


CR 2016/30 - Income tax: scrip for scrip roll-over - acquisition of Recall Holdings Limited by Iron Mountain Incorporated

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Class Ruling

Income tax: scrip for scrip roll-over – acquisition of Recall Holdings Limited by Iron Mountain Incorporated

Contents	Para
LEGALLY BINDING SECTION	
What this Ruling is about	1
Date of effect	7
Scheme	8
Ruling	29
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	46
Appendix 2:	
<i>Detailed contents list</i>	51

1 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 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 102-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 102-10 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
- Subdivision 115-A of the ITAA 1997
- section 116-20 of the ITAA 1997, and
- Subdivision 124-M of the ITAA 1997.

All legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies are the holders of ordinary shares in Recall Holdings Limited (Recall) who:

- participated in the scheme that is the subject of this Ruling
- are a 'resident of Australia' as that term is defined in subsection 6(1) of the *Income Tax Assessment Act 1936* and are not a 'temporary resident' as that term is defined in subsection 995-1(1) of the ITAA 1997
- held their Recall shares on the Record Date of the scheme (27 April 2016)
- did not hold their Recall shares as revenue assets (as defined in section 977-50) nor as trading stock (as defined in subsection 995-1(1)) – that is, they held their Recall shares broadly on capital account, and
- are not subject to the taxation of financial arrangements (TOFA) rules in Division 230 in relation to gains and losses on their Recall shares.

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

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 28 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 2015 to 30 June 2016. The Ruling continues to apply after 30 June 2016 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 including:

- final application for Class Ruling dated 26 April 2016
- Scheme Implementation Deed between Iron Mountain Incorporated and Recall dated 8 June 2015
- Scheme Booklet dated 23 October 2015, and
- Supplementary Scheme Booklet dated 1 April 2016.

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

Recall

9. Recall is an Australian resident company for income tax purposes. Recall was demerged from another company to become an independent company in December 2013 (see Class Ruling CR 2014/12).

10. At the date of the Scheme Booklet, Recall had the following securities on issue:

- 314,093,803 Recall Shares quoted on the ASX
- 5,080,618 Recall Performance Rights, which on vesting require the issue of Recall Shares, and
- 1,695,607 Recall Retention Share Rights, which on vesting, require the issue of Recall Shares.

11. Recall took such action as was necessary to ensure that any Recall Performance Rights and Recall Retention Rights which had not vested, did vest and convert into Recall Shares prior to the Record Date.

12. As at the Record Date of 27 April 2016:

- Recall had 323,036,238 fully paid ordinary shares on issue.

- Each ordinary share carried the same rights to vote, receive dividends and receive capital distributions.
- Recall did not have any other class of shares on issue, nor had it issued any options over its shares.
- Recall's ordinary shares were quoted on the Australian Securities Exchange (ASX).

Iron Mountain

13. Iron Mountain Incorporated (Iron Mountain) is a company which is headquartered in Boston, Massachusetts, United States of America and is incorporated in Delaware, US. As at the Record Date, Iron Mountain was listed on the New York Stock Exchange (NYSE) and traded under the NYSE symbol 'IRM'.

Iron Mountain subsidiary

14. Iron Mountain Acquisition Holdings Pty Limited (ACN 608 590 521) (Iron Mountain Sub) is a company incorporated in Australia that is a wholly owned Australian resident subsidiary of Iron Mountain. It was incorporated on 6 October 2015 to make the offer under the scheme.

Disposal of shares in Recall

The scheme of arrangement

15. On 8 June 2015, Iron Mountain and Recall entered into a binding Scheme Implementation Deed under which, a company that was to be subsequently incorporated – Iron Mountain Sub (see paragraph 14) and a member of the wholly-owned group of which Iron Mountain is the ultimate holding company, would acquire all of the shares in Recall by way of a scheme of arrangement under Part 5.1 of the *Corporations Act 2001*.

16. On 19 November 2015, a special meeting of Iron Mountain shareholders was held and a resolution was passed by the requisite majority of Iron Mountain shareholders (as required under the NYSE listed company manual) approving the issue of the new Iron Mountain shares in connection with the proposed scheme of arrangement.

17. In each of the United Kingdom, the United States of America, Canada and Australia, Iron Mountain has applied for clearance from the relevant regulator responsible for competition or anti-trust laws. We understand that in order to obtain regulatory clearances, Iron Mountain has or may have to divest assets in each of those jurisdictions.

18. On 19 April 2016, a meeting of Recall shareholders was held and a resolution was passed by the requisite majority of Recall shareholders (as required by subsections 411(1) and (4) of the

Corporations Act 2001) approving the proposed scheme of arrangement. The scheme of arrangement was subsequently approved by order of the Federal Court of Australia on 21 April 2016.

19. The court orders were filed with Australian Securities and Investments Commission (ASIC) on 21 April 2016 upon which the Scheme of Arrangement became effective and binding on all of the Recall Shareholders and Recall.

20. On 2 May 2016, the scheme of arrangement was implemented resulting in the transfer of all of the shares in Recall to Iron Mountain Sub (the Implementation Date). As a result, Recall became an indirectly wholly-owned subsidiary of Iron Mountain.

Scheme Consideration

21. Iron Mountain established a secondary listing on the ASX to allow Recall shareholders to trade any Iron Mountain shares they received as consideration for their Recall shares on the ASX in the form of CHESS Depository Interests (CDIs).

22. CDIs are units of beneficial ownership in securities. In this case, each CDI represents an underlying Iron Mountain share. The legal title to the Iron Mountain shares is held by CHESS Depository Nominees Pty Ltd (Nominee). Nominee will hold the Iron Mountain shares on trust for the benefit of the Recall shareholders who receive CDIs. A CDI is a 'Chess Unit of Foreign Security' for the purposes of subsection 124-780(6).

23. In consideration for the transfer of their Recall shares to Iron Mountain Sub, Recall shareholders (other than Ineligible Foreign Shareholders) who held Recall shares on the Record Date of 27 April 2016 could receive one of the following in exchange:

- (a) where the Recall shareholder did not make a valid Cash Election, the combination of:
 - 1) the Australian dollar equivalent of US\$0.50 in cash for each Recall share, and
 - 2) (i) where the address of the Recall shareholder on the Recall Share Register is within Australia – CDIs listed on the ASX representing 0.1722 of a new Iron Mountain share for each Recall share, or
 - (ii) where the address of the Recall shareholder on the Recall Share Register is outside Australia – 0.1722 of a new Iron Mountain share for each Recall share,

or

- (b) where the Recall shareholder made a valid Cash Election, the combination of:
- 1) the Australian dollar equivalent of US\$0.50 in cash for each Recall share, and
 - 2) subject to scale back, A\$8.50 (less the Australian dollar equivalent of US\$0.50) in cash for each Recall share.

24. Recall shareholders can request to receive Iron Mountain shares instead of CDIs by contacting the Recall share registry.

25. Under the scale back mechanism set out in clause 4.4 of the Scheme Implementation Deed, the total amount of cash consideration to be paid pursuant to the Cash Election was subject to a cap of A\$225 million. Depending on the factors set out in clause 4.4 of the Scheme Implementation Deed, a Recall shareholder that made a valid Cash Election could end up receiving in exchange for their Recall shares (in addition to the Australian dollar equivalent of US\$0.50 in cash for each Recall share) either (i) a cash amount only, or (ii) a certain combination of cash and new Iron Mountain shares or CDIs.

26. The 'Australian dollar equivalent' of US\$0.50 was defined in paragraph 1.2(k) of the Scheme Implementation Deed to be determined by reference to a published exchange rate on certain dates. This equated to A\$0.6485 on the Record Date.

Ineligible Foreign Shareholders

27. New Iron Mountain shares that would otherwise be issued to Recall shareholders (Ineligible Foreign Shareholders) in jurisdictions where it is not lawful, or unduly onerous to comply with local securities law in relation to the issue of those shares, will be issued to a nominee company as Sale Agent which will, within 20 business days after the Implementation Date, sell those shares on-market and remit the sale proceeds to Iron Mountain as agent for it to pay to those shareholders.

Other matters

28. This Ruling is made on the following basis:
- Recall shareholders and Iron Mountain Sub dealt with each other at arm's length (for the purposes of subsection 124-780(4)).
 - Recall and Iron Mountain did not have a 'significant stakeholder' or 'common stakeholder' in relation to the scheme (within the meaning of those expressions in section 124-783).

- All of the Recall shareholders were offered the opportunity to participate in the scheme on the same terms.
- Iron Mountain (being the replacement entity as defined in subparagraph 124-780(3)(c)(ii)) will not make a choice under subsection 124-795(4).
- No member of the wholly-owned group of which Iron Mountain is the ultimate holding company issued equity (other than the new Iron Mountain shares or CDIs), or owes new debt, under the arrangement that is the subject of this Ruling, to an entity that is not a member of the wholly-owned group, in relation to the issuing of the new Iron Mountain shares or CDIs (for the purposes of paragraph 124-780(3)(f)).

Ruling

CGT event A1

29. CGT event A1 happened when Recall shareholders disposed of their Recall shares to Iron Mountain Sub (section 104-10).

30. The time of CGT event A1 was on the Implementation Date (2 May 2016) (paragraph 104-10(3)(b)).

31. A Recall shareholder made a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a Recall share exceeded the cost base of that share. The capital gain is the amount of the excess (subsection 104-10(4)).

32. A Recall shareholder made a capital loss from CGT event A1 happening if the capital proceeds from the disposal of a Recall share were less than the reduced cost base of that share. The capital loss is the amount of the difference (subsection 104-10(4)).

33. The capital proceeds from CGT event A1 happening to a Recall share is the money received or entitled to be received, and the market value (in Australian Dollars) of any new Iron Mountain shares or CDIs received or entitled to be received, in respect of the disposal of that Recall share. The market value of any new Iron Mountain shares or CDIs received is worked out as at the time of CGT event A1, which is on the Implementation Date (2 May 2016) (subsection 116-20(1)).

Availability of partial scrip for scrip roll-over if a capital gain is made

34. Subject to the qualification in the following paragraph, a Recall shareholder who made a capital gain from the disposal of their Recall shares to Iron Mountain Sub may choose to obtain partial scrip for scrip roll-over for that part of the capital gain that is referable only to

the receipt of the new Iron Mountain shares or CDIs. The part of the capital gain that is referable to the receipt of cash cannot be the subject of a roll-over (sections 124-780, 124-785 and 124-790).

35. Scrip for scrip roll-over cannot be chosen if any capital gain a Recall shareholder might subsequently make from their replacement Iron Mountain shares or CDIs would be disregarded on a subsequent CGT event, except because of a roll-over (paragraph 124-795(2)(a)).

36. A Recall shareholder who made a valid Cash Election and received only cash proceeds and no Iron Mountain shares or CDIs cannot choose to obtain scrip for scrip roll-over (subparagraph 124-780(1)(a)(i)).

Consequences if scrip for scrip roll-over is chosen

Capital gain is partially disregarded

37. If a Recall shareholder chooses scrip for scrip roll-over, that part of the capital gain that is referable to the receipt of new Iron Mountain shares or CDIs is disregarded (subsections 124-785(1) and 124-790(1)). Any part of the capital gain that is referable to the receipt of cash is not disregarded because it is ineligible proceeds for which roll-over is not available (subsection 124-790(1)).

Acquisition date of the new Iron Mountain shares or CDIs

38. If a Recall shareholder chooses scrip for scrip roll-over, the acquisition date of the new Iron Mountain shares or CDIs for the purposes of making a discount capital gain is the date when they acquired the Recall shares that were exchanged for the new Iron Mountain shares or CDIs (item 2 of the table in subsection 115-30(1)).

Cost base and reduced cost base of new Iron Mountain shares or CDIs received

39. If a Recall shareholder chooses scrip for scrip roll-over, the first element of the cost base and reduced cost base of a replacement new Iron Mountain share or CDI received (in exchange for their Recall shares) is worked out by reasonably attributing to it the cost base and reduced cost base (respectively) of the Recall shares for which it was exchanged and for which the roll-over was obtained (subsections 124-785(2) and 124-785(4)). The cost base and reduced cost base of the Recall share exchanged by a shareholder is reduced by so much of it that is attributable to the receipt of cash (subsection 124-785(3)).

Consequences if scrip for scrip roll-over is not chosen, or cannot be chosen***Capital gain is not disregarded***

40. A Recall shareholder who does not choose roll-over, or cannot choose roll-over, must take into account any capital gain or capital loss from CGT event A1 happening on the disposal of their Recall shares in working out their net capital gain or net capital loss for the income year in which CGT event A1 happens (sections 102-5 and 102-10).

41. A Recall shareholder who makes a capital gain where roll-over is not chosen, or cannot be chosen, can treat the capital gain as a 'discount capital gain' provided that the conditions of Subdivision 115-A are met. In particular, the Recall shares must have been acquired, or taken to have been acquired, by the shareholder at least 12 months before the Implementation Date.

Acquisition date of the new Iron Mountain shares or CDIs

42. A Recall shareholder who does not choose roll-over, or cannot choose roll-over, will acquire their new Iron Mountain shares or CDIs on the Implementation Date (item 2 of the table in section 109-10).

Cost base and reduced cost base of new Iron Mountain shares or CDIs received

43. If a Recall shareholder does not choose roll-over, or cannot choose roll-over, the first element of the cost base and reduced cost base of a replacement new Iron Mountain share or CDI received is equal to the market value of the Recall shares given in respect of acquiring the new Iron Mountain share or CDI (subsections 110-25(2) and 110-55(2)). This is the portion of the market value of the total Recall shares that is not given in exchange for the cash consideration. The market value of the Recall shares given is worked out as at the time of acquisition of the new Iron Mountain share or CDI on the Implementation Date. The balance of the market value of the Recall shares, being property given in respect of receiving cash, is not included (subsection 112-30(1)).

Foreign currency exchange conversion calculations

44. There should be no foreign currency exchange calculation required in determining the A\$ capital proceeds received for:

- cash which is received in Australian currency, and
- Iron Mountain CDIs which have an Australian dollar value as a result of their ASX listing.

45. The value of Iron Mountain shares will be denominated in USD and will need to be converted into Australian dollars where a Recall shareholder does not choose roll-over, or cannot choose roll-over. This will be based on the foreign exchange rate prevailing on the Implementation Date.

Commissioner of Taxation

18 May 2016

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.*

Availability of scrip for scrip roll-over if a capital gain is made

46. The tax consequences that arise concerning the scheme that is the subject of this Ruling are outlined in the Ruling part of this document.

47. The main tax consequence that is the subject of this Ruling is the availability of scrip for scrip roll-over under Subdivision 124-M. The roll-over enables a shareholder to disregard a capital gain from a share that is disposed of if the shareholder receives a replacement share in exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

48. Subdivision 124-M contains a number of conditions for, and exceptions to a shareholder being eligible to choose scrip for scrip roll-over. The main requirements that are relevant to the scheme that is the subject of this Ruling are:

- (a) an entity exchanges shares in a company for shares in another company
- (b) the exchange is in consequence of a single arrangement
- (c) conditions for the roll-over are satisfied
- (d) further conditions, if applicable, are satisfied, and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

49. The scheme that is the subject of this Ruling satisfies the requirements for a partial roll-over under Subdivision 124-M.

50. This Ruling has taken into account the amendments made to Subdivision 124-M by the *Tax and Superannuation Laws Amendment (2015 Measures No. 4) Act 2015* which received Royal Assent on 13 October 2015. Schedule 1 to the Act applies to CGT events happening after 7:30pm (by legal time in the Australian Capital Territory) on 8 May 2012.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	7
Scheme	8
Recall	9
Iron Mountain	13
Iron Mountain subsidiary	14
Disposal of shares in Recall	15
The scheme of arrangement	15
Scheme Consideration	21
Ineligible Foreign Shareholders	27
Other matters	28
Ruling	29
CGT event A1	29
Availability of partial scrip for scrip roll-over if a capital gain is made	34
Consequences if scrip for scrip roll-over is chosen	37
Capital gain is partially disregarded	37
Acquisition date of the new Iron Mountain shares of CDIs	38
Cost base and reduced cost base of new Iron Mountain shares or CDIs received	39
Consequences if scrip for scrip roll-over is not chosen, or cannot be chosen	40
Capital gain is not disregarded	40
Acquisition date of the new Iron Mountain shares of CDIs	42
Cost base and reduced cost base of new Iron Mountain shares or CDIs received	43
Foreign currency exchange conversion calculations	44
Appendix 1 – Explanation	46
Availability of scrip for scrip roll-over if a capital gain is made	46
Appendix 2 – Detailed contents list	51

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

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- ITAA 1997 102-5
- ITAA 1997 102-10
- ITAA 1997 104-10
- ITAA 1997 104-10(3)(b)
- ITAA 1997 104-10(4)
- ITAA 1997 109-10
- ITAA 1997 109-50
- ITAA 1997 109-55
- ITAA 1997 110-25
- ITAA 1997 110-25(2)
- ITAA 1997 110-55(2)
- ITAA 1997 112-30(1)
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- ITAA 1997 Subdiv115-C
- ITAA 1997 115-30(1)
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- ITAA 1997 124-780
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- ITAA 1997 124-780(3)(c)
- ITAA 1997 124-780(3)(C)(ii)
- ITAA 1997 124-780(3)(d)
- ITAA 1997 124-780(3)(e)
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- ITAA 1997 124-780(4)
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- ITAA 1997 124-782
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- ITAA 1997 124-785(2)
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- ITAA 1997 124-795
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- ITAA 1997 124-795(2)(b)
- ITAA 1997 124-795(3)
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- ITAA 1997 977-50
- ITAA 1997 995-1(1)
- Corporations Act 2001 411(1)
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- Corporations Act 2001 Pt 5.1

ATO references

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