, to be under an obligation to make a related payment in respect of the final dividend, the relevant holding period is therefore the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.

152. Accordingly, the holding period rule requires shareholders to hold the shares, or the interest in shares, on which the dividend is paid at risk for a continuous period of at least 45 days. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk in relation to the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

153. Under former subsection 160APHM(2) of the ITAA 1936, a shareholder is taken to have materially diminished the risks of loss and opportunities for gain with respect to shares or interests in shares if the 'net position' of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares or interest in shares.

154. It is considered that until the record date for the scheme, eligible shareholders will not, by reason of the scheme, have done anything to materially diminish their risks of loss or opportunities for gain in respect of their Coles shares.

155. There are 45 clear days between 1 October 2007 and 16 November 2007. Therefore, an eligible shareholder who acquired shares on or after 2 October 2007 will not satisfy the holding period rule. Shares purchased on or before 1 October 2007 satisfy the holding period rule as long as those shares are held at risk for at least 45 continuous days.

Non-resident shareholders

156. As the final dividend received is fully franked, a non-resident shareholder is not liable to Australian withholding tax on the final dividend (paragraph 128B(3)(ga) of the ITAA 1936).

The anti-avoidance provisions

Section 177EA

157. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares.

158. Specifically, subsection 177EA(3) of the ITAA 1936 provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and

- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

159. If section 177EA of the ITAA 1936 applies the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each dividend paid to the relevant taxpayer or, in the alternative, that no imputation benefit arises in respect of a dividend paid to the relevant taxpayer.

160. Coles is a corporate tax entity. The sale of the ordinary shares in Coles pursuant to the Coles scheme is a scheme for the disposition of membership interests. Coles also paid a frankable distribution which was fully franked and Coles' shareholders will receive imputation benefits as a result of the distribution.

161. Therefore, it is considered that the conditions of paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme (as provided for in subsection 177EA(17) of the ITAA 1936), it would be concluded that, on the part of Coles, its shareholders or any other relevant party, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the scheme.

162. In arriving at a conclusion one must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of diverse matters which taken individually or in conjunction with other matters, listed or not, could indicate the requisite purpose, that is, that the delivery of the imputation benefit is more than an incidental purpose of the scheme.

163. In this case the disposition of the ordinary shares in Coles was made pursuant to the scheme. The scheme is an ordinary commercial transaction. As the entire final dividend is fully franked and paid to all the shareholders, it cannot be argued that Coles has directed the flow of distributions in such a manner as to ensure that imputation benefits are derived by members who derive greater benefit from franking credits, while other members receive lesser or no imputation benefits. There is no intention evidenced in the scheme that the payment of the final Coles dividend was to enable a particular shareholder or class of shareholders (current and future) to obtain imputation benefits.

164. Having regard to the relevant circumstances of the scheme, it cannot be concluded that Coles or the shareholders entered into or carried out the scheme for the purpose of enabling the shareholders to obtain an imputation benefit.

Section 204-30

165. Section 204-30 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

166. If section 204-30 applies the Commissioner has a discretion under subsection 204-30(3) to make a determination in writing:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); and/or
- (b) that no imputation benefit is to arise in respect of any streamed distributions made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

167. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from imputation benefits than other members. The words 'derives a greater benefit from franking credits' (imputation benefits) are defined in subsection 204-30(8) by reference to the ability of the members to fully utilise imputation benefits.

168. All eligible shareholders will receive an imputation benefit as a result of the final dividend; the resident shareholder in the form of a tax offset (paragraph 204-30(6)(a)) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). The resident members will derive a greater benefit from franking credits than the non-resident members. However, as the final dividend was to be fully franked and paid to all the shareholders, it cannot be argued that Coles has directed the flow of distributions in such a manner as to ensure that imputation benefits are derived by members who derive greater benefit from franking credits, while other members receive lesser or no imputation benefits.

169. Having regard to all of the relevant circumstances it is considered that section 204-30 does not apply.

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