


CR 2007/74 - Income tax: capital gains: scrip for scrip roll-over: exchange of units in Investa Brisbane Commercial Trust, Investa Fourth Commercial Trust and Investa Sixth Commercial Trust for units in Investa Diversified Office Fund

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Class Ruling

Income tax: capital gains: scrip for scrip roll-over: exchange of units in Investa Brisbane Commercial Trust, Investa Fourth Commercial Trust and Investa Sixth Commercial Trust for units in Investa Diversified Office Fund

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ⓘ 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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
- Subdivision 124-M of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is the holders of units in Investa Brisbane Commercial Trust (IBCT), Investa Fourth Commercial Trust (I4CT) and Investa Sixth Commercial Trust (I6CT) that:

- (a) are 'residents of Australia' as that term is defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- (b) acquired their respective units in IBCT, I4CT and I6CT after 20 September 1985;
- (c) hold their units in IBCT, I4CT and I6CT on capital account;
- (d) will dispose of their units (that were not subject to the Merger Sale Facility) in IBCT, I4CT and I6CT in exchange for units in Investa Diversified Office Fund (IDOF); and
- (e) are not 'significant stakeholders' or 'common stakeholders' within the meaning of those expressions as used in Subdivision 124-M.

In this Ruling, a person belonging to this class of entities is referred to as a 'Unit Holder'.

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 13 to 19 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.

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Date of effect

8. This Ruling applies from 29 May 2007 to 30 June 2008. However, the 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.

9. 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.

10. 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)).

11. 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.

12. 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

13. The following description is based on information provided by the applicant. The following documents, or relevant parts of them, as the case may be, form part of and are to be read with this description:

- Class Ruling application dated 4 April 2007 from Greenwoods & Freehills Pty Ltd;
- copies of the Constitutions of IDOF, IBCT, I4CT and I6CT;
- copies of the Annual Reports for IDOF, IBCT, I4CT and I6CT for the year ended 30 June 2006;
- copies of the unit holder register for IBCT, I4CT and I6CT as at 30 June 2006;

- correspondence from Greenwoods & Freehills from 17 May 2007 to 14 June 2007;
- IDOF Product Disclosure Statement dated 11 July 2006; and
- Unit Holder Meeting Explanatory Memorandums for IBCT, I4CT and I6CT (all dated 1 May 2007).

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

14. IDOF, IBCT, I4CT and I6CT are all registered managed investment schemes, and their Constitutions comply with the *Corporations Act 2001*.

15. The Scheme that is the subject of this Ruling involves the merger of each of IBCT, I4CT and I6CT with IDOF. This will result in IDOF holding 100% of the units in IBCT, I4CT and I6CT on issue. Each merger will constitute a separate scheme.

16. IDOF, IBCT, I4CT and I6CT will each be 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 subsection 995-1(1) of the ITAA 1997.

17. The Responsible Entity of each of IDOF, IBCT, I4CT and I6CT will implement the Scheme by means of a unit holder approved scheme whereby all the unit holders in IBCT, I4CT and I6CT (other than IDOF) will transfer all their units in exchange for units in IDOF.

18. Under the Scheme:

- each IBCT unit holder is entitled to receive 0.9255 IDOF units for every unit in IBCT;
- each I4CT unit holder is entitled to receive 0.9672 IDOF units for every unit in I4CT; and
- each I6CT unit holder is entitled to receive 1.0738 IDOF units for every unit in I6CT.

19. If a unit holder in IBCT, I4CT or I6CT does not want to participate in the Scheme, the unit holder can take advantage of the Merger Sale Facility and exchange some or all of their units for cash under a predetermined sale price rather than receive units in IDOF. Limits will be placed on the total number of units in each trust that can be sold under the Merger Sale Facility.

Ruling

20. CGT event A1, in section 104-10, will happen when the Unit Holders exchange their units in IBCT, I4CT or I6CT for units in IDOF under the Scheme.

21. The Unit Holders can choose scrip for scrip roll-over under Subdivision 124-M provided:

- (a) the Unit Holders make a capital gain from CGT event A1 happening to their units in IBCT, I4CT or I6CT (paragraph 124-781(3)(b)); and
- (b) any capital gain that may be made upon a future CGT event happening in relation to the units in IDOF that they receive under the Scheme would not be disregarded (except because of a roll-over) (paragraph 124-795(2)(a)).

Commissioner of Taxation

8 August 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

22. CGT event A1 happens when the Unit Holders dispose of their units in IBCT, I4CT or I6CT for units in IDOF under the Scheme or for cash under the Merger Sale Facility (section 104-10).

23. The Unit Holders will make a capital gain when CGT event A1 happens if the capital proceeds from the disposal of the units are more than the cost base of the units. The Unit Holders will make a capital loss if the capital proceeds are less than the reduced cost base of the units (subsection 104-10(4)).

24. The capital proceeds received by the Unit Holders for the disposal of the units in IBCT, I4CT or I6CT will be the market value of the IDOF units acquired under the Scheme and the cash, if any, received under the Merger Sale Facility (subsection 116-20(1)).

Choosing scrip for scrip roll-over

25. Scrip for scrip roll-over enables a Unit Holder to disregard a capital gain made from a unit that is disposed of as part of a takeover or merger if the Unit Holder receives a replacement unit in exchange.

26. If the Unit Holder chooses roll-over, and the only capital proceeds they received were replacement units, the first element of the cost base or reduced cost base of each new unit will be the cost base of the original units at the time of the roll-over.

27. Roll-over will only be available for a Unit Holder if certain conditions are satisfied.

Requirements for scrip for scrip roll-over

28. Subdivision 124-M contains a number of conditions for, and exceptions to the eligibility of, a Unit Holder to choose the scrip for scrip roll-over. Below is an outline of the main conditions and exceptions that are relevant to the circumstances of the Scheme that is the subject of this Ruling.

Units are exchanged for units in another trust

29. Subparagraph 124-781(1)(a)(i) requires an entity (Unit Holder) to exchange a unit in a trust for a unit in another trust.

30. This requirement is satisfied to the extent that a Unit Holder receives units in IDOF in exchange for their units in IBCT, I4CT or I6CT. Roll-over is not available in respect of units for which the Unit Holder receives cash under the Merger Sale Facility.

Entities have fixed entitlements to all of the income and capital of both trusts

31. Paragraph 124-781(1)(b) requires that the Unit Holders have fixed entitlements to all of the income and capital of the original entity (IBCT, I4CT or I6CT) and the acquiring entity (IDOF).

32. It is considered that, for the purposes of paragraph 124-781(1)(b), Unit Holders have fixed entitlements to all of the income and capital of IBCT, I4CT, I6CT and IDOF immediately before, during and immediately after the Scheme that is the subject of this Ruling.

The exchange occurs as part of an arrangement

33. Paragraph 124-781(1)(c) requires that the exchange of units must be in consequence of an arrangement.

34. Under the Scheme, there are three separate arrangements. Each arrangement must also satisfy the following conditions.

(a) 80% or more of trust voting interests

35. Paragraph 124-781(2)(a) requires that the exchange of units results in the acquiring entity (IDOF) becoming the owner of 80% or more of the trust voting interests in the original entity (IBCT, I4CT or I6CT).

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

37. The applicant has stated that prior to the implementation of each arrangement, there will be only one class of units on issue in each of IBCT, I4CT and I6CT. All of these units will be trust voting interests. Hence, the acquisition by IDOF of the units in IBCT, I4CT and I6CT will represent an acquisition of these trust voting interests.

38. As IDOF will acquire 80% or more of the units in each of IBCT, I4CT or I6CT, this requirement will be satisfied in respect of each arrangement.

(b) All owners of trust voting interests participate

39. Paragraph 124-781(2)(b) requires that the arrangement be one in which at least all owners of trust voting interests in the original entity (IBCT, I4CT or I6CT) could participate.

40. This requirement will be satisfied because all of the existing Unit Holders in the original entities are entitled to participate in the respective arrangements.

(c) Participation is on substantially the same terms

41. Paragraph 124-781(2)(c) requires that the arrangement be one in which participation was available on substantially the same terms for all of the owners of interests or units of a particular type in the original entity.

42. This requirement is satisfied because the Scheme provides that all Unit Holders are entitled to participate in the Scheme on the same terms.

Conditions for the roll-over

43. Paragraph 124-781(1)(d) requires that the conditions for roll-over outlined in subsections 124-781(3) and (4) are satisfied. These conditions must be met for each unit for which scrip for scrip roll-over is chosen.

44. The conditions in subsections 124-781(3) and (4) are as follows.

(a) Original interests are post-CGT interests

45. Paragraph 124-781(3)(a) requires that the original interest holder (Unit Holder) acquired their interest on or after 20 September 1985.

46. This requirement is satisfied because IBCT, I4CT and I6CT were settled after 20 September 1985. Hence, the Unit Holders acquired their units after 20 September 1985.

(b) The Unit Holders would otherwise make a capital gain

47. Paragraph 124-781(3)(b) requires that apart from the roll-over, the original interest holder (Unit Holder) would make a capital gain from a CGT event happening in relation to its original interest.

48. As explained in paragraph 23 of this Ruling, a Unit Holder will make a capital gain if the capital proceeds from the disposal of the units in IBCT, I4CT or I6CT are more than the cost base of those units.

49. Therefore, whether this condition is satisfied will depend on the individual circumstances of each Unit Holder.

50. Roll-over is not available if, in respect of a unit, a Unit Holder makes a capital loss.

(c) A Unit Holder can choose scrip for scrip roll-over

51. Paragraph 124-781(3)(c) requires that the original interest holder (Unit Holder) chooses to obtain roll-over, or if section 124-782 applies to the Unit Holder for the Scheme, the Unit Holder and the trustee of the acquiring entity jointly choose to obtain the roll-over.

52. Whether a Unit Holder chooses to obtain roll-over, or if section 124-782 applies, the Unit Holder and Investa Funds Management Ltd as trustee of IDOF jointly choose to obtain roll-over is a question of fact to be determined for each individual Unit Holder.

Further roll-over conditions in certain cases

53. Subsection 124-781(4) provides additional requirements to be satisfied if the original interest holder (Unit Holder) and the trustee of the acquiring entity (IDOF) did not deal with each other at arm's length, and neither the original entity (IBCT, I4CT or I6CT) nor the acquiring entity had at least 300 beneficiaries just before the arrangement started. The additional requirements are that:

- (a) the market value of the Unit Holder's capital proceeds for the disposal of their units in IBCT, I4CT or I6CT must be at least substantially the same as the market value of the units disposed of; and
- (b) the units in IDOF must carry the same kind of rights and obligations as those attached to the original interest (units in IBCT, I4CT or I6CT).

54. Subsection 124-781(4) will not apply if neither IDOF nor IBCT, I4CT or I6CT has at least 300 beneficiaries just before the respective arrangements started.

Exceptions to obtaining scrip for scrip roll-over

55. Paragraph 124-795(2)(a) provides that the roll-over is not available if any capital gain a Unit Holder might make from their replacement interest (a unit in IDOF) would be disregarded (except because of a roll-over).

56. Whether the capital gain arising because of the disposal of a unit in IDOF is disregarded under another provision of the ITAA 1997 is a question of fact to be determined in respect of each Unit Holder.

57. Paragraph 124-795(2)(b) provides that the roll-over is not available if the original interest holder (Unit Holder) and the acquiring entity (IDOF) 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.

58. This exception will not apply as IDOF is not a foreign resident.

Consequences of choosing roll-over

59. Scrip for scrip roll-over under Subdivision 124-M enables a Unit Holder to disregard all or part of a capital gain from a unit that is disposed of as part of a takeover or merger if the Unit Holder receives a replacement unit in exchange.

60. If the only capital proceeds the Unit Holder receives in respect of the disposal are replacement units and the requisite conditions are satisfied, the capital gain is disregarded (subsection 124-785(1)).

61. Under the Scheme, the Unit Holders will dispose of their units, and receive IDOF units in exchange, or they will dispose of their units and receive cash under the Merger Sale Facility.

62. As a consequence, the Unit Holders will only be able to choose scrip for scrip roll-over for those units disposed of in exchange for IDOF units. They will be able to disregard the entire amount of the capital gain made when CGT event A1 happens.

63. Subdivision 124-M will not apply to those units disposed of for cash. The normal consequences under CGT event A1 will arise for those units.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Subject references:

- 80% control test
- acquisition of CGT assets
- arrangement
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- CGT assets
- CGT replacement asset roll-over
- CGT replacement assets
- fixed entitlements
- fixed trust
- foreign resident
- scrip for scrip roll-over
- unit trust
- unitholder

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 95(2)
- ITAA 1997
- ITAA 1997 104-10
- ITAA 1997 104-10(4)

- ITAA 1997 116-20(1)
- ITAA 1997 Subdiv 124-M
- ITAA 1997 124-781(1)(a)(i)
- ITAA 1997 124-781(1)(b)
- ITAA 1997 124-781(1)(c)
- ITAA 1997 124-781(1)(d)
- ITAA 1997 124-781(2)(a)
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- ITAA 1997 124-781(6)
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- ITAA 1997 124-785(1)
- ITAA 1997 124-795(2)(a)
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ATO references

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