


CR 2009/36 - Income tax: capital gains tax: James Hardie Industries NV transformation and re-domicile

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Class Ruling

Income tax: capital gains tax: James Hardie Industries NV transformation and re-domicile

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

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions 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 provision dealt with in this Ruling is section 104-155 of the *Income Tax Assessment Act 1997* (ITAA 1997).¹

Class of entities

3. The class of entities (Australian Shareholders) to which this Ruling applies are entities who:

- (a) are residents of Australia within the meaning of that expression in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);

¹ All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

- (b) owned ordinary shares or CHESS Units of Foreign Securities (CUFS) representing shares in James Hardie Industries NV (JHINV) at the time of the scheme; and
- (c) held their ordinary shares or CUFS on capital account at the time of the scheme.

4. This Ruling does not apply to Australian residents who held their ordinary shares or CUFS on revenue account.

5. In this Ruling, Australian Shareholders who held CUFS representing shares in JHINV at the time of the scheme are taken to be absolutely entitled to the shares covered by the CUFS.

6. In this Ruling, ordinary shares and CUFS are collectively referred to as 'shares'.

Qualifications

7. The Commissioner makes this ruling on the precise scheme identified in this Ruling.

8. 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 28 of this Ruling.

9. 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

11. This Ruling applies from 1 July 2008 to 30 June 2010. The Ruling continues to apply after 30 June 2010 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

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

- the application for class ruling dated 16 February 2009;
- the documents received with the class ruling application dated 16 February 2009;
- subsequent correspondence dated 19 March 2009, 8 April 2009, 24 April 2009 and 28 April 2009; and
- draft Explanatory Memorandum in relation to the scheme.

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

13. JHINV is a public limited liability corporation (Naamlooze Vennotschap (NV)) registered in The Netherlands. JHINV has a primary listing on the Australian Securities Exchange (ASX) and also has a listing in the form of American Depositary Receipts (ADRs) on the New York Stock Exchange (NYSE). JHINV was listed in October 2001, after shareholders voted to accept a recommendation by the board of James Hardie Industries Limited to restructure the company and establish JHINV, a company incorporated in The Netherlands, as the parent company.

Overview of the scheme

14. The scheme that is the subject of this Ruling involves:

- the transformation of JHINV to a European company (Societas Europaea or SE) (Stage 1); and
- transfer of its registered office (referred to in this Ruling as corporate domicile), tax residence and head office from The Netherlands to Ireland (Stage 2).

Stage 1 of the scheme

15. Under Stage 1, JHINV will transform from a public limited liability corporation registered in The Netherlands (NV) to an SE. JHINV will thereafter become a 'Dutch SE', with its corporate domicile, head office and tax residence in The Netherlands.
16. Upon transformation of JHINV to a Dutch SE with its registered office in The Netherlands there will be some minor amendments to the Articles of Association of JHINV to adapt to the rules that apply to a Dutch SE.
17. To complete Stage 1, JHINV will enter into a merger with a newly formed subsidiary, Irish PLC. At the point of merger, Irish PLC will have no assets or liabilities apart from its initial share capital. The result of the merger will be the dissolution of the Irish PLC, with JHINV continuing as the surviving entity transformed to James Hardie Industries S.E. (JHISE), following an amendment to the Articles of Association.
18. The transformation of JHINV to JHISE following the merger and the amendment of the Articles of Association will involve a change of corporate form only, with the entity having the same assets and liabilities both before and after the transformation. JHINV has obtained independent legal advice which confirms that the transformation will not affect the company's continuity as a legal person in The Netherlands.
19. JHINV will need to change details of its registration in The Netherlands to reflect its change of corporate form to JHISE. However, as JHINV (prior to the merger) and JHISE (post merger) are the same legal entity, JHISE continues with the same registration number. Further, JHISE will continue to have the same registration number with the Ministry of Justice.

Stage 2 of the scheme

20. Under Stage 2 of the scheme, JHISE will move its head office and corporate domicile to, and become a tax resident of, Ireland. As part of Stage 2, the registered office and head office of JHISE will move from The Netherlands to Ireland.
21. The conversion of JHISE under Stage 2 will involve a change of corporate domicile only, with the entity having the same assets and liabilities both before and after the conversion. JHINV has obtained independent legal advice which confirms that from an Irish legal perspective, the transfer of registered office to Ireland will not result in a winding up of JHISE and no new legal entity comes into existence in Ireland.
22. The Memorandum and Articles of Association of JHISE will change upon its re-registration in Ireland to take account of the fact that the company will be subject to Irish law.

23. The relocation of JHISE's corporate domicile from The Netherlands to Ireland occurs under Council Regulation (EC) No. 2157/2001 on the Statute for a European Company (SE Regulations) and in accordance with the relevant parts of Dutch and Irish law.

24. The scheme does not involve any further steps.

Other matters

25. Australian Shareholders of JHINV will not receive or be entitled to receive money or other consideration and will not incur any expenditure in relation to the amendment of the Articles of Association of JHINV under Stage 1 and the change to the Memorandum and Articles of Association of JHISE under Stage 2 of the scheme.

26. The shares held by the Australian Shareholders in JHISE after Stage 1 of the scheme will be the same shares that they previously held in JHINV.

27. The shares held by the Australian Shareholders in JHISE after Stage 2 of the scheme will be the same shares that they previously held after Stage 1 of the scheme.

28. JHINV will continue to have a primary listing on the ASX and also a listing in the form of ADRs on the NYSE.

Ruling

29. The variation of the rights attaching to JHINV shares on JHINV's transformation to JHISE in Stage 1 of the scheme will cause CGT event H2 to happen in respect of those shares under section 104-155. However, no Australian Shareholder will make a capital gain or capital loss when CGT event H2 happens.

30. The variation of rights attaching to JHISE shares on the relocation of JHISE's corporate domicile to Ireland in Stage 2 of the scheme will cause CGT event H2 to happen in respect of those shares under section 104-155. However, no Australian Shareholder will make a capital gain or capital loss when CGT event H2 happens.

Commissioner of Taxation

15 July 2009

Appendix 1 – Explanation

① *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Stage 1 of the scheme

31. In Stage 1 of the scheme, JHINV will enter into a merger with a newly formed subsidiary, Irish PLC. The result of the merger will be the dissolution of Irish PLC, with JHINV continuing as the surviving entity transformed to JHISE, with its corporate domicile, head office and tax residence in The Netherlands.

32. CGT event H2 will happen on the transformation of JHINV to JHISE in Stage 1 of the scheme.

Variation of share rights in Stage 1 of the scheme

33. The amendments to JHINV's Articles of Association under Stage 1 of the scheme will result in minor alterations to the rights of Australian Shareholders in relation to their JHINV shares. These amendments will not result in the cancellation or redemption of the shares.

CGT event H2

34. CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base. The variation in the rights attached to the JHINV shares is an act, transaction or event in relation to those shares. Therefore, the variation results in the occurrence of CGT event H2.

35. Under subsection 104-155(3), an Australian Shareholder will make a capital gain if the capital proceeds from the event are more than the incidental costs incurred in relation to the event. An Australian Shareholder will make a capital loss if those capital proceeds are less than the incidental costs.

36. Subsection 116-20(2) provides that the capital proceeds from CGT event H2 happening are the money or other consideration received, or entitled to be received, because of the act, transaction or event. Paragraph 29 of Taxation Ruling TR 95/3 provides that 'consideration' for these purposes can include the benefit of mutual promises flowing to parties even if those promises are not in themselves property.

37. Incidental costs are defined in section 110-35 and include nine forms of expenditure.

38. The Australian Shareholders will not receive or be entitled to receive money or other consideration, including the benefit of any mutual promises in respect of the event happening. Further, the Australian Shareholders will not incur any expenditure relating to the amendment of the Articles of Association of JHINV.

39. Therefore, although CGT event H2 will happen in respect of the JHINV shares, the Australian Shareholders will not make a capital gain or capital loss as a result of the changes to the Articles of Association of JHINV proposed in Stage 1 of the scheme.

40. The acquisition date of the JHINV shares will not be affected when CGT event H2 happens.

Stage 2 of the scheme

41. In Stage 2 of the scheme, JHISE will move its head office and corporate domicile to, and become a tax resident of, Ireland.

42. CGT event H2 will happen on the conversion of JHISE from a Dutch SE to an Irish SE in Stage 2 of the scheme.

Variation of share rights in Stage 2 of the scheme

43. The amendments to the Memorandum and Articles of Association of JHISE upon its re-registration in Ireland will result in changes to the rights of Australian Shareholders in relation to their JHISE shares.

CGT event H2

44. The variation of the rights attached to the JHISE shares is an act, transaction or event in relation to those shares. Accordingly, the variation will result in the occurrence of CGT event H2.

45. The Australian Shareholders will not receive or be entitled to receive money or other consideration, including the benefit of any mutual promises in respect of the event happening. Further, the Australian Shareholders will not incur any expenditure relating to changes made to the Memorandum and Articles of Association of JHISE.

46. Therefore, although CGT event H2 will happen in respect of the JHISE shares, the Australian Shareholders will not make a capital gain or capital loss in respect of the variation of the share rights proposed in Stage 2 of the scheme.

47. The acquisition date of the JHISE shares will not be affected when CGT event H2 happens.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 95/3; TR 2006/10

Subject references:

- capital gains tax

Legislative references:

- ITAA 1936 6(1)
 - ITAA 1997
 - ITAA 1997 104-155
 - ITAA 1997 104-155(3)
 - ITAA 1997 110-35
 - ITAA 1997 116-20(2)
 - TAA 1953
 - Copyright Act 1968
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ATO references

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