


CR 2010/22 - Income tax: scrip for scrip roll-over: acquisition of units in Mirvac Real Estate Investment Trust by Mirvac Property Trust

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Class Ruling

Income tax: scrip for scrip roll-over: acquisition of units in Mirvac Real Estate Investment Trust by Mirvac Property Trust

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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 provisions

2. The relevant provisions dealt with in this Ruling are:

- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 108-5 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;
- section 112-30 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 116-20 of the ITAA 1997;

- section 116-40 of the 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 unit holders in the Mirvac Real Estate Investment Trust (MREIT) who:

- (a) disposed of their MREIT units to Mirvac Funds Limited (MFL) as the responsible entity of the Mirvac Property Trust (MPT) in exchange for cash and/or Mirvac Group (MGR) stapled securities (consisting of units in MPT and shares in Mirvac Limited (ML));
- (b) held their MREIT units on capital account at the time of disposal; and
- (c) were 'residents of Australia' as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* at the time of disposal.

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 9 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.

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Date of effect

8. This Ruling applies from 1 July 2009 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

9. 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:

- (a) Class Ruling application dated 27 October 2009;
- (b) MPT Constitution dated 22 October 2008 incorporating all amendments made since MPT was established;
- (c) Supplemental Deed Poll to the MREIT Constitution – unsigned execution copy;
- (d) Merger Implementation Deed – unsigned execution copy;
- (e) Explanatory Memorandum to the scheme;
- (f) correspondence between PricewaterhouseCoopers and the Australian Taxation Office (ATO) dated 27 November 2009, 19 January 2010 and 15 February 2010 in relation to the Class Ruling application; and
- (g) Australian Securities Exchange (ASX) announcements by Mirvac REIT Management Limited (MRML) as responsible entity of MREIT on 12 October 2009, 18 November 2009, 25 November 2009 and 7 December 2009.

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

Overview

10. The scheme that is the subject of this Ruling involves the acquisition of all the units in MREIT by MFL as the responsible entity of MPT (the Scheme).

Relevant entities

MREIT

11. MREIT was at the time of the Scheme, a resident unit trust listed on the ASX. MREIT is a managed investment scheme registered under Chapter 5C of the *Corporations Act 2001*. MREIT invests either directly or indirectly in investment properties which are held primarily for the purpose of deriving rent.

12. MRML is the responsible entity of MREIT.

13. Approximately 24.6% of the issued units in MREIT were held by the James Fielding Trust (JFT), a resident unit trust. All of the units in JFT are held by MPT.

MPT

14. MPT is also a resident unit trust and a managed investment scheme registered under Chapter 5C of the *Corporations Act 2001*.

15. Each unit in MPT is stapled to a share in ML to form a MGR stapled security which is listed on the ASX.

The proposal

16. On 12 October 2009, MRML, as the responsible entity of MREIT, announced that it had entered into a Merger Implementation Deed with ML and MFL, as responsible entity of MPT. If approved by the requisite majority of MREIT unit holders, the transaction would be effected via a 'trust scheme' under which all units in MREIT would be transferred to MFL as responsible entity of MPT.

17. The terms of the proposed trust scheme were revised on 18 November 2009. Under the terms of the revised trust scheme:

- (a) All MREIT unit holders who held their units on 2 December 2009 at 7.00pm (Record Date), were entitled to elect to receive either:
 - one MGR stapled security for every 2.6 MREIT units held (Scrip Alternative); or
 - \$0.55 per MREIT unit for their first 20,000 MREIT units and one MGR stapled security for every 2.6 MREIT units held above the first 20,000 MREIT units (Cash and Scrip Alternative).
- (b) MREIT unit holders who did not make an election received the Cash and Scrip Alternative.
- (c) Any fractional entitlement to a part of a MGR stapled security was rounded down to the nearest whole number of MGR stapled securities.

- (d) MREIT unit holders who had a registered address on the record date that was outside Australia and New Zealand were not eligible to receive MGR stapled securities. The MGR stapled securities that would otherwise have been issued to those unit holders were issued to a nominee. The nominee then sold the MGR stapled securities and remitted the net proceeds of sale to the relevant unit holders (Sale Facility).
 - (e) Other MREIT unit holders eligible to receive MGR stapled securities were also entitled to elect to have the MGR stapled securities, which they would otherwise have been entitled to receive, sold instead by the nominee under the Sale Facility.
 - (f) All MREIT unit holders on the Record Date were entitled to receive a special cash distribution equal to \$0.01 per MREIT unit (Special Distribution).
18. On 25 November 2009, the required majority of MREIT unit holders voted in favour of the proposed trust scheme.
19. On 7 December 2009, the trust scheme was implemented in accordance with the terms described in paragraph 17 of this Ruling.

Other matters

20. There were no 'significant stakeholders' or 'common stakeholders' in relation to the Scheme within the meaning of those expressions in section 124-783.
21. All units in MREIT were acquired on or after 20 September 1985.
22. The applicant has advised that the closing price of a MGR stapled security on the Implementation Date (7 December 2009) was \$1.405. They further advised that, of this amount:
- (a) \$1.26 is attributable to a MPT unit; and
 - (b) \$0.145 is attributable to a ML share.

Ruling

CGT event A1 happens on the disposal of MREIT units

23. CGT event A1 happened when the MREIT unit holders disposed of each of their MREIT units to MPT. The time of the event was 7 December 2009, the Scheme's Implementation Date (subsections 104-10(1) and 104-10(2) and paragraph 104-10(3)(b)).

Capital gain or capital loss

24. A MREIT unit holder made a capital gain when CGT event A1 happened if the capital proceeds from the disposal of the MREIT unit exceeded its cost base. A MREIT unit holder made a capital loss if the capital proceeds from the disposal of the MREIT unit was less than its reduced cost base (subsection 104-10(4)).

Capital proceeds

25. The capital proceeds from the disposal of each MREIT unit is:

- (a) if the unit was exchanged for cash, \$0.55, being the amount of money received in respect of the CGT event (paragraph 116-20(1)(a)); or
- (b) if the unit was exchanged for MGR stapled securities, that part of the market value of the MGR stapled security received (worked out as at the time that CGT event A1 happened) that is reasonably attributable to the disposal of the MREIT unit (subsections 116-20(1) and 116-40(1)).

26. In working out the market value of the part of a MGR stapled security that is reasonably attributable to the disposal of each MREIT unit the Commissioner accepts the following formula:

$$\begin{array}{rcl} \text{Market value of} & & \text{Total number of MGR stapled securities} \\ \text{MGR stapled} & & \text{received} \\ \text{security} & \times & \hline & & \text{Total number of MREIT units} \\ & & \text{exchanged for MGR stapled securities} \end{array}$$

27. The market value of a MGR stapled security is worked out at the time the MREIT unit holder disposes of the MREIT unit (which occurred on the Implementation Date).

Special Distribution

28. The Special Distribution of \$0.01 per unit received by MREIT unit holders from MREIT is not capital proceeds from the disposal of each MREIT unit to MPT, as it is considered, having regard to all the circumstances of the arrangement, that it was not paid in respect of the CGT event happening (subsection 116-20(1)).

If a capital gain was made***Capital gain from the disposal of MREIT units for MGR stapled securities – partial scrip for scrip roll-over***

29. A capital gain made from the disposal of MREIT units for MGR stapled securities is eligible for partial scrip for scrip roll-over (subsection 124-790(1)).

30. Each MGR stapled security comprises two separate CGT assets: a unit in MPT and a share in ML (section 108-5). For the purposes of section 124-790:

- (a) the MPT unit component of each MGR stapled security is eligible proceeds; and
- (b) the ML share component of each MGR stapled security is ineligible proceeds.

31. Subject to the qualification in paragraph 32 of this Ruling, a MREIT unit holder who made a capital gain from the disposal of their MREIT units for MGR stapled securities, may choose partial scrip for scrip roll-over from the disposal of their MREIT units (section 124-790).

32. Scrip for scrip roll-over cannot be chosen if any capital gain the MREIT unit holder might make from the replacement MGR stapled security would be disregarded, except because of a roll-over (subsection 124-795(2)).

33. If scrip for scrip roll-over is chosen, that part of the capital gain that is referable to the receipt of MPT units is disregarded (subsection 124-790(1)).

Capital gain referable to ML shares

34. The part of the capital gain that is referable to the receipt of ML shares is not disregarded. This is because the ML shares received are ineligible proceeds under subsection 124-790(1).

Discount capital gain

35. A MREIT unit holder who makes a capital gain that is not disregarded (that is, those relating to cash consideration or ML shares or capital gains where scrip for scrip roll-over is not chosen) is eligible to treat any resulting capital gain as a 'discount capital gain' provided that the conditions in Subdivision 115-A and, if applicable, Subdivision 115-C are satisfied.

Cost base of MGR stapled securities

36. As noted at paragraph 30 of this Ruling, each MGR stapled security comprises two separate CGT assets: a unit in MPT and a share in ML.

37. Each MPT unit and ML share has its own cost base or reduced cost base for CGT purposes.

Cost base of MPT units

38. Where scrip for scrip roll-over is chosen, the first element of the cost base and reduced cost base of each new MPT unit is equal to the sum of the parts of the cost bases of the MREIT units that are reasonably attributable to the acquisition of each MPT unit (subsections 124-785(2) and 124-785(4)).

39. Where scrip for scrip roll-over is not chosen, the first element of the MREIT unit holder's cost base and reduced cost base for each MPT unit is equal to the market value of the property (that is, MREIT units) that is reasonably attributable to the acquisition of the MPT unit (subsections 110-25(2) and 110-55(2) and section 112-30).

Cost base of ML shares

40. The first element of the MREIT unit holder's cost base and reduced cost base for each ML share is equal to the market value of the property (that is, the MREIT units) that is reasonably attributable to the acquisition of the ML share (subsections 110-25(2) and 110-55(2) and section 112-30).

Acquisition date of MPT units and ML shares

41. The acquisition date for MREIT unit holders of the MPT units and the ML shares acquired in exchange for their MREIT units is 7 December 2009 (section 109-10).

42. However, for the purposes of determining if a capital gain on a subsequent disposal of their MPT units is eligible to be treated as a discount capital gain, MREIT unit holders who choose scrip for scrip roll-over are taken to have acquired their MPT units when they acquired the corresponding MREIT units that were exchanged for the relevant MPT units (item 2 of the table in subsection 115-30(1)).

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

43. The tax consequences and relevant legislative provisions that arise in regard to the Scheme are outlined in the Ruling part of this document.

44. One of the consequences is the availability of scrip for scrip roll-over. It enables a unit holder to disregard a capital gain from a unit in a trust that is disposed of as part of a takeover or merger if the holder of that unit receives a replacement unit in a trust in exchange.

45. The scrip for scrip rollover provisions in Subdivision 124-M contain a number of conditions for, and exceptions to, eligibility to choose scrip for scrip roll-over. The main conditions and exceptions that are relevant to this Scheme are:

- (i) units are exchanged for units in another trust (subparagraph 124-781(1)(a)(i));
- (ii) entities have fixed entitlements to all of the income and capital of the original trust and the acquiring trust (paragraph 124-781(1)(b));
- (iii) the exchange occurs in consequence of an arrangement that satisfied subsection 124-781(2) (paragraph 124-781(1)(c));
- (iv) conditions for roll-over are satisfied (subsection 124-781(3)); and
- (v) further conditions are not applicable (subsection 124-781(4)).

46. Under the Scheme the conditions for roll-over under Subdivision 124-M are satisfied. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted other than the following matters relating to the conditions for roll-over described in paragraph 45 of this Ruling.

47. The first relevant issue concerns the application to the Scheme of paragraph 124-781(2)(c) which requires that the exchange is in consequence of an arrangement in which participation is available on substantially the same terms for all owners of interests of a particular type in the original entity (MREIT).

48. When considering the application of paragraph 124-781(2)(c) to the Scheme, it is noted that the basis on which the different forms of consideration (that is, cash and scrip) that are made available to MREIT unit holders can differ according to the size of their respective unitholdings. Unit holders with 20,000 or fewer units are entitled to receive either cash or scrip in exchange for their entire holding. However, to the extent that the unit holding exceeds 20,000 units, the unit holder's ability to access the cash alternative is, when measured as a percentage of the original holding, progressively reduced.

49. It is considered that, because of this feature of the Scheme, holders of units of the same type participate on different terms. However, having regard to all of the circumstances of the arrangement, it is considered that the nature and extent of these differences do not prevent the Scheme from being one in which the unit holders participate on 'substantially' the same terms.

50. In reaching the conclusion at paragraph 49 of this Ruling, the Commissioner has had particular regard to the apparent absence of any practical disadvantage to any group of unit holders in favour of another. It is noted, in particular, that the Scheme provides unit holders with more than 20,000 units to 'cash out' their entire holding via the Sale Facility. The Commissioner has also had regard to the commercial and regulatory drivers for the basis on which the consideration was made available to unit holders.

51. The second issue concerns paragraph 124-781(1)(b) which requires that entities have fixed entitlements to all of the income and capital of the original entity (MREIT) and the acquiring entity (MPT).

52. Having regard to:

- (a) all of the documents and any other material referred to in paragraph 9 of this Ruling; and
- (b) all the facts comprising the Scheme as described in paragraphs 10 to 22 of this Ruling,

it is considered that for the purposes of paragraph 124-781(1)(b), there are fixed entitlements to all of the income and capital of MREIT and MPT immediately before, during and immediately after the Scheme that is the subject of this Ruling.

Appendix 2 – Detailed contents list

53. 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 2006/10

Subject references:

- arrangement
- capital gains
- CGT event A1 – disposal of a CGT asset
- disposal of assets
- fixed entitlements
- scrip for scrip roll-over
- unit trusts

Legislative references:

- ITAA 1936 6(1)
 - ITAA 1997
 - ITAA 1997 104-10
 - ITAA 1997 104-10(1)
 - ITAA 1997 104-10(2)
 - ITAA 1997 104-10(3)(b)
 - ITAA 1997 104-10(4)
 - ITAA 1997 108-5
 - ITAA 1997 109-10
 - ITAA 1997 110-25
 - ITAA 1997 110-25(2)
 - ITAA 1997 110-55
 - ITAA 1997 110-55(2)
 - ITAA 1997 112-30
 - ITAA 1997 Subdiv 115-A
 - ITAA 1997 115-30
 - ITAA 1997 115-30(1)
 - ITAA 1997 Subdiv 115-C
 - ITAA 1997 116-20
 - ITAA 1997 116-20(1)
 - ITAA 1997 116-20(1)(a)
 - ITAA 1997 116-40
 - ITAA 1997 116-40(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(2)(c)
 - ITAA 1997 124-781(3)
 - ITAA 1997 124-781(4)
 - ITAA 1997 124-783
 - ITAA 1997 124-785(2)
 - ITAA 1997 124-785(4)
 - ITAA 1997 124-790
 - ITAA 1997 124-790(1)
 - ITAA 1997 124-795(2)
 - TAA 1953
 - Corporations Act 2001
 - Corporations Act 2001 Ch 5C
 - Copyright Act 1968
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ATO references

NO: 1-1S8YJUF

ISSN: 1445-2014

ATOlaw topic: Income tax ~~ Capital Gains Tax ~~ CGT event A1 – disposal of a CGT asset
Income tax ~~ Capital Gains Tax ~~ roll-over – scrip for scrip