


CR 2014/9 - Income tax: Mirvac Group - capital reallocation

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Class Ruling

Income tax: Mirvac Group – capital reallocation

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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 provisions

2. The relevant provisions dealt with in this Ruling are:
- Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 104-70 of the ITAA 1997;
 - section 110-25 of the ITAA 1997;
 - section 110-55 of the ITAA 1997;
 - Division 725 of the ITAA 1997;
 - Division 727 of the ITAA 1997; and
 - section 855-10 of the ITAA 1997.

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

Class of entities

3. The class of entities to which this Ruling applies is the holders of Mirvac Group stapled securities (each stapled security consisting of a share in Mirvac Limited (Mirvac) stapled to a unit in Mirvac Property Trust (MPT)) who:

- (a) are registered on the Mirvac Group securities register on the Record Date of 17 December 2013;
- (b) do not hold their units in MPT and shares in Mirvac as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) – that is, they hold their units in MPT and shares in Mirvac on capital account;
- (c) participate in the capital reallocation (Capital Reallocation) announced on 5 December 2013 and described in the Scheme part of this Ruling; and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their units or shares.

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

In this Ruling, an entity belonging to this class of entities is referred to as a Securityholder.

Qualifications

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

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 22 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

Date of effect

7. This Ruling applies from 1 July 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

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

- Class Ruling application dated 21 August 2013, including Appendices A to C as listed below:
 - (a) Appendix A – Capital Reallocation Proposal flow chart;
 - (b) Appendix B – MPT Supplemental Deed dated 5 December 2013 and Mirvac Constitution as amended dated 5 December 2013;
 - (c) Appendix C – Mirvac Group interim results for the half year ended 31 December 2012;
- Draft resolutions entitled 'Constitutional amendments relating to capital reallocation' sent by the applicant via email dated 11 September 2013; and
- Mirvac announcement dated 5 December 2013.

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

Mirvac Group

9. Mirvac Group is an Australian property group specialising in owning, managing and developing office, industrial and retail properties, primarily in Australia.

10. Mirvac Group consists of Mirvac and MPT and their controlled entities. Mirvac Funds Limited (MPT RE) is the responsible entity of MPT.

11. The Mirvac Group stapled security trades on the Australian Securities Exchange (ASX) as a stapled security and has been listed since 16 June 1999.

The Capital Reallocation

12. The Mirvac Group considers that the Capital Reallocation will result in a balance sheet of the Group that provides a more desirable debt/equity mix for sustainable long term growth and, if any future capital raisings are undertaken, equity will be more appropriately allocated between MPT and ML.

13. At the Annual General and General Meetings (the Meetings) of Mirvac Group, held on 14 November 2013, securityholders approved a proposal to reallocate up to \$500 million of capital during the year ending 30 June 2014. Pursuant to this approval, the Mirvac Group undertook a Capital Reallocation on 18 December 2013 which consisted of:

- a distribution of trust capital by MPT to all Securityholders of \$0.08186 per unit (MPT Capital Reduction Amount); and
- the trust capital being compulsorily applied on behalf of each Securityholder as a further capital contribution in respect of existing shares in Mirvac, as to \$0.08186 per share (Mirvac Contribution Amount).

14. Currently there are 3,664,938,678 MPT units and 3,664,938,678 Mirvac shares on issue. Consequently, the total MPT Capital Reduction Amounts and the total Mirvac Contribution Amounts are approximately \$300 million each.

15. The MPT Capital Reduction Amount will be debited to the contributed equity of MPT.

16. MPT RE will resolve that the distribution of the MPT Capital Reduction Amount be a distribution of trust capital.

17. The Mirvac Contribution Amount is to be contributed in respect of an existing share in Mirvac. No new shares will be issued by Mirvac under the Capital Reallocation.

18. The Mirvac Contribution Amount will be credited to Share Capital in Mirvac's accounts.

19. Following the approval of securityholders at the Meetings, the constitutions of both MPT and Mirvac have been amended to facilitate the Capital Reallocation as follows:

- the rights attaching to each share in Mirvac have been amended so that each securityholder's liability in respect of their share in Mirvac will be increased by the amount of the Mirvac Contribution Amount (Mirvac Share Liability); and
- the MPT constitution has been amended to enable MPT RE to be irrevocably appointed as agent and attorney for each securityholder for the purpose of consenting to the Mirvac Share Liability, and to apply the MPT Capital Reduction Amount, on behalf of each holder, as the Mirvac Contribution Amount in full satisfaction of the Mirvac Share Liability.

20. The amendments to the respective constitutions did not take effect until, amongst other things, the Mirvac Group made an announcement to the ASX on 5 December 2013 that the Capital Reallocation was implemented on 18 December 2013.

21. In respect of Mirvac no entity, or no entity and its associates between them, controls Mirvac or can exercise or can control the exercise of, at least 40% of the voting power in Mirvac or has the right to receive at least 40% of any dividends, or distribution of capital as shareholders of Mirvac. Further, no securityholder has de facto control over Mirvac.

22. In respect of MPT no entity, or no entity and its associates between them controls or, has the right to receive at least 40% of any distribution of trust income, or trust capital as unitholders of MPT. Further, no securityholder has de facto control over MPT.

Ruling

Non-assessable payment

23. The MPT distribution of trust capital of \$0.08186 per unit will not be included in a Securityholder's assessable income under section 6-5 or pursuant to Division 6 of Part III of the ITAA 1936.

CGT event E4

24. CGT event E4 happens in respect of each MPT unit when MPT pays \$0.08186 per unit to a Securityholder (section 104-70). For the purposes of section 104-70, the entire amount of \$0.08186 per MPT unit is a non-assessable part.

Capital gain

25. A Securityholder will make a capital gain if the non-assessable amount of \$0.08186 per MPT unit exceeds the cost base of the unit (subsection 104-70(4)).

Cost base reduction

26. Where a Securityholder makes a capital gain when CGT event E4 happens, the cost base and reduced cost base of the MPT unit will be reduced to nil (subsection 104-70(5)).

27. If the non-assessable amount of \$0.08186 per MPT unit is less than or equal to the cost base of the MPT unit, the cost base and reduced cost base of the MPT unit are reduced by that amount (subsection 104-70(6)).

Foreign resident Securityholders

28. A foreign resident Securityholder who is paid the non-assessable amount of \$0.08186 per MPT unit disregards any capital gain made from CGT event E4 if their MPT unit does not constitute 'taxable Australian property' (section 855-10).

Capital contribution and cost base

29. No CGT event will happen to a Securityholder as a result of the variation of the terms of each Mirvac share to increase the Securityholder's liability to contribute capital.

30. The fourth element of the cost base and reduced cost base of a Mirvac share will increase by \$0.08186 per share, which is the further share capital contribution in respect of each existing share in Mirvac (subsections 110-25(5) and 110-55(2)).

Value shifting

31. There will be no consequences for a Securityholder under Divisions 725 and 727.

Commissioner of Taxation

22 January 2014

Appendix 1 – Explanation

ⓘ *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.*

Non-assessable payment

32. Subsection 6-5(1) provides that a taxpayer's assessable income includes income according to ordinary concepts (ordinary income). In *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514; (1966) 10 AITR 367; (1966) 14 ATD 286, Windeyer J stated at CLR 526; AITR 375; ATD 293 that:

Whether or not a particular receipt is income depends upon its quality in the hands of the recipient.

33. The MPT distribution of trust capital of \$0.08186 per unit will be a distribution of trust capital for the year ended 30 June 2014 (being a payment of corpus) and does not have the quality of income in the hands of the Securityholders and is not ordinary income under section 6-5.

34. On the basis that MPT RE will resolve that the distribution of the MPT Capital Reduction Amount will be a distribution of trust capital for the year ended 30 June 2014, the receipt of that distribution will not result in a Securityholder being presently entitled to a share of the income of MPT, and no amount will be included in that Securityholder's assessable income pursuant to Division 6 of Part III of the ITAA 1936.

CGT event E4

35. Under section 104-70, CGT event E4 happens if the trustee of a trust makes a payment to a unitholder in respect of their unit in the trust and some or all of the payment is not included in the unitholder's assessable income (non-assessable payment).

36. CGT event E4 happens in respect of each MPT unit when MPT pays \$0.08186 per unit to a Securityholder (section 104-70). For the purposes of section 104-70, the entire amount of \$0.08186 per MPT unit is a non-assessable part.

Capital gain

37. If CGT event E4 happens during an income year, a unitholder will make a capital gain if the total value of the non-assessable payments made by the trustee during the income year in respect of their unit exceeds its cost base (subsection 104-70(4)). A unitholder cannot make a capital loss when CGT event E4 happens.

38. A Securityholder will make a capital gain if the non-assessable amount of \$0.08186 exceeds the cost base of the unit (subsection 104-70(4)).

Cost base reduction

39. When a unitholder makes a capital gain from CGT event E4 happening, the cost base and reduced cost base of the unit are reduced to nil (subsection 104-70(5)).

40. However, if the sum of the non-assessable payments is less than or equal to the cost base of the unit, the cost base and reduced cost base of the unit are reduced by that amount (subsection 104-70(6)).

41. Where the Securityholder makes a capital gain, the cost base and reduced cost base of their MPT unit is reduced to nil (subsection 104-70(5)).

42. If the non-assessable amount of \$0.08186 per MPT unit is less than or equal to the cost base of the unit, the cost base and reduced cost base of the MPT unit is reduced by that amount (subsection 104-70(6)).

Foreign resident Securityholders

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

44. The term 'taxable Australian property' is defined in the table in section 855-15. The table sets out these five categories of CGT assets:

Item 1	taxable Australian real property;
Item 2	an indirect Australian real property interest not covered by item 5;
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by item 1, 2, or 5;
Item 4	an option or right to acquire a CGT asset covered by item 1, 2 or 3; and
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident).

45. However, a foreign resident, or the trustee of a foreign trust for CGT purposes, just before CGT event E4 happens, cannot disregard under subsection 855-10(1) a capital gain from CGT event E4 happening if:

- their MPT unit was an 'indirect Australian real property interest' (item 2 of the table in section 855-15);

- their MPT unit had been used at any time by the foreign resident in carrying on a business through a permanent establishment in Australia (item 3 of the table in section 855-15); or
- their MPT unit was covered by subsection 104-165(3) (item 5 of the table in section 855-15).

46. A foreign resident Securityholder will have an 'indirect Australian real property interest' if it holds a membership interest in MPT, and the interest passes the 'non-portfolio interest test' (section 960-195) and the 'principal asset test' (section 855-30).

Capital contribution and cost base

47. The MPT distribution of trust capital of \$0.08186 per unit will be applied to each Mirvac share as a contribution of share capital. This contribution of share capital represents capital expenditure incurred by a Securityholder for the purpose of increasing or preserving the value of their Mirvac share.

48. The fourth element of the cost base and reduced cost base of each Mirvac share includes the amount of the share capital contribution that is referable to that share (subsection 110-25(5) and 110-55(2)).

Value shifting

49. There is a direct value shift under a scheme involving equity or loan interests in an entity where there is a decrease in the market value of some equity or loan interest and an increase or issue at a discount of other equity or loan interests (section 725-145).

50. There is an indirect value shift where there is an unequal exchange of economic benefits between two entities – the losing entity and gaining entity (subsection 727-150(3)).

51. There can only be consequences for a direct value shift if there is any entity that controls the target entity for value shifting purposes at some time during the scheme period as defined in section 725-55 (paragraph 725-50(b)). Section 727-355 sets out the relevant tests as to when an entity controls a company for value shifting purposes. Section 727-360 sets out the relevant tests for whether an entity controls a fixed trust for value shifting purposes.

52. There can only be consequences for an indirect value shift if the entities between which the value is shifted (the losing entity and the gaining entity) satisfy an ultimate controller test and/or a common ownership nexus test at some time during the indirect value shift period defined in subsection 727-150(7) (paragraph 727-100(c) and sections 727-105 and 727-110).

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53. On the basis of the information provided, there was no entity that controlled Mirvac or MPT for value shifting purposes or that satisfied, together with Mirvac or MPT, the ultimate controller test and/or the common ownership nexus test as described above. As a result, there are no consequences under Divisions 725 and 727 for any direct value shift or indirect value shift that occurs under the Capital Reallocation.

Appendix 2 – Detailed contents list

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

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References

<i>Previous draft:</i>	- ITAA 1997 104-165(3)
Not previously issued as a draft	- ITAA 1997 110-25(5)
	- ITAA 1997 110-55(2)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 Div 725
TR 2006/10	- ITAA 1997 725-50(b)
	- ITAA 1997 725-55
<i>Subject references:</i>	- ITAA 1997 725-145
- capital gains	- ITAA 1997 Div 727
- capital gains tax	- ITAA 1997 727-100(c)
- CGT assets	- ITAA 1997 727-105
- CGT cost base	- ITAA 1997 727-110
- CGT events	- ITAA 1997 727-150(3)
- CGT events E1-E9 – trusts	- ITAA 1997 727-150(7)
- CGT reduced cost base	- ITAA 1997 727-355
- trusts	- ITAA 1997 727-360
- value shifting – entity interests	- ITAA 1997 855-10
direct value shifting rules	- ITAA 1997 855-10(1)
- value shifting – entity interests	- ITAA 1997 855-15
indirect value shifting rules	- ITAA 1997 855-30
-	- ITAA 1997 960-195
	- TAA 1953
<i>Legislative references:</i>	- Copyright Act 1968
- ITAA 1936 Div 6 of Pt III	
- ITAA 1997 6-5	
- ITAA 1997 6-5(1)	
- ITAA 1997 104-70	
- ITAA 1997 104-70(4)	
- ITAA 1997 104-70(5)	
- ITAA 1997 104-70(6)	
	<i>Case references:</i>
	- Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514; (1966) 10 AITR 367; (1966) 14 ATD 286

ATO references

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